



In Surprising Memo, IRS Concludes There Is No Statute of Limitations On Affordable Care Act "Pay or Play" Taxes: *What Steps Employers Should Take Now*

Prepared by:
Eric W. Gregory
Dickinson Wright PLLC

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IN SURPRISING MEMO, IRS CONCLUDES THERE IS NO STATUTE OF LIMITATIONS ON AFFORDABLE CARE ACT “PAY OR PLAY” TAXES: WHAT STEPS EMPLOYERS SHOULD TAKE NOW

Written by Eric Gregory

In an unexpected memo from the IRS, the Office of Chief Counsel has concluded that the filing of Affordable Care Act (“ACA”) returns does not start the statute of limitations on the Employer Shared Responsibility Payments (“ESRP”) that may be owed by employers with 50 or more full-time (or equivalent) employees. ESRP is also commonly referred to as the “pay or play” tax. Employers should be aware of this position and should be prepared to fight ESRP assessments outside of the otherwise-applicable statute of limitations.

The Statute of Limitations

The Internal Revenue Code generally provides that there is a 3-year statute of limitations that runs from the date a return is filed or the return’s due date, whichever is later. On that basis, employers have claimed that the filing of ACA Forms 1094-C and 1095-C should start the statute of limitations running for the IRS to assess ESRP.

The IRS Position

The IRS relies on U.S. Supreme Court precedent to determine that Forms 1094-C and 1095-C do not meet one of the requirements for the statute of limitations to start running: the requirement that there must be sufficient data on the return filed to calculate tax liability. It is important to know that the 1094-C and 1095-C Forms themselves do not require or allow employers to calculate or report ESRP amounts. In fact, an ESRP is not triggered unless at least one full-time employee receives the Premium Tax Credit ("PTC") through the ACA Marketplace.

Because ESRP is not triggered unless at least one full-time employee receives a PTC, the IRS cannot assess ESRP until it can cross-reference the individual Form 1040 income tax returns filed by full-time employees. Therefore, the IRS has concluded that the Forms 1094-C and 1095-C, standing alone, cannot be used to determine whether or the amount of ESRP owed by an employer.

Practical Actions for Employers

Considering the IRS has an evergreen option to assess ESRP, employers should consider taking the following action to limit liability:

- **Keep the following records indefinitely:**
- **Records of how full-time status is determined.** Keep records to determine whether full-time status is determined using the monthly or look-back measurement period, and the records that are used to determine when an employee qualifies for an offer of coverage based on those methods. The choice of

method should be documented in a summary plan description ("SPD") and plan document.

- **Records of waiting periods.** Ensure that you have documented the waiting period used before coverage is offered, and that coverage was offered by that deadline.
- **Records of offers of coverage.** Keep records demonstrating that offers of minimum essential coverage were made to employees.
- **Ensure that the Forms 1094-C and 1095-C are filed with the IRS timely.** Setting aside ESRP, employers are subject to a penalty of up to \$270 per return for a failure to file a late filing or an incomplete filing, which more than doubles to \$550 per return in the case of intentional disregard.
- **Ensure that Form 1095-C is furnished to employees timely.** Employers are subject to the same penalties in the case of failure to furnish returns to employees.

Conclusion

This will certainly be an area for employers to watch. It would not be surprising for an employer to challenge an ESRP assessment from the IRS that is made outside of the statute of limitations period in Tax Court or the Court of Federal Claims. In the meantime, employers should be sure to maintain records indefinitely in the case of a future ESRP assessment.

About the Author

Eric W. Gregory is a Member in Dickinson Wright's Troy office where he assists clients in all areas of employee benefits law, including qualified retirement plans, welfare plans, and non-qualified compensation programs. Eric can be reached at 248-433-7669 or egregory@dickinsonwright.com and you can visit his bio [here](#).

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