

Out of Sight, Out of Mind . . . But Don't Forget the Possibility of ACA Retaliation Claims

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While many were hoping that the Affordable Care Act (ACA) would finally be dead by now, and others are lamenting the fact that the “repeal-and-replace” attempts have fallen by the wayside, we thought it may be worthwhile to remind people that the ACA has not gone anywhere. In fact, as we are quickly approaching the end of 2017, employers may soon be receiving employer mandate assessments.

Employers should remember that, pursuant to guidance, employer mandate taxes that accrued in January of 2015 must be assessed by January of 2018. The statute requires that notices be provided to employers at least 60 days prior to the end of the year. What does this mean? Basically, if the notices are provided as promised, they must be mailed prior to November 2, 2017. This means that employers should be receiving assessments in the next six to eight weeks.

The Internal Revenue Service (IRS) stated that it would provide guidance prior to the assessments being delivered. But as 2018 rapidly approaches, there are still a lot of questions with regard to the process of the assessment itself and an employer's right to appeal. While we do not know the exact amount of employer dollars that will be at risk due to the assessments, we do know that the Congressional Budget Office estimates that between 2015 and 2024, it will be \$139 billion (yes, billion with a “b”). As time is running out, we can only hope to see IRS guidance this month.

You may be asking why the reminder. The answer is actually twofold. First, we want to make sure that employers are aware that the notices should be coming. It would not be good to let the time limit to appeal an assessment expire. Second, we want to remind employers that it is against the law to retaliate against an employee for receiving a subsidy. Every marketplace applicant will see the following language on the ACA website:

It's also against the law for your employer to fire or retaliate against you if you report violations of the Affordable Care Act's health insurance reforms to your employer or the government . . . You can file a complaint with the U.S. Occupational Safety and Health Administration (OSHA) if you think you were fired or retaliated against because you:

- Received premium tax credits when you bought a health plan in the Marketplace
- Reported a violation of the reforms found in Title I of the Affordable Care Act

To clarify, OSHA is the agency charged with retaliation investigations, and OSHA, unlike the IRS, is more than adequately staffed to enforce anti-retaliation requirements. It appears that OSHA's enforcement rules are similar to the Sarbanes-Oxley rules that protect securities fraud whistleblowers. This is why it is important that employers have a process in place to protect themselves from retaliation claims. In theory, an employer would be notified which employees received subsidies, and if it later took adverse action against such employee, it could be exposed to an ACA retaliation charge.

One way for an employer to avoid or defeat a retaliation claim is to keep the identity of employees receiving subsidies away from employment decision makers. While the process of appealing an assessment can be handled internally, it may be difficult to keep the information confidential. If it is decided that the employer will handle the appeals process internally, best practice would be to carefully house the process within the benefits department (and away from employment decision makers). Another option is to consider outsourcing the appeals process. Outsourcing the appeals process minimizes exposure to retaliation claims if the subsidy recipients are later disciplined or discharged.

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