Subject: 1) Status of Individual Mandate; 2) Understanding IRS Letter 227; 3) Indexed MEC Adjustments; and 4) PCOR Fee Reminder
Date: June 19, 2018

Status of Individual Mandate

Last year, the mantra for the Affordable Care Act (ACA) went something like this: repeal, repeal and replace, leave it alone, repeal, repeal and replace….

This notwithstanding, the ACA remains the law of the land, with the exception of the penalty tax imposed on individuals for failure to maintain minimum essential coverage (MEC). The Tax Cuts and Jobs Act reduces this tax to zero, effective January 1, 2019. The requirements to maintain health coverage continues to apply, despite the absence of a penalty.

The mantra this year is arguably more subversive: challenge, counter-challenge, defend, do not defend….

In February, a coalition of 20 State Attorneys General from primarily Republican states led by Texas Attorney General Ken Paxton and Wisconsin Attorney General Brad Schimel filed a lawsuit with the U.S. District Court for the Northern District of Texas arguing that repeal of the individual tax should cause the entire ACA to fall.

In April, a coalition of 16 Attorneys General from primarily Democratic states led by California Attorney General Xavier Becerra filed an action to intervene in the lawsuit. A month later, the judge of the Texas Court granted intervention in the matter.

The 20-coalition group who initiated the action is now seeking a preliminary injunction to suspend the law while the case winds its way through the Court. In response, the Democratic coalition of State Attorneys General filed a motion in opposition to a preliminary injunction seeking to ensure all aspects of ACA remain in force while court proceedings are carried out.

Separately, in a relatively unusual move, the U.S. Justice Department (DOJ) filed a response with the Texas Court on June 7, 2018, stating that the DOJ would no longer defend the individual mandate, including the guaranteed issue and preexisting condition limitation prohibition and rate restriction provisions of the law. On the same day, U. S. Attorney General Jeff Sessions a letter sent to Congress defending the DOJ's position that questions the constitutionality of the individual mandate in light of the repeal of the related tax penalty.

In summary, at this point, the ACA remains in full force and effect. From an employer's perspective, this means 'business as usual'.

At minimum, the move by the DOJ fuels discussion and debate for the upcoming November elections. This turn of events may create uncertainty in the individual insurance market as rates are being set for the 2019 year. Similarly there could be some ancillary impact on the group market. All of this uncertainty notwithstanding, bear in mind the importance of complying with the law unless and until it is changed. See the next topic to understand how enforcement is going forth.

Understanding IRS Letter 227

Late in 2017, the Internal Revenue Service began issuing Letters 226J to gather information relating to the imposition of the employer shared responsibility (ESR) tax (see *Employer Shared Responsibility Penalty Assessment Procedures*, CBIZ HRB 134, 11/17/17. The Letter 226J relates to the ESR reporting obligations for the 2015 calendar year reporting. As a reminder, the ESR rules apply to employers employing 50 or more employees.

The next step in this process is an IRS Letter 227, which follows up on Letter 226J. The Letter 227, like the Letter 226J, is not a penalty assessment. The obligation to pay a penalty would be documented on the "Notice CP 220J".

There are five versions of the Letter 227:

- Letter 227-J indicates that there is agreement between the IRS and the taxpayer on the penalty amount and no further action is needed.
- Letter 227-K indicates no penalty amount assessed and no further action needed
- Letter 227-L indicates that the penalty is revised; the taxpayer can agree and request a meeting or can appeal the determination.
- Letter 227-M indicates no change in the penalty. Like the 227-L the taxpayer can agree and request a meeting or appeal the determination.
- Letter 227-N acknowledges results of an appeal and no further response is required.

The IRS has established a dedicated webpage, Understanding Your Letter 227, to further explain the purpose of the Letters, together with an outline of next steps.

In summary, it is important to keep an eye out for these Letters and respond appropriately and timely if indicated to do so. In an informal IRS comment, the majority of the Letters 226 have resulted in no penalty.

Indexed Adjustments for Minimum Essential Coverage (MEC)

Certain Affordable Care Act (ACA) standards are subject to inflationary adjustments. To this end, the IRS released Revenue Procedure 2018-34 which provides indexed adjustments to required contributions relating to minimum essential coverage beginning in 2019, as follows:

- **Affordability Standard – Employer Shared Responsibility Mandate**

  Coverage under an employer-sponsored plan is deemed affordable to a particular employee if the employee's required contribution to the plan does not exceed 9.86% (indexed for 2019; up from 9.56% for 2018) of the employee's household income for the taxable year, based on the cost of single coverage in the employer's least expensive plan.

  As background, employers subject to the ACA's employer shared responsibility mandate who fail to offer minimum essential coverage to their full-time employees or fail to offer adequate and affordable coverage may be subject to an excise tax if at least one of its employees qualifies for premium assistance through a marketplace. If an employer does not know an individual's household earnings, it can use one of three safe harbors for purposes of determining affordability; they are:

  1. A ***Form W-2 determination*** in which the employer's lowest cost self-only coverage providing minimum value does not exceed 9.56% (indexed for 2018; 9.86% for 2019), of the employee's Form W-2 wages (Box 1) for the calendar year.

  2. A ***rate of pay method*** in which the minimum value cannot exceed 9.56% (indexed for 2018; 9.86% for 2019), of an amount equal to 130 hours, multiplied by the employee's hourly rate of pay as of the first day of the coverage period. For salaried employees, the monthly salary is used instead of the 130 hour standard. An employer can apply this method to hourly employees if they experience a reduction in pay during the year; however, this methodology cannot be used for commissioned sales people.

3. A ***Federal poverty line (FPL) standard*** in which cost of single coverage does not exceed 9.56% (indexed for 2018; 9.86% for 2019) of the individual federal poverty line rate for the applicable calendar year, divided by twelve. An employer is permitted to use the poverty guidelines in effect six months prior to the beginning of the plan year. The Department of Health and Human Services released the 2018 FPL standards in January, 2018 (see *HHS Releases 2018 Federal Poverty Guidelines, Benefit Beat*, 2/7/18).

- **Premium Tax Credit.** The following contribution percentages are used to determine whether an individual is eligible for a premium tax credit for the 2018 and 2019 tax years:

Household Income Percentage of Federal Poverty Line	Initial Percentage *2018*	Final Percentage *2018*	Initial Percentage *2019*	Final Percentage *2019*
Under 133%	2.01%	2.01%	2.08%	2.08%
Between 133% and 150%	3.02%	4.03%	3.11%	4.15%
Between 150% and 200%	4.03%	6.34%	4.15%	6.54%
Between 200% and 250%	6.34%	8.10%	6.54%	8.36%
Between 250% and 300%	8.10%	9.56%	8.36%	9.86%
Between 300% and 400%	9.56%	9.56%	9.86%	9.86%

PCOR Annual Fee Reminder

July 31st is fast approaching and it's time to begin preparations for payment of the ACA's Patient-Centered Outcomes Research (PCOR) fee. Virtually, all health plans, whether insured or self-funded, are subject to these fees. The PCOR fee is assessed on the average number of lives covered under the policy or plan. For policy and plan years ending between October 1, 2017 and October 1, 2018, the fee is $2.39 per covered life.

The fee is to be paid once a year in connection with IRS Form 720, *Quarterly Federal Excise Tax Return*. For insured plans, the insurer is obligated to file the Form 720 by July 31st following the close of the policy year. For self-funded plans, the plan sponsor is obligated to file the Form 720 by July 31st of the calendar year following the plan year end.

As a reminder, the PCOR fee is an employer responsibility and cannot be paid from plan assets, including participant contributions.

For additional information about the PCOR fee, see IRS webpage, Questions and Answers and Chart of Plans Subject to the Fees.

About the Author: Karen R. McLeese is Vice President of Employee Benefit Regulatory Affairs for CBIZ Benefits & Insurance Services, Inc., a division of CBIZ, Inc. She serves as in-house counsel, with particular emphasis on monitoring and interpreting state and federal employee benefits law. Ms. McLeese is based in the CBIZ Kansas City office.

The information contained herein is not intended to be legal, accounting, or other professional advice, nor are these comments directed to specific situations. The information contained herein is provided as general guidance and may be affected by changes in law or regulation. The information contained herein is not intended to replace or substitute for accounting or other professional advice. Attorneys or tax advisors must be consulted for assistance in specific situations. This information is provided as-is, with no warranties of any kind. CBIZ shall not be liable for any damages whatsoever in connection with its use and assumes no obligation to inform the reader of any changes in laws or other factors that could affect the information contained herein.