

# A Game Plan for Employers Facing Possible ACA Penalties

January 17, 2018

All employers are at risk of receiving a notice from the IRS that they are liable for a penalty under the Affordable Care Act for failing to offer enough employees insurance coverage, or for failing to offer particular employees insurance coverage. This alert offers a game plan to implement upon receipt of that notice. **What You Will Receive.** The notice will be provided via an automatically-generated letter, known as “Letter 226-J,” based on (a) data received from employers who filed Forms 1094-C and 1095-C with the IRS, (b) individual Form 1040s filed by employees, and (c) information provided by individuals who enrolled in the exchange. **Your Initial Reaction.** Employers should react quickly, as the Letter 226-J only provides 30 days to defend against a penalty assessment. The first step is to review the IRS notice carefully, focusing on whether the facts recited in the letter are accurate. For example, the letter assumes that your entity is an “Applicable Large Employer” (i.e., an “ALE” - entity with more than 50 combined fulltime employees and fulltime employee equivalents), and should list the employees triggering the penalty. Any factual errors may offer a proper defense to the assessment. For example, if you previously determined that you were not an ALE, or were not an ALE for the months triggering the penalty, that would be a primary defense. If the individuals listed are not your employees, or were not your employees for the months listed, that would be another defense. Maybe the IRS believes a fulltime employee was not offered coverage when, in fact, the employee was offered, but declined, coverage. **Your Second Reaction.** If the facts in the Letter 226-J are correct, or you want to provide additional defenses (because in general, “more” is “better”), you should assess whether you have additional defenses. Maybe the listed individuals were employees, but they were not eligible because of a valid waiting period. Maybe the individuals were working fulltime hours, but were properly treated as ineligible part-time employees because of the lookback period. To the extent you spent time (and money) determining how to comply with the ACA shared responsibility requirements, now is the time to show that to the IRS. To the extent you did not spend time (or money) to comply with the ACA, now is the time to spend a little time and money to avoid the penalties. Potentially, this is an area where your insurance compliance consultant or attorney can help you significantly. **Your Final Reaction.** Your final reaction should be to generate a response to the Letter 226-J, as you will be presumed to owe the amount assessed if you do not respond, and the

IRS may levy assets to collect. If you disagree with the assessment, either because you disagree that your entity owes anything, or you believe it owes a lesser amount, your response should express your defenses. Ultimately, we recommend your response contain everything you discovered that supports your position. Obviously, this is another area where your consultant or attorney can provide significant help, and if you would like assistance from a Carlton Fields attorney or have general questions about the subject of this alert, please contact the author or the firm attorney with whom you normally communicate.

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