

# The Affordable Care Act: What's New in 2018/2019?

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**Over the past several years, there has been much speculation surrounding the Patient Protection and Affordable Care Act (the 'ACA'), including whether it would be repealed in full, only partially, or not at all.**

Despite this widespread speculation and Congress' numerous efforts at some form of repeal, the ACA, in large part, remains the law of the land. However, there have been several developments over the past year of which Employers should be aware as they approach year end.

First, and likely most importantly for Employers, the Employer Shared Responsibility provisions of the ACA (oftentimes dubbed the "Employer Mandate") remains fully intact. In its simplest form, this means that an employer who employs on average at least fifty or more full-time employees (including full-time equivalent employees) must offer qualifying health insurance coverage to all full-time employees.

While that may seem relatively simple on its face, employers who have dealt with the ACA know simplicity is not characteristic of the ACA. Any employer who is subject to the ACA (known as an "Applicable Large Employer" or an "ALE") but does not offer coverage that is (a) affordable, (b) provides minimum essential coverage ("MEC"), and (c) meets minimum value actuarial calculations, may owe an "employer shared responsibility payment" to the IRS. As most know, these penalties can be astronomical, especially for an ALE who, for whatever reason, failed to offer qualifying coverage to its full-time employees. And don't forget about the employees of your commonly owned or controlled entities - these employees are counted in determining an employer's (or employer group's) status as an ALE.

Second, the relatively new tax law, the Tax Cuts and Jobs Act (the "Tax Act"), was enacted in late December of 2017, but its impact on the ACA takes effect January 1, 2019. How did the Tax Act impact the ACA? The Tax Act repealed the tax penalties associated with the "Individual Mandate" of the ACA beginning January 1, 2019, but, to date, has not had an impact on the "Employer Mandate." The Individual Mandate generally requires individuals to maintain qualifying health insurance coverage (known as minimum essential coverage). There are coverage exceptions, but generally speaking, if an individual did not maintain qualifying coverage, then he or she would be responsible for paying a tax penalty. The Tax Act removes the tax penalty associated with an individual not maintaining qualifying coverage beginning January 1, 2019; however, the actual requirement to maintain coverage is still on the books, and the tax associated with the Individual Mandate is still effective for the 2018 year. In short, the Tax Act affects the Individual Mandate, but not the

Employer Mandate (at least not directly); however, stay tuned as there is an ongoing legal battle challenging the ACA in light of the Tax Act's repeal of the Individual Mandate penalty.

Third, despite the Tax Act's impact on the Individual Mandate and Congress' efforts to repeal the ACA, the Employer Mandate remains fully enforceable. As such, the IRS is in full swing enforcing the Employer Mandate by sending out ACA Penalty Letters. You may have heard of other business owners receiving a "Letter 226J" from the IRS. These letters have covered calendar years 2015 and 2016, and 2017's letters are expected soon. The penalties can be excessive, especially for a business with low margins. If you are the recipient of a Letter 226J, do not sit idly by thinking this is a mistake and will go away on its own. Even if it is a mistake, you need a representative who is knowledgeable on the ACA's requirements, including reporting requirements, to explain your situation and persuade the IRS against assessing the level of penalties suggested in the Letter 226J. This firm has represented numerous clients before the IRS on these letters, as have other law firms. You will be well-served to consult with legal counsel who is knowledgeable on these issues early in the process; otherwise, you could find yourself knee-deep in an uphill IRS battle before you know it.

Fourth, the IRS recently released guidance extending the deadline for ALEs (*i.e.*, employers subject to the ACA) to furnish employees with Forms 1095-B and 1095-C (*i.e.*, ACA information returns). The deadlines for furnishing these required information returns to employees **is now March 4, 2019**; however, the deadline for filing these returns with the IRS has **not** been extended at this time. Thus, ALEs must file by February 28, 2019 (if not filing electronically) or April 1, 2019 (if filing electronically).

Fifth, the IRS extended the "good faith" transition relief from penalties associated with incorrect or incomplete information reported on ACA returns for the 2018 reporting year. Like in prior years, this "good faith" transition relief only applies to reporting forms that contain incorrect or incomplete information, notwithstanding the filer's good faith (read: reasonable) efforts to comply with the requirements of the ACA. The relief does **not** apply to filers who fail to furnish the required information return by the due date.

Sixth, the IRS increased the affordability percentage from 9.56% in 2018 to 9.86% in 2019. In addition, the projected increases to the 4980H(a) and 4980H(b) penalties are as follows:

- 4980H(a) penalty is expected to increase from \$2,320 annually (per full-time employee), to \$2,500 annually (per full-time employee); and
- 4980H(b) penalty is expected to increase from \$3,480 annually (per employee who receives a premium tax credit), to \$3,750 annually (per employee who receives a premium tax credit).

Finally, while there are countless other nuanced changes in the health and welfare benefit world, the important message for employers is to re-evaluate, on at least an annual basis, your continued compliance with the ACA. Although there remains a push in Congress and from the White House to repeal the Employer Mandate, there are just as many skeptics who believe any such repeal is not remotely on the horizon. Employers should take a look at their benefit offerings, ensure that they continue to place the ACA at the forefront, and reach out to legal counsel for an ACA compliance audit.

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