

IRS Memo Concludes No There is Statute of Limitations for ACA Employer Mandate Penalties Under Internal Revenue Code § 4980H

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The IRS Office of Chief Counsel recently issued a [memo](#) which, in a surprise to many, concluded that the filing of the Affordable Care Act (“ACA”) Forms 1094-C and 1095-C (“C Forms”) does **not** start the statute of limitations on the Employer Shared Responsibility Payments (“ESRP”) under Internal Revenue Code (“Code”) § 4980H and, in fact, that there is **no** statute of limitations with respect to ESRP assessments.

In short, the ESRP is a penalty that may be assessed against “applicable large employers” (“ALEs”)^[1] when, in certain circumstances, a full-time employee obtains a premium tax credit for health coverage purchased on an Exchange. Employers file C Forms annually to report information about their offers of health care coverage to employees so that the IRS can assess potential ESRP liability under Code § 4980H. Until the memo’s issuance, the consensus opinion was that the filing of the C Forms started the Code’s general 3-year statute of limitations that runs from the date a “return” is filed or the return’s due date, whichever is later. The instructions on the C Forms, in fact, refer to the C Forms as “returns” and advise filers to keep copies of information returns and supporting documents for at least three years from the returns’ due date.

In reaching its conclusion that the 3-year statute of limitations does not apply to ESRP assessments, the memo first notes that Code § 4980H does not have a section-specific limitations period. Then, relying on the four-part test established by the Supreme Court for determining whether a document filed with the IRS is a “return” for statute of limitations purposes, the memo concludes that the C Forms are not “returns” within the meaning of the law because the first prong of the test requires that the purported return provide sufficient data to calculate tax liability. The memo explains that the IRS calculates the ESRP by using *both* the information on the C Forms *and* information contained in full-time employees’ individual tax returns (*i.e.*, Form 1040), and therefore that an employer does not know at the time it files the C Forms whether it has potential ESRP liability. Thus, according to the memo, because the C Forms do not provide information regarding a full-time employee’s eligibility for a premium tax credit, which is an essential piece of information for determining the ESRP, they do not satisfy the first required element for being deemed a “return.” The memo therefore concludes, “[b]ecause there is no return that contains the necessary data to calculate the amount of the ESRP that could be owed by an ALE, there is no statute of limitations for the ESRP[.]”

Action Items

In light of the memo, employers should take the following actions:

- until and unless the IRS ceases to enforce the ESRP, ALEs should consider keeping the following records, starting with the 2015 tax year (the first year in which the ESRP provisions were enforced), *indefinitely*:
 - records on how full-time status is determined (i.e., using the monthly or look-back measurement period);
 - records that are used to determine when an employee qualifies for an offer of coverage;
 - records of waiting periods used before health coverage is offered, if any, and records that coverage was offered at the end of the waiting period; and
 - records of offers of “minimum essential coverage” to full-time employees; and
- discuss with their accountants whether any prior years’ release of ESRP liability shown in financial statements should be reviewed and revised and whether prior years’ potential ESRP liability should be reported as contingent liabilities.

[1] An ALE is an employer with on average 50 or more full-time or full-time equivalent employees in the prior calendar year.

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