

## EMPLOYER SHARED RESPONSIBILITY PAYMENTS MAY HAVE NO STATUTE OF LIMITATIONS

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In Chief Counsel Memorandum 20200801F, released on February 21, 2020, the IRS established its position that no statute of limitations applies to employer shared responsibility payments that may be assessed under Section 4980H of the Internal Revenue Code (the “Code”). This IRS internal guidance should serve as a warning for applicable large employers that non-compliance with the Affordable Care Act’s employer shared responsibility rules can result in significant penalties that may be assessed at any time in the future.

The IRS bases its position on the fact that the information returns on Forms 1094-C and 1095-C do not provide sufficient information to calculate the tax liability due by an employer under Section 4980H of the Code. In *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff’d* 793 F.2d 139 (6th Cir. 1986), the tax court set forth a four-part test for determining whether a document is sufficient to start a statute of limitations under Section 6501 of the Code, with the first test requiring that the document include sufficient data to calculate the taxpayer’s tax liability. In the IRS’s view, since neither Form 1094-C nor the Form 1095-C includes information with respect to an employee’s eligibility for a premium tax credit – which is necessary data for determining whether a Section 4980H penalty applies – an employer cannot know whether it has potential liability under Section 4980H at the time those forms are filed. As a result, the IRS concluded that the statute of limitations cannot begin to run under the *Beard* test, and, since Congress has not specified another statute of limitations to apply to Section 4980H, no statute of limitations applies.

Section 4980H(a) imposes a penalty on applicable large employers who do not offer minimum essential coverage to at least 95% of its full-time employees, and at least one full-time employee qualifies for the ACA’s premium tax credit. This “sledgehammer” penalty is currently equal to \$2,750 annually multiplied by all full-time employees minus 30. Section 4980H(b) also imposes a penalty on applicable large employers who offer unaffordable coverage to employees who qualify for the premium tax credit, in an amount currently equal to \$3,860 annually multiplied by the number of full-time employees who qualify for a premium tax credit.

### RELATED PRACTICE AREAS

- Employee Benefits & Executive Compensation

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