

AN EMPLOYER'S GUIDE TO NAVIGATING THE ACA REPORTING REQUIREMENTS



DANNAE L. DELANO is a Partner with The Wagner Law Group in Saint Louis. She concentrates her practice in employee benefits, executive compensation and tax matters. Focusing on comprehensive, practical and innovative employee benefits solutions for all types of employers, she counsels clients regarding all aspects of employee benefits design, implementation, termination, and compliance for the full spectrum of benefits programs including: retirement plans, health and welfare plans and executive and incentive compensation arrangements. She also has considerable experience in integrating benefits in mergers and acquisitions and qualified retirement plan corrections.



ROBERTA CASPER WATSON is a Partner with The Wagner Law Group in Boston. Her practice areas include ERISA, Employee Benefits; Pension and Profit Sharing Plans; Health and Welfare Benefit Plans, including COBRA, HIPAA and the Affordable Care Act; ERISA Fiduciary Decision-Making; Employee Stock Ownership Plans; Benefits Litigation Backup; Benefits Aspects of Mergers and Acquisitions; Employee Benefits Aspects of Family Law; Labor Laws Affecting Employee Benefits, including ADA, ADEA, and FMLA; Other Employee Benefits and Deferred Compensation; Employee Benefit Disputes and Employee Benefits Claims.

Beginning in 2015, certain employers were required to report information to the IRS on an annual basis to assist the IRS in assessing penalties associated with the employer shared responsibility and individual mandate requirements of the Affordable Care Act ("ACA") and administration of the premium tax credits for exchange-based coverage. While the individual mandate was essentially repealed effective in 2019, by reducing the amount of the penalty tax to zero, the employer shared responsibility and reporting requirements remain fully applicable.

Late last year, the IRS began utilizing the information it received from required reporting to assess penalties against noncomplying employers and individuals. Penalties applicable to employers for failure to report are in addition to other ACA noncompliance penalties and are two-fold, including assessments for both a failure to file correct returns with the IRS and a failure to provide a required statements to employees. Penalties for failure to report can be significant because they are assessed with regard to each affected employee up to an annual maximum of \$3 million. Further penalties can be increased where there is intentional disregard for the reporting requirements. Through the 2017 reporting cycle, the IRS has issued transition relief granting a reprieve from penalties for employers who have made a good faith effort to comply with the reporting requirements. Nevertheless, it remains to be seen whether such transition relief will be granted for

the 2018 reporting cycle. Consequently, employers can avoid costly penalties by understanding and complying with the ACA reporting requirements.

The ACA imposed reporting requirements on any Applicable Large Employer ("ALE") and on all employers sponsoring self-funded group health plans. As a result, an employer will fit into one of 4 different categories, each with different reporting requirements:

- **Category 1** does not have any reporting requirements at all. This category includes employers who are NOT ALEs, and who either do not sponsor a group health plan or sponsor a fully-insured group health plan.
- **Category 2** does have reporting requirements, but they are minimal. This category includes employers who are NOT ALEs, but who do sponsor a self-funded health plan.
- **Category 3** does have reporting requirements, but they are less than those in category 4. This category includes employers who are ALEs, and who either sponsor a fully-insured group health plan or do not sponsor any group health plan.
- **Category 4** has the most significant reporting requirements. This category includes employers who are ALEs and who also sponsor a self-funded group health plan.

An employer knows from the outset if it sponsors a self-funded group health plan, but whether the employer is an ALE is a determination that must be made on an annual basis. If an employer is required to report for 250 or more employees, the employer is required to report electronically. There is a special IRS reporting system that was developed for this purpose called the AIR system, which stands for the ACA Information Return (AIR) system.

WHAT IS AN ALE?

Whether an employer is an ALE is determined for each calendar year, and depends on the average size of the employer's workforce during the prior year. If an employer has fewer than 50 full-time employees, including full-time equivalent employees, on average during the prior year, the employer is not an ALE for the current calendar year. If an employer has at least 50 full-time employees, including full-time equivalent employees, on average during the prior year, the employer is an ALE for the current calendar year. To determine its workforce size for a year an employer adds its total number of full-time employees for each month of the prior calendar year to the total number of full-time equivalent employees for each calendar month of the prior calendar year and divides that total number by 12. An employer that was not in existence on any business day in the prior calendar year is still an ALE if it is reasonably expected to employ, and actually does employ, an average of at least 50 full-time employees (including full-time equivalent employees) on business days during the current calendar year.

A full-time employee for any calendar month is an employee who has on average at least 30 hours of service per week during the calendar month, or at least 130 hours of service during the calendar month. A full-time equivalent employee is a collection of employees, each of whom individually is not a full-time employee, but who, when hours are considered collectively, are equivalent to a full-time employee. An employer determines its number of full-time-equivalent employees for a month by the following steps:

- Combine the number of hours of service of all non-full-time employees for the month but do not include more than 120 hours of service per employee, and
- Divide the total by 120.

Hours that must be counted include paid vacation and sick time and certain paid disability time off, and certain seasonal employees can be excluded for purposes of determining ALE status.

Companies with a common owner or that are otherwise related under certain rules in IRC §414 are generally combined and all employees of all the companies are counted to determine ALE status. If the combined number of full-time employees and full-time equivalent employees for the group is large enough to meet the definition of an ALE, then each employer in the group (called an "ALE Member") is part of an ALE and all must report even if one or more of the separate ALE Members would not be ALEs standing alone. This means each ALE Member is liable for its own information reporting requirements, and is not liable for the information reporting requirements of any other entity in the group. One ALE Member in the group may, however, do the reporting tasks on behalf of, and in the names of, the respective ALE Members.

The common control rules are important and determinative. Even companies that are in different industries will result in the employees being counted together to determine ALE status if they have common owners that meet the "controlled group" tests. For example, a husband and wife can own and operate both a small restaurant that employs 40 full-time and full-time equivalent employees and a florist shop that is operated by their daughter that employs 15 full-time and full-time equivalent employees and the two entities together are considered an ALE with separate reporting responsibilities.

CATEGORY 2 EMPLOYERS

Employers who are not ALEs, but who sponsor self-insured group health plans, must report information about the covered employees (and their spouses and dependents) to their employees, even though the employers are not subject to the employer shared responsibility provisions or the information reporting requirements for ALEs. These non-ALEs use Form 1095-B, Health Coverage, and the transmittal Form 1094-B, Transmittal of Health Coverage Information Returns, to meet the information reporting requirements. Information that must be reported includes the name and address of the covered employee, the name and social security number (see the section on "Employer Social Security Number Obligations" below for more

information) of the employee and each covered spouse and/or dependent and whether or not each individual was covered by the plan for each month of the calendar year. If the individual was covered by the plan for even one day of a month, the individual is considered covered for that month.

CATEGORY 3 EMPLOYERS

An ALE must file Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, and Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS for its full-time employees. The ALE must also furnish a similar statement to each of its full-time employees (similar to W-2 reporting requirements). An ALE can provide the required statement to its full-time employees by furnishing a copy of the Form 1095-C filed with the IRS. Alternatively, these returns and employee statements may be provided by using substitute forms. A substitute form must include all the information required to be reported on Forms 1094-C and 1095-C, and must comply with applicable revenue procedures or other published guidance relating to substitute returns. Because Category 3 Employers sponsor a fully-insured group health plan, only Parts I and II of Form 1095-C must be completed. The Part III information will be submitted to the IRS by the group health plan's insurer. Part II requires certain coded information for which there are very specific instructions. Many of the codes only apply if the code is applicable for the entire month being reported. The Instructions for the Form 1095-C can be found on the IRS website and should be carefully followed to avoid errors that could lead to an unwarranted penalty assessment.

CATEGORY 4 EMPLOYERS

Like Category 3 Employers, these are ALEs that must file Form 1095-C, Employer-Provided Health Insurance Offer and Coverage, and Form 1094-C, Transmittal of Employer-Provided Health Insurance Offer and Coverage Information Returns, with the IRS for its full-time employees. The ALE must also furnish a similar statement to each of its full-time employees (similar to W-2 reporting requirements). An ALE can provide the required statement to its full-time employees by furnishing a copy of the Form 1095-C filed with the IRS. Alternatively, these returns and employee statements may be provided by using substitute forms. A substitute form must include all of the information required

to be reported on Forms 1094-C and 1095-C, and must comply with applicable revenue procedures or other published guidance relating to substitute returns. Forms 1095-C must be have Parts I, II AND III completed. Part II requires certain coded information for which there are very specific instructions. Some of the coding can only be used if applicable to the employee for the entire month for which you are reporting. Part III of Form 1095-C is the same information required to be reported by Category 2 Employers on the 1095-B. Information that must be reported includes the name and address of the covered employee, the name and social security number (see Employer Social Security Number Obligations below for more information) of the employee and each covered spouse and/or dependent, and whether or not each individual was covered by the plan for each month of the calendar year. If the individual was covered by the plan for even one day of a month, the individual is considered covered for that month, which is counterintuitive because the coding requirements require the code to be applicable for the entire month for it to be used in Part II.

ELECTRONIC FILING

Form 1094-C and Form 1095-C are subject to the requirements to file returns electronically. ALEs that file 250 or more information returns must file the returns electronically through the ACA Information Returns (AIR) program. For information on the communication procedures, transmission formats, business rules and validation procedures for returns transmitted electronically through the ACA Information Reports ("AIR") system, ALEs should review Publication 5165, Guide for Electronically Filing Affordable Care Act ("ACA") Information Returns. The 250-or-more requirement applies separately to each type of return and separately to each type of corrected return. For more information on the electronic filing requirement see the Instructions for Forms 1094-C and 1095-C.

ALE Members must furnish a Form 1095-C to each of their full-time employees on paper by mail, unless the recipient affirmatively consents to receive the statement in an electronic format. The requirement for affirmative consent to receive the statement in electronic format ensures that statements are furnished electronically only to individuals who are able to access them. An individual may consent on paper or electronically. If consent is on paper, the individual must confirm the consent electronically.

DEADLINES FOR REPORTING

Forms that must be given to employees are required to be provided on or before January 31 (again, similar to W-2 requirements). In the past this deadline has been extended, but the IRS has not yet extended the 2019 deadlines for 2018 reporting requirements (last year it was not extended until December 22, 2017). Forms that must be filed with the IRS must be filed by February 28 for paper filers and March 31 for electronic filers.

SOCIAL SECURITY NUMBER OBLIGATIONS

Because employers sponsoring self-funded plans must report the social security numbers ("SSNs") of all individuals covered under the plan (or, in the alternative, their birthdates), employers should consider engaging in a three-step process that may be used to demonstrate reasonable cause for failure to complete the forms as required and thereby avoid a penalty. Here is the timing of the three attempts the employer should make to collect missing SSNs:

- **Initial Request.** The initial request should be made when the individual applies for coverage (when the health plan "receives a substantially complete application for coverage").
- **Second Request.** A second attempt must be made on or before the 75th day after the initial request. If the coverage effective date will be retroactive, the IRS says the 75-day clock begins to run on "the date the determination of retroactive coverage is made," meaning the date the employer processes the application.
- **Third Request.** The final attempt to get the missing SSNs must be made by Dec. 31 of the year following the initial request. No further attempts are required for future years. Note that this third request can, in most cases, simply be made as part of the next open enrollment period following the second request.

Where the plan is missing an SSN from a dependent, the plan doesn't need to make the SSN request of the dependent directly. The rules consider requests made to the employee as being made to any covered family members. When an employee adds a new family member to coverage, the employer has an obligation to request the newly added individual's SSN up to three times. SSNs can be requested in a variety of ways, including electronically. If the request is made by mail, a return envelope is required. The request for an SSN does not have to be accompanied by an IRS Form W-9, Request for Taxpayer Identification Number and Certification. An employer's obligation to make a second or third request for a missing SSN is not required if the individual's coverage lapses before the deadline to make the request.

AN EMPLOYER ACTION ITEM CHECKLIST FOR 2018 ACA REPORTING

- Determine ALE status for 2018 based on 2017 data.
- Determine electronic filing status.
- Determine which category of employer applies to you.
- Evaluate whether proper data collection is in place to meet reporting requirements.
- Review the instructions for the Forms that must be completed for changes from prior years.
- Make sure social security number request obligations are being fulfilled.
- Have a plan for timely form completion – the deadline is January 31, 2019 for employee statements.
- Issue employee statements to employees on or before January 31, 2019.
- Submit required paper forms to IRS on or before February 28, 2019.
- Submit required electronic forms to IRS on or before April 1, 2019.