ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: Practical Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, and Dan Taylor provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte and Washington, D.C. law firm. Ashley Gillihan, Carolyn Smith and Dan Taylor are members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

Potential Impact of Health Care Reform on ACA Reporting

With the start and stop of "repeal and replace" efforts, it is unclear when changes may be coming to reporting required under the Affordable Care Act ("ACA"). However, even if proposals such as the House's American Health Care Act ("AHCA") and the Senate's Better Care Reconciliation Act ("BCRA") make reporting easier, they would not immediately eliminate employer reporting responsibility.

In fact, the IRS has been sending letters to employers who it believes should have filed Form 1094-C and Forms 1095-C, but did not file. These IRS efforts should serve as a reminder that employers are not off the hook, and should remain focused on complying with the ACA reporting requirements.

Background

The ACA requires applicable large employers ("ALEs") to furnish and file Form 1095-C annually. Generally, an employer is an ALE if it had 50 or more full-time and/or full-time equivalent employees in the prior calendar year. The Form 1095-C provides information on when and if the employer offered a full-time employee health coverage and information about that coverage. ALEs must also file Form 1094-C, which summarizes their Form 1095-Cs submissions.

The IRS first required ALEs to complete this reporting for the 2015 calendar year.[1] Putting aside potential excise taxes related to the ACA's employer mandate, simply failing to comply with the reporting requirements can be costly. The potential penalty is up to $520 per 1095-C ($260 for not furnishing to the employee and another $260 for not filing with the IRS), up to a maximum of $3,193,000 per year.[2] The IRS can waive these penalties for failures due to reasonable cause and not willful neglect.[3]

The IRS considers whether reasonable efforts were made to prepare for reporting to the IRS and furnishing to employees. However, in the case of intentional disregard, the potential penalty increases to $1,060 per 1095-C ($530 for not furnishing to the employee and another $530 for not filing with the IRS) without any limit.

The IRS provided "good faith" penalty relief for incorrect or incomplete Form 1094-C and Forms 1095-Cs, and will continue to provide this good faith relief for 2017.[4] As a result, the IRS will not assess penalties that report incorrect or incomplete information if they can show good faith efforts to comply with the reporting requirements.

However, this penalty relief is not available to employers that fail to furnish or file the forms, miss applicable deadlines, and/or do not make good faith efforts to comply. Most well-advised large employers made good faith efforts to file timely, even if those filings might not have been perfect (more on that below), so that they could obtain the IRS good faith penalty relief.

Responding to TIN Errors

It is very common for an employer's 1095 file to be accepted by the IRS with errors related to mismatches in the name and taxpayer identification number provided on the form—typically for covered dependents identified in Part III of the 1095-C. How are employers supposed to respond? There is much confusion around this issue and the confusion arises from the seemingly conflicting guidance we are receiving from the IRS.

Normally, any error on a 1095-C (or any other information return required to be filed with the IRS) will trigger a penalty *absent reasonable cause*. The good news is that employers are subject to a good faith standard for 2016. Good faith is obviously something less than reasonable cause but how much less? The bad news is that it is

very difficult to distinguish the difference between the good faith standard and the reasonable cause standard *as applied to TIN errors* because there are special rules in the reasonable cause requirements related to incorrect TINs.

IRS Publication 1586 indicates that no penalties will be assessed with respect to TIN errors if the employer satisfies the solicitation requirements in Internal Revenue Code ("Code") Section 6724 and the final regulations issued thereunder. Generally speaking, the final regulations under Code Section 6724 indicate that the employer must solicit a TIN within 75 days after receiving **notice of the error from Treasury OR receiving a penalty assessment.**

If we stop right there, then it would seem clear that employers must solicit the correct TIN if a 1095 was accepted with TIN in order to satisfy the reasonable cause standard and avoid penalties because the employer has presumably received notice of the error from the IRS. However, according to Publication 1586, if the employer solicits and the taxpayer provides the correct information, the employer need only hold on to the correct information and use it for subsequent filings (in other words, there is no need to actually file a corrected 1095).

But we can't stop there. In an effort to better align the Code Section 6724 rules with the 1095 requirements, the IRS issued proposed regulations last year under Code Section 6055 that attempt to clarify the manner in which the Code Section 6724 solicitation rules would apply in the 1095 context (e.g. with respect to TINs for covered individuals identified IN Part III of 1095-C or on the 1095-B). The proposed rules focused mostly on the dates that employers are considered to have made a solicitation. There is, however, an interesting footnote in the proposed rules that indicates that the error notice from the IRS indicating that the name/TIN do not match is neither a penalty assessment nor a requirement to solicit. This means employers do not have to do anything, right?

It does seem to suggest that "do nothing" is an appropriate response for employers; however, this footnote in a proposed regulation contradicts the final solicitation regulations and the reasonable cause guidance in Publication 1586. It also contradicts the instructions to the Form 1095-B and C, which identify TIN errors as one of the errors that require correction.

What about the good faith standard? Does it provide clarity? As noted above, employers are subject to the good faith standard, which is something less than reasonable cause. So what is "good faith"? The IRS has not provided a hard and fast rule but the IRS has made it clear that it will take into account generally (for all errors—not just TIN errors) the steps the employer takes to correct the information once the employer knows it was wrong. That standard, along with the instructions, seem to suggest that employers who receive the error notice from the IRS must not only solicit but also correct if they receive corrections from the individual.

So with all of the confusion and contradictions, what is the path that employers should take. Can employers avoid penalties if they do absolutely nothing? Perhaps—in reliance on the footnote in proposed regulations-- but we question whether employers wish to be in a position of having to rely on a footnote in proposed regulations when responding to a penalty assessment.

Should employers solicit and then correct if the correct TIN is provided? That is a fail proof path but may be administratively burdensome for many—and may be unnecessary. Perhaps the compromise suggested by the guidance mentioned above is to solicit following notice of the errors but only use the corrected information on subsequent 1095s. Additional clarifying guidance from the IRS on this issue would be helpful.

NOTE: the footnote in the proposed regulations only applies to the Code Section 6055 reporting requirements.

IRS Enforcement Efforts

As noted, IRS enforcement efforts to date appear to be focused on large employers who did not furnish and file *any* 1095-Cs and submit a Form 1094-C. The IRS has been sending Letter 5699, "Request for Employer Reporting of Offers of Health Insurance Coverage (Forms 1094-C and 1095-C)" to those employers. Employers who receive the letter must respond within 30 days of the letter's date. The letter provides five response options for the employer:

- The employer was an ALE and already filed Form 1094-C and Forms 1095-C with the IRS. In this case, the IRS requests the company name used for filing, the employer identification number (EIN), and filing date.

- The employer did not comply previously, but is now enclosing its Form 1094-C and Forms 1095-C. This option is not available for employers that were required to file electronically (generally employers filing 250 or more 1095-Cs).

- Employer was an ALE and will file for the year in question. In this case, the IRS requests the company name used for filing, the employer identification number (EIN), and the anticipated filing date. If the anticipated filing date is more than 90 days after the letter day, then the IRS requests an explanation.

- Employer was *not* an ALE for the calendar year.

- Other, which requires a statement about why the forms were not filed and any actions the employer plans to take.

Most large employers made good faith efforts to furnish and file Forms 1095-C and file Form 1094-C, so they are unlikely to receive this letter from the IRS.

As noted, the House's AHCA and Senate's BCRA *do not* repeal the ACA's reporting requirements for large employers, although they might be simplified in future years. Procedural rules limit reconciliation efforts to provisions that affect tax and revenue, which does not include the reporting rules. Thus, employers should not expect relief from the reporting requirements soon. Accordingly, employers might want to correct any inaccuracies in their Forms 1094-C and 1095-C filings to ensure they fall on the right side of the IRS's "good faith" relief. ■

References

1- See IRS Notice 2013-45; IRS Notice 2016-4 (further extending the filing deadline for the 2015 calendar year).

2- Code §§ 6721 and 6722; Rev. Proc. 2015-53.

3- Code § 6724; Treas. Reg. § 301.6056-1(i)(1).

4- IRS Notice 2016-70.