# ACA Information Reporting - Ensuring Big Data Analyses Do Not Lead to Big Penalties

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# ACA Information Reporting: Ensuring Big Data Analyses Do Not Lead to Big Penalties

**By Michelle Capezza (Member of the Firm, Epstein Becker Green) and Howard Gerver (President, ACA Managed Services)**

As employers prepare the Affordable Care Act information reporting filings for the 2016 year that will be due in 2017 (notably the 1094/1095 B&C), the good faith standard of compliance, and the potential for inaccuracies, is no longer available. In order to seek a waiver of penalties for the 2016 filings made in 2017, an employer will need to meet a standard of reasonable cause and no willful neglect. With this standard, an employer must show that there are significant mitigating factors or the failure was due to certain events outside their control and the filer acted responsibly. While "responsibly" remains subjective, the employer must be able to demonstrate that the same level of quality assurance and audit rigor that is applied to other governmental reporting must be applied to the 1095 and 1094 IRS reporting processes. Also, at this time, anticipate that the filings will need to be made with the government, and to the employees (and other recipients), under the regular schedule without extensions: *(i.e.,* the disclosures to employees will be due the last day of January following the calendar year in which coverage was provided; forms must be filed with the IRS by the last day of February if filing on paper or March if filing electronically (which is required for employers with 250 plus returns)).

Failure to timely file the Forms with the IRS and provide them to employees can lead to significant penalties (for example, currently large businesses are subject to a penalty of $260 per return up to a maximum of $3,178,500, as adjusting in successive years); this is not tax deductible.

The following is a checklist of issues that employers should consider when getting ready for 2017 ACA information reporting:

1. ***Understand the Big Data Environment.*** Using Big Data algorithms, the IRS has the ability, as it increasingly works in conjunction with other Federal agencies, to identify contradictory data submitted on both individual employee forms and across multiple employees, which can lead to audits, as well as enforcement of the individual and employer mandate For example, in

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the March 2016 Congressional Budget Office Report concerning the federal subsidies for health insurance coverage for people under the age of 65, the government has already estimated that 3 million people will pay the individual mandate penalty in 2016. In 2014, 7.9 million taxpayers paid approximately $1.6 billion in individual mandate penalties.

Moreover, from 2017-2026-the government projects employer mandate penalties of $228 billion. Thus, there is clear anticipation that revenue will be generated and violations will be ascertained through the information reporting filings. As carriers continue to withdraw from key markets and continue to incur material losses (billions of dollars are owed to carriers by the Federal government) the need to quickly enforce the employer penalties is even greater so the government can reimburse payors and providers the billions that are owed.

Given 1) the multi-billion dollar employer penalty budget and 2) the billions of dollars that have been/will be paid vis-à-vis the individual mandate, employers should thoroughly review their 2015 1095-C forms data and provide on-going QA of their 2016 data to mitigate risk.

It is imperative that employers confirm the integrity, accuracy and completeness of their employee data including: collection and verification of social security numbers of employees and dependents (as applicable), waiver information, eligibility determinations, offers of coverage (1095-C, line 14) and employee status/safe harbor codes (1095-C, line 16)

**Employers should also know where the data resides, how to extract it, and confirm that it is consistent with unique employee identifiers (*e.g.* SSN).** In addition, ensure that the responses on the forms do not contain conflicting codes (*e.g.,* an employee would not be made a qualifying offer (Code 1A on Line 14 of Form 1095-C) while being in their respective limited assessment period (Code 2D on Line 16 of Form 1095-C). These are the types of inconsistencies that can trigger a red flag with the government. Clearly the applicable data should be reviewed early and often.

In order to ensure that 2015 reporting was accurate, employers should audit last year's forms data. This way, errors as well as the underlying root cause can be identified and remedied to mitigate future risk. Employers should also adequately plan for and execute internal controls. For example, employers should perform a Data Diagnostic to calculate the expected number of offers (either 1A or 1E on line 14). The same should be done for Series 2 codes on Line 16. This way the actual results can be compared to the expected results.

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2. ***Ensure Proper Worker Classifications***. Misclassified workers raise many issues not only from an employment law standpoint but also an employee benefit plan standpoint. For group health plans, a key requirement is properly defining full time employees and equivalents to determine if an employer is an applicable larger employer under the employer mandate and that the requisite number of full time employees and their dependents are offered qualifying coverage. We are now in an environment where applicable large employers must cover the requisite 95% of full time employees or risk exposure to penalties (it was 70% last year). Properly identifying which workers are actually the employer's employees, in addition to their hours of work, is a critical step. This gets even more complicated when the employer has workers through alternative arrangements such as relationships with staffing firms. It should be noted that a service contract does not override the common law test for making a determination regarding employer status. An employer should consider a self audit of worker classifications.

3. ***Monitor changes in the applicable guidance***.

   *Draft Forms*. The new draft information reporting forms include changes such as: (a) the eliminated from form 1095-C the transition relief codes for 2015 regarding 70% coverage of employees as opposed to 95% and the exemption from penalties if the employer had less than 100 employees– code 1l and Code 2I (for noncalendar year plans); (b) Line 14 has a new Code IJ—used if minimum essential coverage providing minimum value is offered to an employee and conditionally offered to a spouse but not dependents. A common conditional offer occurs when coverage is offered to a spouse only if the spouse certifies he or she is not eligible for coverage under a plan sponsored by his or her own employer or not eligible for Medicare. If this code is used it can lead to a penalty because coverage is not offered to dependents. Code I K is used if qualifying coverage is offered to the employee, dependents and conditionally to a spouse. If either new code IJ or IK is used-line 15 of the 1095-C must be completed, (c) Offers of COBRA following a termination of employment should be coded with 1H (line 14) and 2 A (line 16) whether or not COBRA is elected. For COBRA offers after a reduction in hours, treat as an offer of coverage on Line 14 1095-C, (d) Line 15 instructions clarify that the employee required contribution for Line 15 of Form 1095-C is the employee's share of monthly cost for the lowest cost self only minimum essential coverage with minimum value offered.

   *Proposed Regulations*.

   a) Note that under proposed regulations issued July 6, 2016 regarding the premium tax credit, if an employee opts out of coverage and does not

substantiate other coverage, this increases the costs of coverage for the employee when making an affordability determination and can mean that the employee was not offered affordable coverage. This opt out payment must be added to the employee's premium contribution and reported on the Form 1095-C. If there is a conditional opt-out where the employee provides substantiation of other minimum essential coverage for the employee and their tax family (for example through a spouse's plan but not individual coverage through the Marketplace) at least annually, this will not increase the cost for the affordability determination. The comment period on these regulations has just ended so it will be important to monitor any changes in final rules. Under transition rules, these rules will be effective with the 2017 plan year for opt out programs in effect prior to 2016.

b) In Proposed Regulations issued July 29, 2016 under Code Section 6055 and relating to the Form 1095-B and 1095 C part III, it is worth noting that if the employee is covered by multiple plans providing minimum essential coverage by the same sponsor, reporting is only required by one of the plans. These rules apply month by month per individual. Therefore, if for a month an employee is enrolled in a self-insured health plan and HRA by the same employer, the employer only reports one type of coverage but, if the employee drops coverage under the health plan, the employer reports coverage for the HRA for the remaining months. Also reporting is not required for supplemental coverage where the employee is already covered by minimum essential coverage for which reporting is required or through Medicare, TRICARE or Medicaid.

4. ***Ensure Accurate Names and Social Security Numbers.***

- Employers should remind employees to report any name changes due to life events such as marriage or divorce to both the Social Security Administration and the employer.

- Employers should establish procedures for securing Forms W-4 and using that information to prepare forms W-2.

- An initial solicitation must be made for a correct SSN when completing the information reporting requirements unless the employer has the employee's SSN and uses it for all transactions with the employee. When an employee begins work, it is usually considered an initial solicitation with completion of a Form W-2, W-4 and I-9.

- When the employee's SSN is missing or incorrect after the initial solicitation, the employer will generally need to conduct annual solicitations for a correct

SSN and there should be a process for re-solicitation of required information. SSN solicitations are also made at time of an open enrollment.

The July 29, 2016 proposed regulations noted above provide that an employer acts responsibly if it engages in proper solicitation of SSNs which includes an initial and 2 subsequent annual solicitations (*i.e,* the first annual solicitation being within 75 days after open enrollment and the second by the December 31st of the following year). Employers should retain employee responses in employer records and note that solicitations were made.

5. ***Corrected Returns***. It's worth commenting that in addition to getting ready for 2017 filings, there may be some clean up required for the 2015 forms that were just filed earlier this year.

- Errors could be identified by an IRS error message, internal audit or by an employee.

- A corrected return corrects an inaccurate return (such as Form 1095 B/C) or transmittal (1094-C) that was previously filed and accepted (with or without errors) by the IRS.

- If a transmission or submission was REJECTED by the IRS-then a rejection requires a replacement -it is necessary to replace all records in the transmission or submission that was rejected.

- Correcting errors is part of the good faith effort to file accurate and complete information returns.

- Employers should have an internal review process to ensure correction of forms will not be necessary.

6. ***Record Retention***. It is important to document and retain proof to substantiate responses on the ACA information reporting forms, and, record retention policies should be updated to include ACA information reporting records. Among the records employers should retain are (i) records of employees who were provided with an offer of coverage and corresponding dates, (ii) eligibility methodology and determinations, (iii) signed waivers or opt out forms, (iv) SSN solicitation records, (iv) controlled group determinations, (v) participant communications, (vi) affordability calculations.

7. ***Marketplace Notice and IRS Penalty Notice*.** For the Marketplace Notices which some employers started to receive in early July, note that these are not the IRS Penalty Notices for employer mandate penalties which may start to be issued later this year. The Marketplace Notice can be issued to large

and small employers. It is a notification that the particular employee purchased coverage in the current year and received a subsidy. An employer has 90 days after the date of the notice to appeal and claim that the employee should not receive the premium tax credit.It is especially important for large employers to check records to determine if this employee was offered qualifying coverage, that the employee was properly classified and then to determine if it is necessary to challenge the employee's receipt of the subsidy because this could be a trigger for later receipt of an IRS penalty notice.Therefore, thought should be given to setting the record straight and preparing defenses to a potential IRS penalty notice. If the employer wins the Marketplace Notice appeal, the employee must pay back the subsidy received or offset any tax refunds. The Marketplace appeals center will issue the decision. An IRS penalty notice will indicate that the IRS believes the employer did not offer qualifying coverage during the prior year. Employers will have a chance to respond and appeal the IRS penalty notices. It is important to establish an approach for reviewing and responding to these notices.

8. ***Corporate Transactions***. In the merger and acquisition context, be mindful of representations and warranties regarding ACA compliance and information reporting requirements. Diligence could include review of a sample of the forms that were filed by the target to assess whether they appear to have been completed properly, looking for incomplete or inconsistent codes on the forms, and anticipating potential liabilities. Consideration should be given to factoring in potential penalties to purchase prices and escrow arrangements. A best practice is to perform a 1095-C and 1094-C audit during the due diligence process.

9. ***Fiduciary Responsibility and Governance.*** Health and welfare plans are subject to ERISA and the plan fiduciaries should ensure that they are maintaining these plans in compliance with applicable law, meeting the applicable reporting and disclosure requirements, and prudently selecting and monitoring those that assist in meeting these responsibilities. Consideration should be given to enhancing fiduciary governance procedures, such as benefit committee guidelines and health plan administrative procedures to include ACA information reporting duties, if not done so already.

10. ***Establish an ACA Information Reporting Team.*** ACA compliance has many facets, and information reporting is a complex requirement. Consideration should be given to designating a specific individual or team to address these disclosures. It is important for these individuals to examine data collection and integrity issues so that any mistakes from last year are not repeated. Quality control and data privacy

issues should also be addressed. As part of their mission, the ACA Information Reporting Team should make on-going QA an embedded part of their process.

The ACA Information Reporting Team should also perform a 1095-C audit (and 1094-C audit) to make sure information was accurately reported. Employers should audit last year's forms data. This way, errors as well as the underlying root cause can be identified and remedied to mitigate future risk. Employers should also adequately plan for and execute internal controls. For example, employers should perform a Data Diagnostic to calculate the expected number of offers (either 1A or 1E on line 14). The same should be done for Series 2 codes on Line 16. This way the actual results can be compared to the expected results.

Consideration of these best practices and implementation of same will make a difference when completing the Forms and defending the responses in an audit or an appeal. For more information regarding IRS reporting best practices and how to mitigate penalty and public relations risk, please visitwww.ACAIRSbestpractices.com.

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