



Benefits and
Compensation
Alert

October 2018

Affordable Care Act Update

Highlights:

- IRS enforcement of the Employer Mandate is in full swing. Penalty assessment notices for 2016 are expected this fall.
- Employers should be prepared to respond quickly if a penalty assessment notice (Letter 226-J) is received.
- Attempts to repeal and replace the Affordable Care Act (the “ACA”) have failed, and whatever the outcome of this November’s election, it now appears that the law is here to stay.
- One significant lawsuit remains pending at this time; if successful, it would invalidate portions of the ACA designed to protect individuals with pre-existing conditions.

The election of 2016 initially appeared to signal the demise of the Affordable Care Act (the “ACA”). Repeal and replacement of the ACA had occupied a central plank of the Republican platform for years, and the GOP sweep of the White House and both houses of Congress seemed to make it all but certain that the ACA would be repealed, or at least substantially gutted.

Two years later, despite a barrage of challenges from Congress, the courts, and the President, the ACA remains largely intact. It now appears that most key provisions of the ACA are here to stay.

The upcoming election presents a good opportunity for employers to take stock of the ACA. Which provisions of the ACA remain applicable to employers today? What potential repeal or reform efforts might be expected following the 2018 election? Read on for our take.

I. Enforcement Alert: Penalty Notices for Failure to Offer Coverage (IRS Letter 226-J).

Enforcement of the employer mandate began in earnest in November 2017, when the IRS announced that it would begin sending preliminary assessment notices (Letter 226-J) to employers who failed to offer sufficient health coverage to their full-time employees in the 2015 calendar year.

The IRS is expected to begin issuing Letters 226-J for the 2016 calendar year in November 2018. Since the threshold for avoiding a penalty has increased (coverage must have been offered to 95% of full-time employees in 2016 versus 70% in 2015), it is likely that the number of employers receiving a Letter 226-J will be larger than last year.

Here are some key pointers for employers about Letter 226-J:

- In many cases, the assessment indicated in Letter 226-J is triggered by an error in completing Forms 1094-C or 1095-C.
- The employer has 30 days to submit a written objection to the proposed assessment. If the employer can show that the assessment was based on erroneous information (even if the error was the fault of the employer), the penalty will be reduced or even eliminated.
- Letter 226-J will be directed to the contact person identified on Line 15 of Form 1094-C, which can cause additional delays if this individual has subsequently terminated employment or shifted to a different role in the organization.

Keep an eye out for Letter 226-J, as the proposed penalties can be steep and the 30-day deadline does not leave much time to prepare an adequate response. If you receive a Letter 226-J, contact benefits counsel immediately and begin gathering relevant documents, including copies of Forms 1094-C and 1095-C filed for the year in question as well as payroll records for the employees listed in the assessment notice.

Ivins, Phillips & Barker is ready to help you fight any proposed employer mandate penalty assessment.

II. ACA Still in Effect.

While a few components of the ACA have been repealed by Congress or invalidated by the courts, most of the provisions that impact employers remain in effect today.

Provision	Description	Status
Employer Mandate	Applicable large employers (“ALEs”) must offer health coverage to full-time employees or pay a penalty.	Still in effect.
Form 1094-C / 1095-C Reporting	ALEs must file Forms 1094-C and 1095-C reporting offers of health coverage.	Still in effect.
W-2 Reporting of Value of Health Coverage	Employers must report the value of employer-provided health coverage on Form W-2.	Still in effect.

Summary of Benefits and Coverage	Health plan sponsors must furnish annual statements to plan participants containing details of health plan coverage.	Still in effect.
Individual Mandate	Each individual taxpayer must maintain health coverage or pay a penalty.	Still in effect in 2018; penalties eliminated starting 1/1/2019.
Market Reforms	Health plans must contain certain required terms (including coverage of pre-existing conditions).	Currently under challenge in a significant lawsuit brought by several states; see below for additional details.
“Cadillac” Tax	Heavy tax imposed on insurers / plans offering high-value health coverage.	Delayed through 2019.
Medicaid Expansion	States must expand Medicaid coverage to a larger population of low-income residents or lose federal Medicaid funding.	Financial penalties struck down in <i>Sebelius</i> Supreme Court decision (2012); states now have right to opt out of expanded coverage.

III. Potential Impact of 2018 Election.

While trying to forecast the results of this November’s election would be a fool’s errand, below we anticipate the direction of future health reform efforts depending on which party controls Congress after the election.

2018 Election Result	Potential Impact on the ACA
Split Congress (Democrats take majority of one house of Congress, Republicans retain majority of the other).	Gridlock and more gridlock. Legislation on hot-button topics such as health reform would become almost impossible to pass. The ACA would likely remain unchanged until the 2020 presidential election.
Democrats take majority of both houses of Congress.	This result would galvanize supporters of the ACA. A Democratic Congress might introduce legislation to strengthen the ACA (such as legislation ensuring that exchange subsidies for low-income taxpayers remain funded) or, depending on the outcome of the Texas lawsuit discussed below, to shore up protections for coverage of pre-existing conditions. President Trump would be expected to veto any such legislation, so without a veto-proof Democratic supermajority (not a realistic possibility), the ACA would likely remain unchanged until the 2020 presidential election.

<p>Republicans retain majority of both houses of Congress.</p>	<p>This result could potentially be interpreted by the Republican party as a renewed mandate to repeal and replace the ACA. On the other hand, the previous repeal and replacement efforts illustrated the difficulty of crafting an acceptable alternative, and the ACA's health exchanges have proven popular among voters of both parties. Health reform has not appeared to be a central issue among Republicans thus far in the campaign season, losing ground to other issues such as the Supreme Court, immigration, and the economy. Barring a sharp change in direction post-election, it appears for now that a Republican Congress may be willing to let the ACA stand in largely its current form. Any health reform legislation would more likely focus on the areas outlined in President Trump's Executive Order Promoting Healthcare Choice and Competition, such as increased access to health reimbursement arrangements ("HRAs") and association health plans.</p>
--	--

IV. Litigation Update: Protections for Pre-Existing Conditions Under Attack.

A coalition of twenty states has filed a federal lawsuit in Texas claiming that certain market reform provisions from the ACA are unconstitutional. *Texas v. United States*, No. 4:18-CV-00167-O (N.D. Tex. 2018). At stake are two sets of protections for individuals with costly medical needs: the "guaranteed issue" provisions prohibiting insurers from denying coverage to individuals on the basis of health history, and the "community rating" provisions prohibiting insurers from charging higher premiums on the basis of health history.

The reasoning underlying the lawsuit's argument is convoluted. In an earlier decision upholding the constitutionality of the individual mandate, the Supreme Court held that the individual mandate, which it characterized as a "command" to buy insurance, could not be justified under the Constitution's interstate commerce clause, but could be justified as an exercise of Congressional tax power because individuals who violate the mandate are subject to a tax penalty. *NFIB v. Sebelius*, 567 U.S. 519 (2012). Subsequently, as part of the Tax Cuts and Jobs Act of 2017 ("TCJA"), a now-Republican-controlled Congress amended the ACA by keeping the individual mandate intact but reducing the associated tax penalty to zero.

The current lawsuit argues that because the individual mandate no longer generates revenue for the government, it is not a tax and must be held unconstitutional under the Supreme Court's reasoning in *Sebelius*. The lawsuit further argues that the individual mandate is inseverable from the guaranteed issue and community rating provisions, so that if the individual mandate is unconstitutional, those related provisions must also be unconstitutional.

In an unusual move, the Trump administration declined to defend the constitutionality of the ACA in this lawsuit, and attorneys for the Federal government instead filed briefs urging the court to strike down the guaranteed issue and community rating provisions as unconstitutional.

State attorneys general in Democratic states have intervened to defend the constitutionality of the individual mandate and its severability from the guaranteed issue and community rating provisions. They argued that in enacting the TCJA, Congress retained the guaranteed issue and community rating provisions while eliminating the individual mandate, suggesting that in the view of Congress, those provisions are not in fact inseverable.

The fact that the federal government has conceded the argument makes this a case to watch. Oral arguments were held in early September; a decision could be issued before the end of the year. Whatever the result, the decision is expected to be appealed. If the lawsuit succeeds and the guaranteed issue and community rating provisions are found unconstitutional, this would have widespread implications for employer sponsored health plans and the health insurance market.

IPB BENEFITS AND COMPENSATION TEAM

Ivins, Phillips & Barker, Chartered
 1700 Pennsylvania Ave. NW, Suite 600
 Washington DC, 20006
 (202) 393-7600

<http://www.ipbtax.com>

Contact our Employee Benefits team at benefits@ipbtax.com



Carroll Savage
 (202) 662-3405
csavage@ipbtax.com



Kevin O'Brien
 (202) 662-3411
kobrien@ipbtax.com



Laurie Keenan
 (202) 662-3461
lkeenan@ipbtax.com



Steve Witmer
 (310) 407-5460
switmer@ipbtax.com



Will Sollee, Jr.
 (202) 662-3466
wsollee@ipbtax.com



Jeannie Leahy*
 (202) 662-3414
jleahy@ipbtax.com



Jodi Epstein
 (202) 662-3468
jepstein@ipbtax.com



Robin Solomon
 (202) 662-3474
rsolomon@ipbtax.com



Spencer Walters
 (202) 662-3459
swalters@ipbtax.com



Ben Grosz
 (202) 662-3422
bgrosz@ipbtax.com



Percy Lee
 (202) 662-3458
plee@ipbtax.com



Jon Holbrook
 (202) 662-3478
jholbrook@ipbtax.com

* Not admitted in the District of Columbia

Qualified Retirement Plans • Executive Compensation • Fringe
 Benefits • Health and Welfare Plans • Plan Terminations and
 Bankruptcy • Employment Taxes and Worker Classification