



Employers face ongoing liability for ACA play-or-pay assessments

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No statute of limitations applies to employer shared-responsibility (or so-called pay-or-play) assessments under Section 4980H of the Affordable Care Act (ACA), according to [Memorandum No. 20200801E](#), issued Dec. 26, 2019, by the IRS Office of Chief Counsel.

Employer shared-responsibility assessments

The IRS first began notifying employers in late 2017 about their potential liability for ACA employer shared-responsibility (ESR) assessments for the 2015 calendar year — the first year the ESR mandate went into effect. The IRS has actively collected Section 4980H assessments from applicable large employers (ALEs) for each calendar year since 2015 and shows no signs of slowing down. Despite Executive Order [No. 13765](#) directing federal agencies to “minimize the unwanted economic and regulatory burdens” imposed by the ACA, IRS will enforce provisions like the employer mandate, unless changed by Congress ([IRS Information Letter No. 2019-0008](#)).

Although a tax reform package passed in late 2017 ([P.L. 115-97](#)) zeroed out the penalty for individuals failing to maintain health coverage beginning in 2019, Congress made no changes to the employer mandate or its associated penalties. In addition, litigation challenging the validity of the entire ACA — including the employer mandate provision — will likely not be resolved by the Supreme Court until 2021 ([Texas v. United States](#), No. 19-10011 (5th Cir. Dec. 18, 2019); *cert. granted*, [California v. Texas](#), No. 18-840 (U.S. March 2, 2020)). Until Congress changes the law or the court strikes it down, the IRS will continue to impose ESR assessments on ALEs that fail to comply with ACA Section 4980H.

ESR reporting and IRS assessment

Under the law, ALEs must annually report to the IRS information about any healthcare coverage they offer to full-time employees and dependents. ALEs that don't offer coverage meeting ACA requirements may owe an ESR tax assessment. The IRS determines an ALE's potential liability using the information reported on Forms 1094-C and 1095-C and the individual income tax information on Form 1040 filed by full-time employees.

ALEs must pay assessments as nondeductible excise tax penalties on receipt of the IRS notice and demand for payment. The ESR assessment is not included with any tax return filed by the ALE. Rather, the notice instructs how payment should be made.

Applicable statute of limitations

In the Dec. 26, 2019, memorandum, the IRS concluded that no statute of limitations applies to ESR assessments because no tax return filed by ALEs determines their liability. Congress did not provide a specific limitations period for Section 4980H penalties, so the general limitations period of Internal Revenue Code § 6501(a) normally would apply if an IRS filing determined liability. Section 6501(a) provides a three-year period of limitations for tax assessments, which starts on the date a return is filed.

Relying on prior court cases, however, the IRS memo explains that to trigger Section 6501(a), a return must provide sufficient data to calculate a tax liability (*Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986)). Filing Forms 1094-C and 1095-C is not sufficient for that purpose because IRS also needs information from individual tax returns — including whether an individual received a premium tax credit for public exchange coverage — to determine if an employer owes any Section 4980H penalty.

According to the memorandum, because ALEs do not file a return with sufficient data to calculate Section 4980H tax liability, the IRS is not subject to any limitations period for assessing Section 4980H payments. This conclusion may come as a surprise to some who assumed the general three-year statute of limitations would begin to run from the date of filing Forms 1094-C and 1095-C. If the memorandum's legal conclusion is the operative guidance that all IRS field offices will follow (see Internal Revenue Manual 33.1.3.1.1), an ALE could possibly challenge the IRS's interpretation if a notice and demand for payment of the ESR assessment comes more than three years after the filing date of the related Forms 1094-C and 1095-C.

Action items for employers

Employers should be on the lookout for the IRS preliminary assessment (Letter 226J), even if they don't owe an assessment for any year since the mandate took effect. Careful review of the letter and its enclosures is necessary to identify any erroneous IRS information or the employer's need to explain

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reporting errors. A timely and accurate response is essential to avoid demand notices or reduce the amount owed. Here are a few steps employers can take to prepare for possible assessment notices:

- Consider a retention period longer than the three-year minimum recommended in the [instructions](#) for Forms 1094-C and 1095-C. ALEs evaluating document retention policies should weigh the potentially much longer risk of tax assessments outlined in the memorandum.
- Review 1094-Cs filed for prior years and alert the contact person listed to watch for Letter 226J. Instruct the contact person to forward any IRS correspondence to the appropriate person immediately upon receipt. If the contact person has left the company, ensure the mailroom knows where to direct correspondence.
- Ensure ready access to copies of filed Forms 1095-C from prior years and all relevant backup data, including information on affordability, minimum value, offers of coverage, enrollment, and evidence necessary to support or refute employees' ACA full-time status (including lookback method data).
- If not addressed already, develop a process — including personnel and systems — for responding in a timely manner to IRS communications regarding prior-year ESR assessments.
- Follow IRS and judicial developments in the interpretation of the statute of limitations applicable to Section 4980H penalties.

Related resources

Non-Mercer resources

- [Questions and answers on employer shared responsibility provisions under the Affordable Care Act](#) (IRS, Feb. 18, 2020)
- [Memorandum No. 20200801F](#) (IRS Office of Chief Counsel, Dec. 26, 2019)
- [Texas v. United States](#), No. 19-10011 (5th Cir. Dec. 18, 2019); *cert. granted*, [California v. Texas](#), No. 18-840 (U.S. March 2, 2020)

Mercer Law & Policy resources

- [Healthcare law and policy outlook for 2020](#) (Feb. 18, 2020)
- [Latest ACA case: Appeals court rules individual mandate unconstitutional](#) (Dec. 19, 2019)
- [ACA individual statement deadline and good-faith relief extended again](#) (Dec. 4, 2019)

Other Mercer resource

- [Employers will face difficult decisions if ACA ruling stands](#) (Dec. 17, 2018)

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