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# Employer's Guide to ACA Reporting: 2020 Forms and Instructions

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## Introduction

As part of the Tax Cuts and Jobs Act (TCJA), the Affordable Care Act's (ACA) individual mandate penalty was repealed effective January 1, 2019; however, the TCJA did not repeal the employer mandate nor its reporting requirements. Employers should be prepared to respond to IRS Employer Shared Responsibility Provision (ESRP) penalty letters and continue to prepare for 2020 reporting, which will occur in the first quarter of 2021.

The IRS has released the final versions of its employer and provider reporting forms and instructions for 2020. Links to the forms and instructions are below:

- Form 1094-C: https://www.irs.gov/pub/irs-pdf/f1094c.pdf
- Form 1095-C: https://www.irs.gov/pub/irs-pdf/f1095c.pdf
- Form 1094-C / 1095-C Instructions: https://www.irs.gov/pub/irs-pdf/i109495c.pdf
- Form 1094-B: https://www.irs.gov/pub/irs-pdf/f1094b.pdf
- Form 1095-B: https://www.irs.gov/pub/irs-pdf/f1095b.pdf
- Form 1094-B / 1095-B Instructions: https://www.irs.gov/pub/irs-pdf/i109495b.pdf

Additional IRS guidance can be found here:

- Forms and Instructions for Prior Years: https://apps.irs.gov/app/picklist/list/priorFormPublication.html?resultsPerPage=200&sortColumn=sortOrder&indexOfFirstRow=0&criteria=formNumber&value=1094c+&isDescending=false
- IRS Tool for Determining ALE Status and Potential Penalty Exposure https://taxpayeradvocate.irs.gov/estimator/esrp/
- Q/A's on Reporting by Health Coverage Providers (Section 6055): www.irs.gov/affordable-care-act/questions-and-answers-on-information-reporting-by-health-coverage-providers-section-6055
- Q/A's on Reporting of Offers of Health Coverage by Employers (Section 6056): www.irs.gov/affordable-care-act/employers/questions-and-answers-on-reporting-of-offers-of-health-insurance-coverage-by-employers-section-6056
- Q/A's about Information Reporting by Employers on Form 1094-C and Form 1095-C: www.irs.gov/affordable-care-act/employers/questions-and-answers-about-information-reporting-by-employers-on-form-1094-c-and-form-1095-c
- Q/A's on Employer Shared Responsibility Provisions Under the ACA: www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act

This guide reviews the 2020 forms and instructions and notes relevant changes from 2019. It also addresses IRS guidance on the solicitation of social security numbers ("SSNs") or taxpayer identification numbers ("TINs") and the treatment of cash "opt-out" payments for reporting purposes. It also provides guidance for employers that receive Letter 226J, Notice of a proposed Employer Shared Responsibility Payment, Letter 5699, Request for ACA Reporting Forms, or Letter 972CG, Late Filing, Missing/Incorrect TIN, or Failure to File Electronically Forms.

The reporting requirements are complex, due in part to how the health care reform law was drafted. The Affordable Care Act added two sections to the Internal Revenue Code: Sections 6055 and 6056. The sections are found next to each other in the Code; however, they apply to different types of entities. Section 6055 applies to providers of health insurance, such as health insurance carriers and employers that sponsor self-insured plans. Section 6056 applies to "applicable large employers" or "ALEs", which are employers with 50 or more full-time equivalent employees in the prior calendar year.

To further complicate things, the reporting forms come in two different "series" – the B-Series and the C-Series forms. Employers may use either or both sets depending on their company size and whether their group health plan is self-insured or fully insured. Our goal with this guide is to provide some clarity and best practices for employers.

## Background

The Affordable Care Act ("ACA") added Sections 6055 and 6056 to the Internal Revenue Code (the "Code"). These sections were first effective for calendar year 2015 and require employers and providers of health insurance coverage to report certain information to the IRS, full-time employees, and other plan participants each year. The Section 6055 reporting requirements apply to providers of health insurance coverage, such as insurance companies, employers that sponsor self-insured group health plans, and other entities that provide coverage, such as multiemployer plans. The Section 6056 reporting requirements apply to "applicable large employers" or "ALEs" and require reporting of health care coverage offered to the employer's full-time employees (an ALE is an employer that employed 50 or more full-time equivalent employees on average in the prior calendar year).

Moreover, Section 6056 reporting applies at the "ALE Member" level, meaning that each member company of a controlled group of corporations files its own "authoritative" transmittal (Form 1094-C) and is responsible for reporting on its full-time employees. In other words, parent companies do not report on employees of their subsidiaries or affiliates, although each ALE Member will list the other ALE Members on Part IV of Form 1094-C as being a part of the same "Aggregated ALE Group."

Reporting under Sections 6055 and 6056 involves one or both of two sets of forms: the "B-Series" forms (Forms 1094-B and 1095-B) and the "C-Series" forms (Forms 1094-C and 1095-C). Each set of forms includes a transmittal form (Forms 1094-B and 1094-C), which serves as a cover page to the individualized forms (Forms 1095-B and 1095-C), which are prepared for each employee for whom the employer is required to report. The B-Series forms are used to report whether individuals have minimum essential coverage ("MEC") and, therefore, are not liable for the individual shared responsibility payment (which was eliminated for months after December 2018). The C-Series forms are used to report information about offers of health coverage and enrollment in health coverage for employees, to determine whether an employer owes an employer shared responsibility payment, and to determine the eligibility of employees for the premium tax credit. However, ALEs that sponsor self-insured plans will perform their Section 6055 and 6056 reporting using only the C-Series forms when reporting on full-time employees.

The forms that must be filed and distributed depend on whether the employer is an ALE and the type of coverage provided. The following chart summarizes the filing and distribution requirements for the relevant reporting entities:

| | Fully Insured Plan | Self-Funded Plan |
|---|---|---|
| **Non-ALE** | Not required to file. | Forms 1094-B and 1095-B.*<br>*Sent to the IRS only |
| **ALE** | Forms 1094-C and 1095-C<br>(Part III will not be completed). | Forms 1094-C and 1095-C for employees.<br>Either B-Series or C-Series forms for non-employees. |
| **Insurance Provider** | Forms 1094-B and 1095-B. | Not applicable. |

There is also Form 1095-A, which is provided by the Marketplace and is used by individuals who receive Marketplace coverage to reconcile premium tax credits. A general overview of the filing deadlines and other requirements relevant to the B-Series and C-Series forms is provided below.

## What's New for 2020?

The forms and instructions are largely unchanged from 2019 for purposes of employers who offer major medical coverage; however, beginning January 1, 2020, employers were able to offer Individual Coverage Health Reimbursement Arrangements ("ICHRAs") to certain classes of employees. ICHRAs are integrated with either individual coverage or Medicare (in lieu of employer-sponsored coverage) and, therefore, require their own codes for reporting offers of coverage and new lines for reporting required information.

### All Coverage (Major Medical and ICHRAs)

While in previous years it was optional for employers to include a two-digit number for the Plan Year Start Month box on Form 1095-C, the Plan Year Start Month will be required to be reported beginning in 2020. Therefore, employers can no longer leave this section blank. Penalty amounts for reporting failures reflect indexed increases. The instructions reiterate, as in prior years, that the 250-return threshold that triggers mandatory electronic filing with the IRS applies separately for each type of form (i.e., separately for Form 1095-B and 1095-C) and for original and corrected returns. Finally, the IRS announced in Notice 2020-76 that this will be the final year employers can rely on penalty relief for good-faith reporting errors.

### ICHRAs

In Part II of Form 1095-C, for 2020, the employer is required to input the age of the employee as of January 1st for any employee offered an ICHRA. Further, on Line 14, Codes 1L through 1S have been introduced to capture offers of coverage for ICHRAs. The addition of these codes induces changes to Part II, Line 15 of the Form 1095-C in some cases. Further, a new Line 17 was added to Part II of the Form 1095-C to include an employee's zip code in certain situations when the employee has been offered an ICHRA. Finally, Form 1094-C and Part III

of Form 1095-C require employers to report information related to individuals offered an ICHRA in addition to those offered major medical coverage.

## Suspension of Requirement to Provide Form 1095-B to Individuals

Like last year, because the federal individual mandate penalty was reduced to zero starting in 2019, an individual does not need the information on Form 1095-B in order to complete his or her federal tax return. Therefore, the IRS is granting penalty relief for employers or insurance carriers who fail to furnish a Form 1095-B to individuals, provided that they:

1) Post a notice prominently on their website stating that individuals may receive a copy of their 2019 1095-B upon request, accompanied by an email address, phone number and a physical address the request can be sent; and
2) Furnish an individual with a Form 1095-B within 30 days of a request.

**NOTE**: Applicable Large Employers (ALEs) are still required to furnish Form 1095-C to their full-time employees. They must also complete Part III if the employee is enrolled in self-insured coverage. The relief from furnishing Form 1095-B does not extend to IRS reporting. Forms 1095-B must still be submitted to the IRS, as applicable. In general, this relief from furnishing Form 1095-B applies to insurers, and non-ALEs that sponsor self-insured plans, which complete Form 1095-B for covered participants.

## COVID-19 Impact on 2020 – Lingering Questions

The impact of COVID-19 on ACA reporting is an important question for many employers, particularly if employers were forced to furlough employees, reduce employee pay, or change employer contributions for benefits. Noticeably missing from the Form 1094 and 1095-C Instructions or any other IRS notices released this year was official guidance on, or relief related to these issues, such as penalties related to affordability, or determining full-time employee status and/or ALE status for next year for employers. While further guidance from the IRS would be welcome, in the meantime, here is what we know:

### Furloughs and Reduction in Hours

One of the many unfortunate impacts of COVID-19 is that many businesses were forced to furlough employees. Furlough is not a defined term under ERISA or the Affordable Care Act. Generally speaking, it is considered to be a mandatory leave with limited or no pay, and employees return to work once regular business resumes. Most benefits plans don't differentiate between an employee who is laid off, terminated, or furloughed. Instead, for benefits purposes, eligibility is generally attached to an active full-time employee or an active employee who works at least a minimum number of hours per week (e.g., 30). Thus, unless the employee is on a protected leave – such as FMLA leave – benefits generally would not continue while the employee is furloughed because they are not meeting the

minimum hours of service requirements even though they remain "active" in the employer's system.

In such cases, unless plan documents provide otherwise (or the carrier allows for an exception), furloughed employees' benefits are terminated and they are offered COBRA, state continuation, or they are not provided any continuation (depending on the employer size and location). One note, a furlough can also be characterized as a reduction in hours, as an employee goes from working 30 or 40 hours a week to 0-29 hours a week, depending on the situation. A reduction in hours is a COBRA qualifying event if it results in a loss of coverage.

### *COBRA and Affordability Concerns*

The ACA requires employers to continue offering coverage to active employees who measured as full-time during an applicable measurement period (initial or standard) and are in their stability period, even if they are no longer working 30 or more hours a week. An employer may design its plan to terminate coverage (and offer COBRA) to employees who are in a stability period but have experienced a recent reduction in hours. If an employer chooses to terminate health benefits for an employee in a stability period (but the employee is still employed), the employer may be exposed to the "affordability" penalty if an employee receives a premium tax credit for Marketplace coverage (as COBRA coverage is unlikely to be "affordable" in these situations). If the employer was able to subsidize a portion of the COBRA coverage for furloughed or reduced hour employees, this may not be a concern.

For reporting employees who receive an offer of COBRA, see "Offers of COBRA to employees in a stability period" under the "Tips and Tricks" section of this Guide.

### *Full-Time Status of Employees*

Under the ACA, an employee's full-time status is determined by whether the employee worked, on average, at least 30 "hours of service" a week (or 130 per month). An "hour of service" is each hour an employee is paid or entitled to be paid for a period a time during which no duties are performed, such as while the employee is on vacation, holiday, sick, incapacitated (including disability), laid off, on jury duty, or on leave of absence, such as FMLA leave.

If, during the furlough, the employee was unpaid and didn't used any accrued vacation, PTO or other available paid leave, then the employee was not "paid or entitled to be paid" during the furlough and the time during furlough would count as "0" hours of service (or whatever amount of time they did work if hours were simply reduced). This could impact whether the employee measures as full-time under the applicable measurement period and whether the employee would be entitled to benefits for the next plan year.

While the ACA does not require employers to offer benefits to employees if they do not measure as full-time under the employer's look-back measurement period, employers can always be more generous and may disregard the period of time altogether – similar to how time during an FMLA leave is handled – or they can come up with a reasonable method of calculating hours of service for the employee, such as using an average of the number of hours an employee worked before the furlough and applying that amount to the weeks during the furlough. As long as employers apply this approach consistently for all impacted employees, they are unlikely to face IRS scrutiny.

## Impact of COVID-19 on Affordability Safe Harbors

For calendar year 2020, an offer of coverage is considered affordable for an employee if the employee-required contribution for the employer's lowest cost, self-only coverage available to the employee (regardless of whether the employee enrolls in that coverage) does not exceed 9.78% of the employee's household income. Because it is generally not possible for an employer to know an employee's household income for the year, the employer may use one of the available affordability safe harbors – federal poverty line, W-2, or rate of pay – to determine whether its lowest cost, self-only coverage is affordable.

### *Federal Poverty Line Safe Harbor*

For employers who used the federal poverty line safe harbor in 2020, neither a furlough nor a reduction in employee pay due to COVID-19 would impact whether the employer's coverage was affordable. If the employee's share of cost for the employer's lowest cost, self-only coverage is $101.79 or less, then the coverage will be affordable regardless of the employee's change in hours or change in pay, and employers will be able to use this safe-harbor code for purposes of reporting.

### *W-2 Safe Harbor*

The W-2 safe harbor is based on the amount of wages (in Box 1 of the employee's W-2) the employee is paid for the applicable calendar year. Unlike the rate of pay or federal poverty line safe harbor, this cannot be determined at the beginning of the year and is vulnerable to any changes in pay the employee experiences, or pre-tax contributions the employee makes, during the year. If an employee's pay was reduced during the year, or if the employee was furloughed/experienced a reduction in hours, this will directly impact the amount of pay in an employee's W-2, Box 1 at the end of the year. As such, an employer may be subject to an affordability penalty if an employee's offer of coverage is not determined to be affordable and the employee received subsidized coverage in the Marketplace.

### *Rate of Pay Safe Harbor*

The rate of pay safe harbor is generally determined by an employee's rate of pay at the beginning of the year. For hourly employees, adjustments to the rate of pay calculation

are required mid-year if the hourly rate is decreased. If the hourly rate of pay is increased, the employer is required to use the hourly rate of pay as of the first day of the plan year. For salaried employees, the salary must remain the same the entire year (no increases or decreases) if the employer intends to use the rate of pay safe harbor. Thus, if an employer reduced salaried employee pay during the year as a result of COVID-19, then this safe harbor is not available.

Unlike the W-2 safe harbor, the rate of pay safe harbor is not impacted by an employee's reduction in hours or furlough. For example, if an employee is furloughed, they may no longer be receiving pay from the employer; however, that is only because their hours were reduced (to 0 or another amount), not because their pay was reduced.

If the employer intended to use the rate of pay safe harbor for salaried employees at the beginning of the plan year and had to reduce employee pay, the employer must use the W-2 safe harbor for all salaried employees. If the employer reduced hourly employee pay during the year, the employer will use the lowest applicable hourly rate of pay when determining affordability. If the employer furloughed employees, but did not change their pay rate, then the employer can continue to use the rate of pay safe harbor and the reduction in hours should not impact whether the coverage was affordable.

## 2020 Filing Deadlines and Extensions

Forms 1095-C for the 2020 calendar year must be furnished to individuals by March 2, 2021. Forms 1094-C and 1095-C must be filed with the IRS by March 1, 2021, or March 31, 2021, if filing electronically. An automatic 30-day extension of time to file the forms with the IRS is available by completing Form 8809. The form may be submitted on paper, or through the FIRE System either as a fill-in form or an electronic file. No signature or explanation is required for the extension. However, it must be filed on or before the due date of the returns to get the 30-day extension. Under certain hardship conditions an additional 30-day extension may apply; however, requests for additional extensions of time to file information returns are not automatically granted and the automatic extension of time to file and any approved requests for additional time will only extend the due date for filing the information returns with the IRS. **Note**: The automatic extension for filing with the IRS does not extend the due date for furnishing statements to individuals.

While generally employers may request a 30-day extension of time to furnish the statements to recipients by sending a letter to the IRS that includes identifying information about the employer and which states the reason for delay, because the extension to provide Forms 1095-C to employees was as generous as the 30-day extension permitted by law, employers may not request an extension to furnish Forms 1095-C to employees beyond the March 2, 2021 extended deadline referenced above; however, employers may still obtain an

automatic 30-day extension for filing with the IRS by filing Form 8809 on or before the due date.

## Electronic Filing

Electronic filing under the AIR system is required by entities that are required to file 250 or more information returns, otherwise a penalty will apply. The threshold applies separately to each type of form filed and separately for original and corrected returns. For example, if an entity has 500 Forms 1095-B and 100 Forms 1095-C, it must file Forms 1095-B electronically, but is not required to file Forms 1095-C electronically. If the entity has 150 Forms 1095-C to correct, it may file on paper because the corrected returns fall under the threshold. However, if there are 300 Forms 1095-C to correct, they must be filed electronically. The IRS encourages electronic filing by employers of all sizes. The electronic filing requirement does not apply if the entity applies for and receives a hardship waiver (Form 8508). Also, entities that are required to file electronically can file up to 250 returns on paper; those returns will not be subject to a penalty for failure to file electronically.

## Furnishing Forms to Participants

Statements to participants must be furnished on paper by mail (or hand delivered), unless the recipient affirmatively consents to receive the statement in an electronic format. Note that the consent must relate specifically to receiving the Form 1095-C electronically. Consent may be provided on paper or electronically; however, if consent is on paper, the recipient must confirm the consent electronically. Statements reporting expatriate coverage, however, may be furnished electronically unless the recipient explicitly refuses to consent to receive the statement in an electronic format.

## Substitute Statements to Recipients

If you are not using the official IRS form to furnish statements to recipients, see Pub. 5223, which explains the requirements for format and content of substitute statements to recipients. Employers may develop forms themselves or buy them from a private printer. Substitute statements furnished to recipients may be in portrait format; however, substitute returns filed with the IRS using paper must be printed in landscape format.

## Reporting Penalties

The IRS has granted temporary relief from accuracy-related penalties for reports filed for the 2015-2020 calendar years for reporting entities that can show a good faith effort to comply. In determining good faith, the IRS will consider whether employers have made reasonable attempts to comply with the requirements (e.g., gathering and transmitting the necessary data to an agent or testing its ability to transmit information) and the steps that have been taken to prepare for next year's reporting. As stated previously, the IRS

announced that 2020 will be the final year that the good faith effort to comply standard will apply.

The following table reflects penalties for returns filed in the applicable year (i.e., the 2021 penalty is for returns filed in 2021 for calendar year 2020), based on information found in Rev. Proc. 2019-44. Note that failure to provide Form 1095-C to an employee and the IRS may result in two penalties, as each are supposed to receive the form (doubled for willful failures, with no cap on the penalty). The instructions also make clear that each employer is responsible for satisfying its reporting obligation, regardless of its use of third parties to assist with the reporting process.

| Penalty Description | 2022 Penalty | 2021 Penalty |
|---|---|---|
| **Failure to file an information return or provide a payee statement** | $280 for each return with respect to which a failure occurs | $280 for each return with respect to which a failure occurs |
| **Annual penalty limit for non-willful failures** | **$**3,426,000 | **$**3,392,000 |
| **Lower limit for entities with gross receipts not exceeding $5M** | $1,142,000 | $1,130,500 |
| **Failures corrected within 30 days of required filing date** | $50 | $50 |
| **Annual penalty limit when corrected within 30 days** | $571,000 | $565,000 |
| **Lower limit for entities with gross receipts not exceeding $5M when corrected within 30 days** | $199,500 | $197,500 |
| **Failures corrected by August 1** | $110 | $110 |
| **Annual penalty limit when corrected by August 1** | $1,713,000 | $1,696,000 |
| **Lower limit for entities with gross receipts not exceeding $5M when corrected by August 1** | $571,000 | $565,000 |
| **Failure to file an information return or provide a payee statement due to intentional disregard** | $570 per return with respect to which a failure occurs (no cap) | $560 per return with respect to which a failure occurs (no cap) |

## Employer Shared Responsibility Penalties, Affordability

As discussed, the C-Series forms are used to determine whether employers owe a shared responsibility payment and whether employees are eligible for the premium tax credit (i.e., whether the employees were offered "affordable" coverage). Both the employer shared responsibility penalties and the 9.5% affordability factor are indexed to inflation.

| Code Section | 4980H(a) | 4980H(b) | 36B(b)(3)(A)(i) |
|---|---|---|---|
| **Description** | Coverage not offered to 95% (or all but 5) of full-time employees. | Coverage offered, but unaffordable or is not minimum value. | Premium credits and affordability safe harbors. |
| **2021** | $2,700 | $4,060 | 9.83% |
| **2020** | $2,570 | $3,860 | 9.78% |
| **2019** | $2,500 | $3,750 | 9.86% |
| **2018** | $2,320 | $3,480 | 9.56% |
| **2017** | $2,260 | $3,390 | 9.69% |
| **2016** | $2,160 | $3,240 | 9.66% |
| **2015** | $2,080 | $3,120 | 9.56% |
| **2014*** | $2,000 | $3,000 | 9.50% |

*No employer shared responsibility penalties were assessed for 2014.

## Employer Shared Responsibility Penalties, Letter 226J

Starting in November 2017, employers across the country began receiving penalty notices related to their calendar year 2015 reporting. Enforcement of calendar year 2016 began in the fall of 2018. With enforcement of ESRP penalties for 2015 – 2017 largely concluded, the IRS began proposing penalties for calendar year 2018 reporting in the summer of 2020, and continues to enforce 2018 as of the date this guide is published.

The general procedure the IRS uses to propose penalties is described in Letter 226J, which is the initial proposal of the penalty that may be owed. The IRS has published Understanding your Letter 226J for employers to understand what they need to do and what they may want to do if they receive Letter 226J.

Letter 226J will be issued if the IRS determines that, for at least one month in the year, at least one of the employer's full-time employees was enrolled in subsidized coverage through the Marketplace and the employer did not qualify for an affordability safe harbor (or other relief for the employee). The determination of whether an employer may be liable for a penalty and the amount of the proposed penalty in Letter 226J are based on information

from Forms 1094-C and 1095-C filed by the employer and the individual income tax returns filed by the employer's employees. The letter will include, among other things, the following:

- a brief explanation of the pay-or-play provisions;
- a table itemizing the proposed penalty by month and whether the liability is under the "no coverage" provision, the "unaffordability" provision or neither;
- an employer shared responsibility response form (Form 14764 – ESRP Response);
- a list of full-time employees who received subsidized Marketplace coverage each month (Form 14765 – Employee Premium Tax Credit List) and for whom the employer did not qualify for an affordability safe harbor or other relief;
- a description of the actions the employer should take if it agrees or disagrees with the proposed payment amount in Letter 226J; and
- a description of the actions the IRS will take if the employer does not respond timely.

The response to Letter 226J will be due by the response date shown on that letter, which generally will be 30 days from the date of Letter 226J. The letter will contain the name and contact information of a specific IRS employee that the employer should contact if it has questions about the letter.

### Employer Response to Letter 226J

Employers will have an opportunity to contest any proposed penalty notices. Employers that receive a Letter 226J may respond to the IRS about the proposed payment. The letter will provide instructions for how the employer should respond in writing, either agreeing with the proposed penalty amount or disagreeing with all or a portion of it. Employers may allow someone to contact the IRS on their behalf so long as they send the IRS a Form 2848 (Power of Attorney and Declaration of Representative) that states specifically the year and that it is for the Section 4980H Shared Responsibility Payment.

If an employer agrees with the penalty determination, it must complete and return a Form 14764, ESRP Response, which is enclosed with the letter, and include full payment by check or money order for the penalty amount assessed (or, if enrolled in the Electronic Federal Tax Payment System (EFTPS), pay electronically).

If an employer disagrees with the penalty determination, it must complete and return a Form 14764, ESRP Response, and include a signed statement explaining the basis for the disagreement. The ALE may include documentation with the supporting statement. The statement must also include what changes the ALE would like to make to the Forms 1094-C. Any changes to the Forms 1095-C should be made on Form 14765, Employee PTC Listing. The employer should **not** file a corrected Form 1094-C or 1095-C. The Letter 226J includes additional, specific instructions on making changes to the Employee PTC Listing.

If the ALE responds to Letter 226J, the IRS will acknowledge the ALE's response with one of five versions of Letter 227 (which, in general, acknowledge the ALE's response and describe further actions the ALE may need to take). If, after receipt of Letter 227, the ALE disagrees with the proposed or revised employer shared responsibility payment amount, it may request a pre-assessment conference with the IRS Office of Appeals. The ALE should follow the instructions provided in Letter 227 and Publication 5 for requesting a conference with the IRS Office of Appeals. A conference should be requested in writing by the response date shown on Letter 227, which generally will be 30 days from the date of Letter 227.

If the ALE does not respond to either Letter 226J or Letter 227, the IRS will assess the amount of the proposed penalty and issue a notice and demand for payment (Notice CP 220J). Notice CP 220J will include a summary of the ALE's payment responsibility and will reflect payments made, credits applied, and the balance due, if any. The notice will instruct the ALE how to make payment, if any. ALEs will not be required to include the employer shared responsibility payment on any tax return that they file or to make payment before notice and demand for payment. ALEs may have the ability to make installment payments, as described in Publication 594.

## Request for ACA Reporting Forms, Letter 5699

The IRS has also begun sending letters to employers it believes were ALEs and should have filed Forms 1094-C / 1095-C for 2015 or a subsequent year. Employers receiving Letter 5699 have 30 days to respond to the IRS and indicate whether they:

- offered coverage for the year in question and already submitted forms (if so, they'll need to indicate employer name, EIN and filing date);
- were an ALE for the year in question and have submitted their forms with the response letter (not available for employers that must file electronically);
- were an ALE for the year in question and will submit their forms within the next 90 days (if more than 90 days, an explanation is required); or
- were not an ALE for the year in question.

If none of the above apply, the employer must indicate in writing why they haven't filed and what actions they plan to take. Employers that receive Letter 5699 should consult with ERISA counsel for assistance with obtaining an extension of time to respond and/or preparing a response.

## Late Filing, Incorrect/Missing TIN, or Failure to Electronically File, Letter 972CG

In the fall of 2019, the IRS began to send letters to employers that filed their 2017 Forms 1095-C late, had the incorrect TIN (tax identification number), or failed to file electronically, when required. Similarly, in the fall of 2020, the IRS began sending letters to employers that filed their 2018 Forms 1095-C late, had incorrect TINs, or failed to file electronically when required. There are 5 types of penalties that can occur as part of this letter:

- TIN: penalty applies to returns if with a missing or incorrect tax identification number.
- Failure to File Electronically: penalty applies for each form over 250 that were filed by paper instead of electronic.
- Tier 1: penalty applies to returns filed after the due date but within 30 days.
- Tier 2: penalty applies to returns filed after the due date and after 30 days but before August 1.
- Tier 3: penalty applies to returns filed after August 1.

Employers receiving Letter 972CG will generally have 45 days to respond to the IRS from the date the notice was sent. Within Letter 972CG is a response sheet, where the employer can indicate if they are in full agreement, partial agreement, or total disagreement with the penalty. If the employer partially or totally disagrees with the penalty, the employer is required to submit a signed statement with the reasons why it disagrees and any other supporting documentation. Employers should consult with legal counsel before responding.

The IRS will respond to an appeal and the employer will need to respond accordingly. This could include the IRS accepting the explanation and waiving, partially accepting the explanation and issuing a lower penalty, or not accepting the explanation and requiring the employer to pay the penalty. If the employer disagrees with the IRS' assessment, it should consult with ERISA counsel to determine the next best course of action.

## Guidance on Error Messages, SSN/TIN Solicitation

In general, employers that report under Section 6055 (i.e., those that sponsor self-insured plans) and insurance carriers must obtain SSNs or TINs for their covered participants. Under Section 6055, the requirement to obtain an SSN or TIN may be satisfied by making an initial solicitation when the individual first enrolls. If an SSN or TIN is not provided at the time of initial enrollment, a second solicitation (the first annual solicitation) must be made at a reasonable time thereafter (generally within 75 days). If the second solicitation is {00030937 2}

unsuccessful, a third solicitation (the second annual solicitation) must be made by December 31 of the year following the initial solicitation.

Employers reporting on full-time employees under Section 6056 have an existing requirement to collect an employee's SSN at time of hire (a discussion of which exceeds the scope of this client guide). Therefore, the guidance above regarding when to make an SSN or TIN solicitation applies in the context of obtaining an SSN or TIN from an enrollee in a group health plan.

That said, the following IRS guidance on soliciting SSNs or TINs based on the AIRTN500 error message, which indicates that an SSN or TIN provided on the return do not match IRS records, applies regardless of whether the employer is reporting under Section 6055 and/or Section 6056. In these situations, a filing status of "accepted with errors" due to an AIRTN500 message does not trigger an additional SSN or TIN solicitation requirement. An AIRTN error message is neither a Notice 972CG (Notice of Proposed Civil Penalty), nor a requirement that the employer must solicit an SSN or TIN in response to the error message.[1] Therefore, an employer is not required to make additional SSN or TIN solicitations if the previous solicitation produced an AIRTN500 message, unless the employer receives Notice 972CG from the IRS.

## B-Series Forms and Instructions

In general, most employers will not file the B-Series forms for their employees. Employers that will file the B-Series forms are those who have self-insured plans but are not ALEs, or ALEs that provide self-insured coverage to non-employees (e.g., retirees or COBRA participants in the years following termination) and prefer to use the B-Series forms over the C-Series forms to report on those non-employees who are covered under the self-insured plan (the instructions allow self-funded ALEs the option of using the B-Series or C-Series forms to report coverage for individuals who were not employees at any point during the year).

The B-Series forms are typically used by insurance companies to report months of "minimum essential coverage" or "MEC" to covered individuals. For example, all employees who are enrolled in a fully insured group health plan will receive a Form 1095-B from the insurance company. If the employees work full-time for an ALE, they will also receive a Form 1095-C from their employer. Any government coverage through the Children's Health Insurance Program (CHIP), Medicaid, or Medicare (including Medicare Advantage) is reported by the government sponsors of those programs.

[1] 81 FR 50671 at 50676, footnote 2 (https://www.federalregister.gov/d/2016-18100).

## B-Series Forms – Detail

As noted above, only certain non-ALEs and self-funded employers (including level-funded employers) might use Form 1095-B to report MEC for certain covered individuals. For example, a non-ALE will report self-insured coverage for employees on Form 1095-B, and a self-insured ALE has the option of reporting coverage for any individual who was not a full-time employee for any month of the year on Form 1095-B or Form 1095-C (see below for reporting of non-full-time employees on the C-Series forms).

Non-ALEs reporting self-funded (or level-funded) coverage on Form 1095-B use code B (if they offer employer-sponsored coverage other than an ICHRA to the employee) or G (if they offer an ICHRA) on line 8, leave line 9 blank, leave Part II blank, and enter their relevant company information in Part III as the "provider" of self-funded coverage. Part I contains the participant's information and Part IV reports the months of coverage for the participant and any covered family members. Only insurance companies entering codes A or B on line 8 will complete Part II.

When completing Part IV, employers may enter a date of birth in column (c) only if an SSN or other TIN isn't entered in column (b). When checking the box in column (d) or boxes in column (e), an individual is treated as being covered in a month if the individual was covered on at least one day in that month.

## B-Series Forms – Corrections

In general, employers should file corrected returns as soon as possible after an error is discovered. Errors on Form 1095-B that require correction include mistakes regarding the responsible individual's name, origin of coverage (line 8), SSN or TIN, employer information (Part II), coverage provider information (Part III), and covered individuals (Part IV).

When correcting a Form 1095-B that was previously filed with the IRS, complete the form and enter an "X" in the CORRECTED checkbox when furnishing to the participant. When correcting a Form 1095-B that was previously furnished to a participant, but not the IRS, write, print or type CORRECTED on the new Form 1095-B furnished to the recipient (enter an "X" in the CORRECTED checkbox only when correcting a Form 1095-B previously filed with the IRS). Then, file a Form 1094-B with the IRS along with the corrected Form(s) 1095-B (do not file a corrected Form 1094-B).

## Guidance for Employers with HRAs other than ICHRAs

The instructions for the B-Series forms contain guidance on an employer's obligation to report when an employee is covered under more than one form of MEC. If, for any month, an individual is covered by more than one form of MEC that is provided by the same employer, the employer is required to report only one of the coverages for that month. For example, an insurance company offering a Medicare or TRICARE supplement for which only

individuals enrolled in Medicare or TRICARE are eligible is not required to report coverage under the Medicare or TRICARE supplement.

However, for this rule to apply to employer-sponsored coverage, the employer must sponsor both types of coverage. For example, if an employer offers an HRA that is only available to employees who enroll in its fully insured group health plan, the employer is not required to report the employee's coverage under the HRA for the months in which the employee is enrolled in both plans. If, however, an employer offers an HRA to employees who enroll in coverage sponsored by another employer (such as spousal coverage), the employer sponsoring the HRA must report that coverage.

Considering the application of this rule to employers, it is not clear whether employers must report under Section 6055 if they offer retiree HRAs that require the retiree to be entitled to Medicare to participate. Further guidance from the IRS on this issue would be welcome.

## C-Series Forms and Instructions

As mentioned, applicable large employers or "ALEs" (i.e., employers with 50 or more full-time equivalent employees in the previous year) use Forms 1094-C and 1095-C to report information about offers of health coverage. Form 1094-C is used to report summary information to the IRS and Form 1095-C is used to report information about each full-time employee to the IRS and to the employee. ALE Members that offer self-insured coverage also use Form 1095-C to report information to the IRS and to employees about covered individuals.

### Form 1094-C – Detail

Form 1094-C provides a summary of aggregate, employer-level data to the IRS. It's essentially a "cover page" for the Forms 1095-C that are sent to the IRS. Information required on Form 1094-C includes:

- employer information and information on the ALE Member's controlled group;
- whether the employer is using simplified reporting methods (discussed below);
- information about whether an offer of minimum essential coverage, including an ICHRA, was made to 95% (or all but five) of full-time employees and their dependents;
- total number of Forms 1095-C issued to employees;
- full-time employee count by month; and
- total employee count by month.

### Form 1094-C, Part I

The first 16 lines of Form 1094-C request standard employer information. Line 17 is reserved, and Line 18 requests the total number of Forms 1095-C that will be transmitted along with the Form 1094-C being completed. Line 19, however, can be a source of confusion for employers. As noted above, Form 1094-C is prepared at the ALE Member level, meaning that each member of a controlled group of corporations files its own "authoritative" Form 1094-C by checking the box on line 19. An ALE Member may file multiple Forms 1094-C, although they must mark one (and only one) as the authoritative transmittal. Many employers will file one Form 1094-C, which will be their authoritative transmittal.

> **Note**: Each ALE Member must file its own Forms 1094-C and 1095-C under its own separate Employer Identification Number ("EIN"), even if the ALE Member is part of an Aggregated ALE Group. No Authoritative Transmittal should be filed for an Aggregated ALE Group.

### Form 1094-C, Part II

Lines 20-22 are completed only on the authoritative transmittal. Line 20 requests the total number of Forms 1095-C that will be filed by the ALE Member. Employers filing one Form 1094-C will have the same number in both lines 18 and 20. Line 21 (Aggregate ALE Group) should be checked by employers that are part of a controlled group of corporations during any month of the reporting year. If line 21 is checked, the employer must also complete the "Aggregated Group Indicator" in Part III, column (d), and then complete Part IV to list the other members of the Aggregated ALE Group.

Line 22 – Certifications of Eligibility – can also be confusing for employers. There are two possible choices on line 22, and an employer may select all, some, or none, depending on the facts. The two Certifications of Eligibility are discussed below.

#### *Line 22, Box A – Qualifying Offer Method*

An employer will check this box if they are making a "Qualifying Offer" and are using code 1A in line 14 of Form 1095-C to report that offer, or they are using an alternative method to furnish Form 1095-C to employees.

To be eligible to use the Qualifying Offer Method, the employer must have made a Qualifying Offer to at least one full-time employee for all months during the year in which the employee was a full-time employee for whom an employer shared responsibility payment could apply. A Qualifying Offer is an offer of MEC providing minimum value to a full-time employee, with a required employee contribution that does not exceed 9.5% (as adjusted) of the mainland single federal poverty line ("FPL") in effect within six months before the start of the plan year, divided by 12, provided that the offer includes an offer of MEC to the employee's spouse and dependents (if any).

For calendar year 2020 plans, the required employee contribution percentage is 9.78%, which limits the monthly employee contribution to $101.79 ($12,490 mainland FPL ÷ 12 × 9.78%) if an employer wishes to make a Qualifying Offer.

When an employer uses the Qualifying Offer Method, it must not complete Form 1095-C, line 15 (Employee Required Contribution), for any month for which a Qualifying Offer is made. Instead, it enters code 1A on Form 1095-C, line 14, for any month for which the employee received a Qualifying Offer (or in the "all 12 months" box, if applicable). The instructions provide that employers making a Qualifying Offer need not complete Form 1095-C, line 16 (safe harbor codes) because a Qualifying Offer is, by definition, affordable and therefore no penalty could apply. Note that use of the Qualifying Offer method is not mandatory for employers who qualify; they instead may complete Part II of Form 1095-C with the applicable offer code and required employee contribution.

In addition, an employer that is eligible to use the Qualifying Offer Method may use an alternative method of furnishing Form 1095-C for certain employees. The alternative method is available only for a full-time employee who: (1) received a Qualifying Offer for all 12 months of the calendar year, and (2) did not enroll in employer-sponsored coverage under a self-insured plan. In lieu of furnishing Form 1095-C for these employees, the employer may provide a statement that contains the following information:

- Employer/ALE Member name, address, and EIN;
- Contact name and telephone number at which the employee may receive information about the offer of coverage and the information on the Form 1095-C filed with the IRS for that employee;
- Notification that, for all 12 months of the calendar year, the employee and his or her spouse and dependents, if any, received a Qualifying Offer and therefore are not eligible for a premium tax credit; and
- Information directing the employee to see Pub. 974, Premium Tax Credit (PTC), for more information on eligibility for the premium tax credit.

The alternative method of furnishing Form 1095-C may be of limited usefulness to employers, as the employer is still required to prepare a Form 1095-C for transmission to the IRS.

### *Line 22, Box B – Reserved*

Box B on Line 22 of Form 1094-C is no longer applicable after 2015.

### *Line 22, Box C – Reserved*

Box C on Line 22 of Form 1094-C is no longer applicable after 2016.

### *Line 22, Box D – 98% Offer Method*

To be eligible to check box D and use the 98% Offer Method, the employer must have offered affordable, minimum value coverage to at least 98% of its employees for whom it is required to file a Form 1095-C and offered MEC to those employees' dependents. For these purposes, coverage may be affordable under any of the three affordability safe harbors (W-2, Rate of Pay, and Federal Poverty Line). Under this method, the employer is not required to complete the "full-time employee count" in Part III, column (b) of Form 1094-C.

This method provides limited relief to most employers, although for certain employers it can be very helpful. Employers that only offer coverage to full-time employees will obviously know how many employees were full-time each month, so the 98% Offer Method is of limited use to them. Likewise, employers with fully insured plans will only need to report on full-time employees. However, employers with self-insured plans must report on full-time employees as well as any other individual who are covered under the self-insured plan. A self-insured employer that offers coverage to part-time employees may not bother to track which employees are full-time for ACA purposes, because they offer part-time employees affordable coverage as well. Therefore, this method may be of interest to those employers because it allows them to forgo completing the "full-time employee count" in Part III, column (b) of Form 1094-C.

> **Note**: If an ALE member uses the 98% offer method, it is not required to complete the "full-time employee count" in Part III, column (b) of Form 1094-C.

### Form 1094-C, Part III

Part III of Form 1094-C, lines 23-35, reports monthly information for the ALE Member. Column (a) reports whether the employer offered MEC to at least 95% (or all but five) of its full-time employees and their dependents. Employers can use Line 23 to report on the entire calendar year. Otherwise, Lines 24 through 35 should be used to report the answer for each applicable month. For purposes of column (a), an employee in a limited non-assessment period ("LNAP") such as a waiting period or initial measurement period is not counted in determining whether MEC was offered to at least 95% of the employer's full-time employees and their dependents. In our experience, it appears that if full-time employees are reported for each month of the year (as opposed to Line 23—All 12 Months), the IRS expects the MEC Offer Indicated marked for those moths as well (rather than using Line 23)

> **Note**: As mentioned in the LNAP section below, an employee in an LNAP is not a full-time employee those months, even if coverage is offered before the end of the LNAP.

Column (b) reports the employer's *full-time* employee count by month, excluding employees in an LNAP. The instructions note that an employee should be counted as full-time for any

month in which the employee was full-time under the monthly measurement method or the look-back measurement method, as applicable, on any day of the month.

Column (c) reports the employer's *total* employee count, including full- and part-time employees and employees in an LNAP. The total employees count may be determined by choosing one of the following days of the month: (1) the first day of each month; (2) the last day of each month; (3) the 12th day of each month; (4) the first day of the first payroll period that starts during each month; or (5) the last day of the first payroll period that starts during each month (provided that for each month that last day falls within the calendar month in which the payroll period starts).

Column (d) is completed only if the employer checked "Yes" on line 21, indicating that it was a member of an Aggregated ALE Group. If an ALE Member enters an "X" in one or more months in column (d), it must also complete Part IV.

Column (e) is no longer applicable after 2016 and has been marked as "reserved."

### Form 1094-C, Part IV

An employer must complete this section if it checks "Yes" on line 21. If the employer was a member of an Aggregated ALE Group (a tax-controlled group) for any month of the calendar year, it will enter the names and EINs of the other members (other than itself). Special rules apply when listing more than 30 controlled group members in Part IV. ALE Members with no full-time employees are not required to prepare the C-Series forms.

## Form 1095-C – Detail

Form 1095-C is the individual, employee-specific return to be filed with the IRS and distributed to employees. This form reports information about the employer's offer of coverage, if any, to full-time employees and whether a safe harbor for employer shared responsibility penalties applies.

Each full-time employee must receive only one Form 1095-C from his or her employer. However, an employee who works for more than one ALE Member that is a member of the same Aggregated ALE Group must receive a separate Form 1095-C from each ALE Member. When an employee works for more than one ALE Member in the same month, only one ALE Member is treated as the employer of that employee for reporting purposes that month (generally, the ALE Member for whom the employee worked the greatest number of hours of service).

The operative portion of Form 1095-C is Part II, which requires employers to insert specified codes describing the type of offer, if any, made to an employee, and other information about the coverage. Information required on Form 1095-C includes:

- the employee's age as of January 1st (if they are offered an ICHRA)

- the plan year start month, which is required for 2020;
- whether the employee received an offer of MEC providing minimum value, and whether that offer was also extended to his or her spouse and/or dependents, if any;
- the required employee contribution each month for lowest-cost self-only minimum value coverage;
- any affordability safe harbor used by the employer;
- whether other relief from the employer mandate applies for an employee; and
- the employee's zip code (if they are offered an ICHRA).

Note that if the employer sponsors a self-insured plan, Form 1095-C, Part III must be completed to report information that would otherwise be reported on the B-Series forms.

### Form 1095-C, Part II

Employee's Age (For Employees offered an ICHRA Only)

If the employer offers the employee in question an ICHRA, then the employer must enter the employee's age as of the first day of the plan year. This is necessary to determine whether the ICHRA is affordable for the employee.

### Plan Year Start Month

Beginning in 2020, the employer must input a 2-digit code (01 – 12) for the Plan Year Start Month of the employer's plan. For example, for a calendar year plan, the employer would input 01. If the employer's plan is a non-calendar year plan, then the employer should enter the two-digit code for the applicable month during which the plan year begins (ex. 05 for a May 1 – April 30 plan year).

### Form 1095-C, Line 14

Employers use line 14 to enter one or more of the "offer of coverage" codes, as described below. If the same code applies for all 12 calendar months, the employer may enter the applicable code in the "All 12 Months" box.

> **Note**: Do not leave line 14 blank for any month, including months when the individual was not an employee.

| Offer of Coverage – Code Series 1 | |
|---|---|
| **1A** | Qualifying Offer: MEC providing minimum value is offered to the employee at a cost that does not exceed the FPL safe harbor, and at least MEC is offered to spouse and dependents. Code 1A may be used for certain months even if the employee did not receive a Qualifying Offer the entire year. |

| | |
|---|---|
| **1B** | Offer of MEC providing minimum value to employee only. |
| **1C** | Offer of MEC providing minimum value to employee and at least MEC offered to dependent children (not spouse). |
| **1D** | Offer of MEC providing minimum value to employee and at least MEC offered to spouse (not dependent children). |
| **1E** | Offer of MEC providing minimum value to employee and at least MEC offered to spouse and dependent children. |
| **1F** | Offer of MEC **NOT** providing minimum value offered to employee, regardless of whether coverage is also offered to spouse and dependent children. |
| **1G** | Used for an individual who was not a full-time employee for any month of the calendar year and who enrolled in **self-insured coverage** for one or more months. Code 1G must be used for the entire year if it applies (i.e., the employer must enter it on line 14 in the "All 12 Months" column or in each separate monthly box). |
| **1H** | No offer of coverage (use this code unless the employee was offered MEC that would have been in effect for every day of the month). |
| **1I** | Reserved (not applicable after 2015). |
| **1J** | MEC providing minimum value offered to employee and at least MEC **conditionally** offered to spouse (MEC not offered to dependent children). |
| **1K** | MEC providing minimum value offered to employee; at least MEC offered to dependent children; and at least MEC **conditionally** offered to spouse. |
| **1L** | Offer of individual coverage HRA to employee only with affordability determined by using employee's primary residence location ZIP code. |
| **1M** | Offer of individual coverage HRA to employee and dependent(s) (not spouse) with affordability determined by using employee's primary residence location ZIP code |
| **1N** | Offer of individual coverage HRA to employee, spouse, and dependent(s) with affordability determined by using employee's primary residence location ZIP code |
| **1O** | Offer of individual coverage HRA to employees only using the employee's primary employment site ZIP code affordability safe harbor. |
| **1P** | Offer of individual coverage HRA to employee and dependent(s) (not spouse) with affordability determined by using employee's primary employment site ZIP code affordability safe harbor. |
| **1Q** | Offer of individual coverage HRA to employee, spouse, and dependent(s) with affordability determined by using employee's primary employment site ZIP code affordability safe harbor. |

| | |
|---|---|
| **1R** | Offer of individual coverage HRA that is **NOT** affordable to employee; employee and spouse, or dependent(s); or employee, spouse and dependents. |
| **1S** | Offer of individual coverage HRA to individual who is not a full-time employee. |
| **1T** | Reserved for future use. |
| **1U** | Reserved for future use. |
| **1V** | Reserved for future use. |
| **1W** | Reserved for future use. |
| **1X** | Reserved for future use. |
| **1Y** | Reserved for future use. |
| **1Z** | Reserved for future use. |

If the type of coverage, if any, offered to an employee was the same for all 12 months in the calendar year, enter the Code Series 1 indicator code corresponding to the type of coverage offered either in the "All 12 Months" box or in each of the 12 boxes for the calendar months.

Codes 1J and 1K were first added in 2016 and represent a conditional offer of coverage to a spouse. A conditional offer is an offer of coverage that is subject to one or more reasonable, objective conditions (for example, an offer to cover an employee's spouse only if the spouse is not eligible for coverage under his or her own employer's plan). An employer may use these codes to report a conditional offer to a spouse, regardless of whether the spouse meets the condition. In other words, an employer may use codes 1J or 1K to report a conditional offer to a spouse even if the spouse has access to other coverage and is not eligible to enroll.

### Form 1095-C, Line 15

Complete line 15 only to the extent code 1B, 1C, 1D, 1E, 1J, 1K, 1L, 1M, 1N, 1O, 1P, or 1Q is entered on line 14 either in the "All 12 Months" box or in any of the monthly boxes. Enter the employee share of the monthly cost for the lowest-cost self-only minimum value coverage that is offered to the employee, which should include any cents. If the employee is offered coverage but the required contribution is zero, enter "0.00" (do not leave blank). Note that the amount entered in line 15 will not reflect the amount the employee is paying for coverage if the employee enrolls in any option other than employee-only coverage under the lowest cost minimum value plan.

For non-calendar year plans, an employer may divide the total cost to the employee for the plan year by the number of months in the plan year. This monthly amount of the employee's share of the cost would then be reported for any months of that plan year that fall within the calendar year being reported.

**Example**: For a plan year beginning July 1, 2019, an employer may determine the amount to report for January through June 2019 by taking the total annual employee cost for the plan year ending June 30, 2019 and dividing by 12 (and reporting that amount for January through June 2019). Then, the employer may determine the monthly amount for July through December 2019 by taking the total annual employee cost for the plan year ending June 30, 2020 and dividing by 12 (and reporting that amount for July through December 2019).

### *Wellness Incentives*

Incentives under a wellness program are **not** treated as reducing the employee's required contribution for purposes of Line 15, except for incentives relating to tobacco use. An employer may treat all employees as paying the contribution rate for non-tobacco users, even if the individual is a tobacco user or does not otherwise participate in wellness. All other incentives, however, are treated as unearned for purposes of Line 15.

### *Federal Poverty Level Safe Harbor*

Employers using the FPL safe harbor may set a required employee contribution that does not exceed 9.5% (as adjusted) of the mainland single federal poverty line ("FPL") in effect within six months before the start of the plan year, divided by 12, provided that the offer includes an offer of MEC to the employee's spouse and dependents (if any).

| **Federal Poverty Level Safe Harbor for Calendar Year Plans** | | | |
|---|---|---|---|
| **Calendar Year** | FPL in Effect 6 Mos. Before Plan Year | Affordability Safe Harbor | FPL Safe Harbor |
| **2021** | $12,760 | 9.83% | $104.53 |
| **2020** | $12,490 | 9.78% | $101.79 |
| **2019** | $12,140 | 9.86% | $99.75 |
| **2018** | $12,060 | 9.56% | $96.08 |
| **2017** | $11,880 | 9.69% | $95.93 |
| **2016** | $11,770 | 9.66% | $94.75 |
| **2015** | $11,670 | 9.56% | $92.97 |
| **2014** | $11,450 | 9.50% | $90.96 |

## Affordability Determination for ICHRAs

*Employers may use a location or look-back month safe harbor to determine whether an ICHRA is affordable.*

*Location Safe Harbor*: In order to determine whether an ICHRA is affordable for a full-time employee, the employer may use the cost of self-only coverage for the lowest cost silver plan for the employee for self-only coverage offered through the Exchange or Marketplace

where the employee's *primary site of employment* is located. The ZIP code for the employee's primary site of employment is used to identify the applicable lowest silver plan to determine affordability.

*Look-Back Month Safe Harbor*: Additionally, for calendar year plans, the employer may use the lowest cost silver plan in place the prior January (prior calendar year) in the rating area where the employee resides or where the employee's primary site of employment (if the employer intends to use the location safe harbor), while non-calendar year plans would use the lowest cost silver plan in the rating area where the employee resides or where the employee's primary site of employment in place the current January (current calendar year).

For purposes of ICHRAs and the above safe harbors, the "lowest cost silver plan" or an "applicable lowest cost silver plan" for an employee for a calendar month is generally, "the lowest cost silver plan for self-only coverage of the employee offered through the Exchange for the ZIP code of the employee's applicable location for the month." If there are different lowest cost silver plans in different parts of a rating area, an employee's applicable lowest cost silver plan is the lowest cost silver plan in the part of the rating area in which the employee's applicable location is located. The lowest cost silver plan for an employee is the lowest cost silver plan for the lowest age band in the individual market for the employee's applicable location.

The "applicable location" is where the employee resides for the calendar month, or if the employer is applying the location safe harbor, the employee's primary site of employment for the calendar month.

### Form 1095-C, Line 16

An employer will use line 16 to report to the IRS the reason, if any, why it should not be subject to an employer shared responsibility penalty with respect to the employee on whom it's reporting. Reasons an employer would not be subject to a penalty with respect to an employee include:

- The employee was not employed or was not a full-time employee;
- The employee enrolled in the MEC offered;
- The employee was in a "limited non-assessment period" or "LNAP" such as a waiting period or initial measurement period;
- The employer met one of the three affordability safe harbors with respect to the employee; or
- The employer was eligible for multiemployer interim rule relief for this employee (i.e., the employer was contributing to a multiemployer plan on behalf of the employee).

For each month, an employer should enter the applicable code, if any, from Code Series 2 (described below). If the same code applies for all 12 calendar months, the employer may enter the code in the "All 12 Months" box and not complete the monthly boxes.

**Note**: If none of the codes apply for a month, leave line 16 blank for that month.

In some circumstances, more than one indicator code could apply to the same employee in the same month. For any month in which an employee enrolled in MEC, in general, code 2C is used instead of any other code that could also apply (certain exceptions apply for reporting coverage under a multiemployer plan or post-employment coverage such as COBRA or retiree medical). Special ordering rules apply for employees who did not enroll in health coverage, as described below.

| Safe Harbor and Other Relief – Code Series 2 | |
|---|---|
| **2A** | Employee not employed on any day of the calendar month. |
| **2B** | Employee not a full-time employee that month. Also use for employees who terminates mid-month if they were offered coverage that would have continued through the end of the month, had they remained employed. |
| **2C** | Employee enrolled in health coverage offered for each day of the month, regardless of whether any other code might also apply. Do not enter code 2C when using: multiemployer plan relief (enter code 2E); code 1G in line 14 (leave blank); any month in which a terminated employee is enrolled in COBRA or other post-employment coverage (enter code 2A); or for any month in which the employee enrolled in coverage that was not MEC. |
| **2D** | Employee in a limited non-assessment period ("LNAP"), such as an initial measurement period or waiting period. Do not enter code 2D when using multiemployer plan relief (enter code 2E). |
| **2E** | Multiemployer interim rule relief applies. Use this code over any other for any month in which it applies. |
| **2F** | W-2 affordability safe harbor applies for this employee for the year. If used, it must be used for all months of the year for which the employee is offered health coverage. |
| **2G** | Federal poverty line ("FPL") safe harbor applies for any month(s). |
| **2H** | Rate of pay safe harbor applies for this employee for any month(s). |
| **2I** | Reserved (not applicable after 2015). |

**Note**: Do not enter an affordability safe harbor code (2F, 2G or 2H) for any month in which the employer did not offer MCE to at least 95% (or all but five) of its full-time employees and their dependents.

### Form 1095-C, line 17

If an employer offers an ICHRA to some or all employees and used codes 1L, 1M, 1N, 1O, 1P, or 1Q on line 14, then the employer must enter the ZIP Code used for identifying the lowest cost silver plan used to determine the Employee Required Contribution in line 15. The ZIP Code will be the ZIP Code for the employee's primary residence if the code in line 14 is 1L, 1M, or 1N. The ZIP code will be the ZIP Code for the employee's primary employment site if the code in Line 14 is 1O, 1P, or 1Q.

### Reporting COBRA and Post-Employment Coverage

The instructions provide that an offer of COBRA is reported differently depending on whether the offer is made to a former employee (i.e., due to an employee's termination of employment) or to an active employee (i.e., due to a reduction in hours).

In the months following termination of employment, an employer should report offers of COBRA to a former employee (or to a former employee's spouse or dependents) due to termination of employment using code 1H (no offer of coverage) on line 14 and code 2A (employee not employed) on line 16, without regard to whether COBRA is elected. In the month of termination, the employer may use code 2B if the offer of coverage would have continued through the end of the month, had the employee remained employed. The employer may use code 2C if the employee remains enrolled in coverage through the end of the month of termination.

Like COBRA, other post-employment coverage such as retiree medical should not be reported as an offer of coverage on line 14. Instead, the employer would use codes 1H/2A on lines 14 and 16, respectively (1E/2B or 1H/2B in the month of termination, unless the employee has remained enrolled through the end of the month, in which case code 1E/2C is used).

However, when an offer of COBRA is made to an employee who remains employed, it is reported as an offer of coverage, but only to those individuals offered COBRA.

**Example**: An employer offers employees the opportunity to enroll in family coverage. An employee enrolls in employee-only coverage effective January 1. On July 1, the employee experiences a reduction in hours that results in loss of eligibility under the terms of the plan. The employer terminates coverage and offers COBRA to the employee, but not any spouse or dependents because they were not enrolled in the plan on the day before the qualifying event.

> In this example, the employer should enter code 1E (offer of family coverage) on line 14 for January – June and should enter code 1B (offer of employee-only coverage) on line 14 for July – December.

For purposes of the employer share responsibility provision, an employer is still treated as having made an offer to the employee's dependents for an entire plan year as long as they had an opportunity to enroll at least once for the plan year, even if the employee declined to enroll the dependents in the coverage and, as a result, the dependents later did not receive an offer of COBRA.

### Form 1095-C, Lines 18-30

Part III of Form 1095-C spans lines 18-30 and is completed only by employers that sponsor self-insured coverage. If the employee for whom the employer is preparing the Form 1095-C has enrolled in self-insured coverage offered by the employer, including an ICHRA, the employer will enter "X" in the check box in Part III and will list the employee on line 18 (if enrolled in self-insured coverage, including an ICHRA) and any other family members who enrolled in coverage offered to the employee should be listed on subsequent lines.

> **Note**: For purposes of completing Part III, an individual is considered covered for a month if the individual was covered on at least one day.

All employee family members that are covered individuals through the employee's enrollment must be included on the same form as the employee. If two or more employees employed by the same employer are spouses or an employee and his or her dependent, and one employee enrolled the spouse or dependent in coverage, the enrollment information should be reflected only on Form 1095-C for the employee who enrolled in the coverage and would list the other employee family members as covered individuals.

Employers reporting coverage under a self-insured plan may use the B-Series or the C-Series forms to report coverage for individuals who were not employees for any month of the year, such as non-employee directors, employees who retired in a previous year, employees receiving COBRA (or any other form of post-employment coverage) who terminated employment during a previous year, and a non-employee COBRA beneficiary who independently elected COBRA. In these situations, Part II of Form 1095-C must be completed by using code 1G in the "All 12 Months" box or the separate monthly boxes for all 12 calendar months. The employer must complete Form 1095-B if it chooses not to use Form 1095-C to report non-employee coverage under a self-insured health plan.

Part III should be completed for each individual enrolled in the plan, including the employee reported on line 1. Employers may disregard the continuation sheet if reporting fewer than thirteen covered individuals.

## Reporting Opt-Out Payments

In Notice 2015-87, the IRS clarified several issues regarding the "affordability" of employer-sponsored health coverage, including how to treat various cash opt-out payments for purposes of ACA reporting. Under that guidance, "unconditional" opt-out payments are treated as increasing an employee's cost of coverage for purposes of line 15 of Form 1095-C, although transition relief is available for certain arrangements that were in effect prior to December 16, 2015.

### Unconditional Opt-Out Payments

A cash opt-out payment is "unconditional" when employees may receive it without having to show proof of other coverage, such as enrollment in a spouse's plan. Unless they qualify for transition relief, payments under an unconditional opt-out arrangement are treated as increasing an employee's cost of coverage. With unconditional opt-out payments, an employee must make the regular employee contribution and forgo the opt-out payment to enroll in coverage. Therefore, they must be added to the employee's cost of coverage.

> **Example**: An employer offers employee-only coverage for $125 per month but pays employees $25 each month if they decline coverage. The opt-out payment is treated as increasing the required employee contribution because the employee must forgo the opt-out benefit in addition to making the regular contribution to obtain coverage (line 15 of Form 1095-C would be $150).

### Eligible Opt-Out Arrangements

Until final regulations are issued, employers may treat unconditional opt-out payments as employer contributions for ACA reporting purposes **as long as they were adopted or in effect prior to December 16, 2015** and not substantially increased thereafter ("Eligible Opt-Out Arrangements"). Employers with Eligible Opt-Out Arrangements are not required to treat the payment as increasing the employee's cost of coverage. For example, if an employer charges $100 per month for coverage and offers a $50 per month unconditional opt-out payment, the employer may report the employee's cost of coverage as $100 instead of $150.

Note that the IRS encourages employers to report the cost of coverage as including the opt-out payment (i.e., $150 in this example) and claim relief for Eligible Opt-Out Arrangements under Notice 2015-87 if assessed a shared responsibility penalty. The IRS prefers this approach as it's more likely an employee will obtain a premium credit if the higher cost is reported, and the true cost to the employee is $150 in this example when the opt-out payment is not conditioned on enrollment in other coverage.

### Conditional Opt-Out Payments

A cash opt-out payment is "conditional" when made only to employees who show proof of enrollment in other coverage, such as that of a spouse's employer. It does not increase the employee's cost of coverage. In these situations, the opt-out payment is conditioned on an employee satisfying a meaningful requirement related to the provision of health care to employees. In other words, an employee is not entitled to the opt-out benefit simply by declining the employer's health coverage.

> **Example**: An employer offers employee-only coverage for $125 per month but pays employees $25 per month if they opt-out in favor of a spouse's plan. The opt-out is not treated as increasing the required employee contribution because it is subject to a meaningful condition related to the provision of health care to employees (line 15 of Form 1095-C would be $125).

### Service Contract Act and Davis Bacon Act Employees

Until further guidance is provided, employers may treat "cash-in-lieu" payments as employer contributions toward the cost of health coverage, to the extent the amount of the payment does not exceed the amount required to satisfy the requirement to provide fringe benefit payments under the Service Contract Act ("SCA") or Davis Bacon Act ("DBA").

> **Example**: An employer offers SCA or DBA employees the choice of coverage under a group health plan or $500 per month. For the employee, $500 per month does not exceed the amount required to satisfy the employer's fringe benefit requirements. The required employee contribution is $0 per month, although the employee may consider the required employee contribution to be $500 per month for purposes of the premium tax credit.

The IRS encourages employers not to reduce the amount of an SCA or DBA employee's required contribution by the amount of the fringe benefit payment and claim relief under Notice 2015-87 if contacted by the IRS regarding an assessable payment.

### Cafeteria Plan Flex Credits

Employer contributions towards flex credits under a cafeteria plan that are available to purchase MEC in addition to other cafeteria plan benefits are not treated as an opt-out payment, even if employees waiving health coverage may collect the credit as taxable cash compensation. However, unless the flex credit is a "health flex credit," meaning that it can only be used to pay for medical care or the employer's group health plan premiums, it will be treated as an unconditional opt-out payment for affordability purposes.

> **Example**: An employer offers employees the choice of a $480 health FSA contribution or $480 toward the cost of medical, dental or vision coverage under the employer's plan. The $480 is a health flex credit and is treated as reducing

the required employee contribution (line 15 of Form 1095-C would be reduced by $40 per month reflecting the $480 health flex credit). If the employee could take the $480 as cash or spend it on any non-health benefit it would not qualify as a health flex credit.

### C-Series Forms – Corrections

In general, employers should file corrected returns as soon as possible after an error is discovered. Errors on Form 1094-C that require correction include a mistake in the name or EIN of the employer, information about the employer's Aggregated ALE group membership, offer of MEC indicator, full-time employee count, and transition relief indicator (for 2015 and 2016 returns). Employers correcting Form 1094-C should prepare a new authoritative Form 1094-C, enter an "X" in the "CORRECTED" box at the top of the form, and submit the standalone corrected Form 1094-C (no Forms 1095-C).

Errors on Form 1095-C that require correction include name, SSN, company EIN, offer of coverage, employee required contribution, Section 4980H Safe Harbor and other relief codes, and information regarding covered individuals.

When correcting a Form 1095-C that was previously filed with the IRS, complete the form and enter an "X" in the CORRECTED checkbox when furnishing to the participant. When correcting a Form 1095-C that was previously furnished to a participant, but not the IRS, write, print or type CORRECTED on the new Form 1095-C furnished to the recipient (enter an "X" in the CORRECTED checkbox only when correcting a Form 1095-C previously filed with the IRS). Then, file a Form 1094-C with the IRS along with the corrected Form(s) 1095-C (do not file a corrected Form 1094-C).

If an employer eligible to use the Qualifying Offer Method had furnished the employee an alternative statement, the employer must furnish the employee a corrected statement if it filed a corrected Form 1095-C correcting the employer's name, EIN, address or contact name and telephone number. If the employer is no longer eligible to use an alternative furnishing method for the employee, it must furnish a Form 1095-C to the employee and advise the employee that the Form 1095-C replaces the statement it had previously furnished.

### *De Minimis* Errors on Line 15 of Form 1095-C

The instructions for Forms 1094-C and 1095-C include additional information for employers that have errors on Forms 1095-C. Specifically, the instructions indicate that Forms 1095-C filed with incorrect dollar amounts for Employee Required Contributions (line 15) may fall under a *de minimis* error safe harbor. The safe harbor generally applies if no single amount in error differs from the correct amount by more than $100. If the safe harbor applies, employers will not have to correct Form 1095-C to avoid penalties. However, if the recipient

elects for the safe harbor not to apply, the employer may need to issue a corrected Form 1095-C to avoid potential penalties.

## Tips and Tricks

Below are a couple of approaches to consider that may help control costs or ease the administrative burden associated with reporting.

### Offers of COBRA to employees in a stability period

An offer of COBRA coverage to an active employee who has experienced a reduction in hours is still an "offer of coverage" for purposes of line 14 of Form 1095-C – it's just likely to be unaffordable. Employers have a choice as to how they structure their group health plan to handle situations where employees move to part-time status while being treated as full-time in a stability period. In general, they can continue coverage through the end of the applicable stability period, or they can terminate coverage immediately, offer COBRA, and have exposure to 1/12$^{th}$ of the $3,000 (as indexed) "unaffordable coverage" penalty for each month in which the employee is required to be treated as full-time and receives subsidized Marketplace coverage. The potential employer shared responsibility penalty may be less than the cost of continuing "affordable" coverage for an employee who is no longer working full-time.

Also, the months of exposure to an unaffordable coverage penalty will be limited to three months in certain situations. There is a special rule (known as the "three-month rule") that allows employers to terminate coverage during a stability period for full-time employees who make a move to part-time employment that is intended to be permanent, and who have been offered minimum value coverage continuously by the end of their third full calendar month of employment (i.e., it is unavailable for employees who experienced an initial measurement period of greater than 3 months). Under these conditions, an employee who is in a stability period as full-time and who works less than 130 hours for the three consecutive months following a change to part-time may be measured using the monthly measurement method after the end of the third calendar month until the end of the next standard measurement period (and associated administrative period) to begin following the change to part-time. This effectively allows the employee to be treated as part-time after the end of the third full calendar month following the change to part-time. Employers who terminated coverage immediately upon the change to part-time will have exposure to only three months of the unaffordable coverage penalty, for any employee who qualifies under the three-month rule. This rule allows the employer to use the monthly method to determine full-time status for the employee even though other employees in that classification (e.g., hourly) are measured using the look-back method.

## Using Limited Non-Assessment Periods ("LNAP")

Employers should not overlook the limited non-assessment period, or LNAP. The LNAP refers to a period during which an ALE Member will not be subject to an assessable payment for a full-time employee, regardless of whether that employee is offered health coverage during that period. The LNAPs are described in detail in the instructions, and generally include periods such as the employer's waiting period or initial measurement period.

With respect to new, full-time employees, the LNAP generally extends through the end of the third full calendar month of employment, regardless of the length of the waiting period. Moreover, employers may use the entire LNAP even if coverage is offered before the end of the LNAP.

> **Example**: An employer offers minimum value coverage effective on the date of hire if the employee timely enrolls. An employee is hired September 2, 2020 and enrolls in coverage. Form 1095-C is not required for the employee in 2020 because for every month of the year the employee is either not employed (January through August) or in an LNAP (September through December).
>
> Note that if the employee enrolled in self-insured coverage during his months of employment in 2020, reporting under Section 6055 would apply and the employee could receive either Form 1095-C or 1095-B.

A new part-time, seasonal or variable hour employee who reaches the end of the year before the end of their initial measurement period will not be considered a full-time employee that year and is not required to be provided a Form 1095-C (assuming the employee hasn't enrolled in self-insured coverage during that time). Likewise, an employee who terminates employment during their initial measurement period (and associated administrative period) is not a full-time employee and is not required to be provided a Form 1095-C.

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**About the Author.** This guide was prepared for [HealthSure] by Stacy H. Barrow and Nicole Quinn-Gato. Mr. Barrow and Mrs. Quinn-Gato are employee benefits attorneys with Marathas Barrow Weatherhead Lent LLP, a national law firm with recognized experts on the Affordable Care Act. For more information about ACA reporting, please contact Stacy Barrow at sbarrow@marbarlaw.com.