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Employers: The American Rescue Plan could increase your risk of ACA non-compliance

The new law contains provisions that can increase complexity and place employers at greater risk of incurring IRS penalties.

BY KYLE J. SCOTT

The American Rescue Plan, now federal law, is resulting in some of the biggest changes to the Affordable Care Act (ACA) since the ACA's passage more than a decade ago. The new $1.9 trillion stimulus package supports healthcare affordability and increases marketplace access for millions of Americans by expanding consumer eligibility for premium tax credits to pay for health insurance premiums.

The American Rescue Plan also presents new implications for employers – and they're not all positive. That's because the new law contains provisions that can increase complexity and place employers at greater risk of incurring IRS penalties for ACA non-compliance.

New risks for employers

Under the ACA, employers are deemed at risk of incurring a fine (known as Penalty B) when they fail, for whatever reason, to offer affordable health coverage that meets minimum value requirements to eligible employees. Coverage is considered affordable if the employee's contribution for employee-only (or single) coverage is less than or equal to 9.83% of their income. Failure to meet this requirement results in a $4,060 penalty per full-time employee who receives a premium tax credit (also called a subsidy) when purchasing insurance through a public healthcare exchange.

Until now, only individuals who made less than 400% of the federal poverty level (FPL) were eligible to receive a subsidy. Now, the American Rescue Plan expands eligibility by eliminating the 400% FPL income cap for tax years 2021 and 2022. With the threshold removed, more individuals will qualify for subsidies, resulting in greater risk to employers in failing to offer affordable coverage and potentially more work in responding to IRS requests.

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When a full-time employee receives a marketplace subsidy, the IRS will send the employer a 226-J Letter with a notice of proposed Penalty B fines for each employee identified. For employers that do not meet the offer requirements, this could result in tens- or hundreds of thousands of dollars in fines. Even for compliant employers, responding to a 226-J Letter can be timely and costly.

On top of the new law, the pandemic-induced reduction of workforce hours already presents increased risk of employers' plans being classified as unaffordable. Coverage for employees whose work hours and income have been reduced may no longer be considered affordable under the ACA.

Affected employee(s) buying insurance through an exchange could set up a scenario in which the employer incurs an IRS 226-J penalty notice.

Affordability is a matter of perspective

Adding to the confusion for employers is that "affordability" is calculated differently on the exchanges than it is at the employer level.

Employers, following the rules set out for them under the ACA, can leverage safe harbors – the FPL, rate of pay or W2 calculations – to determine whether the coverage they offer each full-time employee is affordable. If affordability safe harbors is a new term for you, here's how the IRS explains it:

> "Employer-provided coverage is considered affordable for an employee if the employee-required contribution is no more than 9.78 percent (as adjusted) of that employee's household income. In general, the employee required contribution is the employee's cost of enrolling in the least expensive coverage offered by the employer that provides minimum value. The employee-required contribution includes amounts paid through salary reduction or otherwise and takes into account the effects of employer arrangements such as health reimbursement arrangements (HRAs), wellness incentives, flex credits, and opt-out payments."

Employers may use a safe harbor to ensure the employee-required contribution is no more than the affordability threshold for a given year. You can even choose different safe harbors for different employee populations, in accordance with ACA guidelines.

Safe harbors were established because, as the law is written, the ACA determines affordability based on a taxpayer's total household income – information that employers frequently don't have access to. Exchanges, on the other hand, determine affordability on household size and household income – data they collect directly from the individuals who are applying for coverage.

(Photo: Shutterstock)

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What all this means is that there may be a larger subsidy-eligible population than an employer realizes within their workforce, especially for single earner households with larger families.

Advice for employers

With subsidies now available to a broader population, coupled with the pandemic-induced workforce impact, employers must be even more diligent in their ACA data collection and record-keeping in case they need to defend themselves against Penalty B charges from the IRS if the premium on their lowest cost plan offering exceeds affordability requirements. The following steps can help employers avoid triggering a 226-J notice:

Validate your data by looking for anomalies Inconsistent data reflecting hire dates, offers of coverage, leaves of absence and disability classifications can all pose potential problems. Solidify your data and ensure accuracy.

Review and confirm the affordability of your safe harbor Consider the **affordability of premiums** for your lowest-paid employees, not just your average employee. Determine if your plans meet the FPL safe harbor. If it doesn't, consider whether the Rate of Pay or W-2 safe harbor is a better fit. Work with your ACA technology solution to model affordability determinations.

Make the most of your eligibility determination solution Use your ACA technology solution to validate your total number of employees, their full-time status through monthly or look-back measurement, and your Form 1095-C code determination combinations, and potential fail codes and fail code combinations.

Closely examine your anticipated future premium costs Make sure you are making affordable offers to eligible employees and fully understand your risk profile. Remember that even your lowest premium plan might not be considered affordable under the ACA for employees whose work hours and income were reduced (because of the pandemic or for other reasons).

Promptly respond to any 226-J Letter you receive Whether an employer agrees or disagrees with a penalty assessment, they should contact their ACA reporting solution provider, or whomever assisted in generating their forms, immediately for assistance.

If you disagree with the assessment, first review your Form 1094-C and compare the Forms 1095-C for each identified employee to Form 14765, the Employee Premium Tax Credit Listing (you do not need to re-submit corrected Forms 1094-C or 1095-C).

Next, complete, date and sign Form 14764, "ESRP Response" and send it back to the IRS with any supporting documents by the due date written on the letter, with a statement describing why you are disputing the assessment. If you agree with the assessment, simply enclose a check for the amount requested and the process ends.

Once Form 14764 is sent, the IRS will acknowledge the employer's response to Letter 226-J with Letter 227 which describes what action the employer must take, if any. After responding to Letter 227, or after your conference with the IRS Office of Appeals, you will receive Notice CP 220-J asking you to pay the reassessed penalty. If the numbers are correct and you have yet to pay the penalties, pay the amount requested electronically, or via check. If you continue to disagree with the assessment, consult legal counsel on how to proceed.

Other impacts of the American Rescue Plan for employers and ACA compliance The American Rescue Plan Act also provides for fully subsidized COBRA premiums from April 1 to September 30, 2021. During this five-month time frame, the Act reduces an employee's COBRA premium to zero in anticipation of a tax credit and reduces an employer's ACA Penalty B risk.

To illustrate: Amidst the pandemic and associated economic implications, it's been common for employers to reduce an employee's hours to contain costs. Because the employee is now earning less income, the employer's offer of a COBRA plan is too expensive for the employee. Instead, the employee purchases coverage on the exchange, where they receive a subsidy. The subsidy then triggers a 226-J Letter to the employer. Under the ACA, the employer-offered COBRA coverage is deemed unaffordable to the employee. The employer is assessed a fine.

Now, under the American Rescue Plan Act, because the employee's cost for COBRA is zero, the COBRA coverage offer is considered affordable, and the employer is not at risk for Penalty B.

A final word

Staying up to date on ACA employer responsibilities can be challenging. If you're puzzling over how to avoid inadvertent non-compliance and associated financial penalties, be sure to turn to a trusted health reform technology partner that monitors the changing landscape and provides expertise on how to manage it.