INSIDE THE LAW

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PUSHING BACK ON PROPOSED ACA PENALTIES

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A significant number of 226-J Letters sent to large employers contain material errors. Don't cut the IRS a check unless you're sure the ESRP penalty being proposed is actually due.

WHAT IS A 226-J LETTER?

As part of the Affordable Care Act ("ACA"), large employers are required to offer at least 95% of their full-time employees the opportunity to enroll in an employer-sponsored healthcare plan that provides standardized coverage at an affordable price. Failure to offer sufficient coverage to enough full-time employees can expose an employer to the ACA's Employer Shared Responsibility Payment ("ESRP") penalties. The IRS is tasked with monitoring whether employers are in compliance with the ACA and whether an ESRP penalty is due.

The IRS requires that taxpayers annually file Forms 1095-C and 1094-C in order to self-report the total number of full-time employees they retain during the year. Individual employees are given statements concerning whether or not they were enrolled or offered the opportunity to enroll in an employer-sponsored ACA-compliant healthcare plan. The IRS began requesting this data from employers in 2015, in late 2017 it began analyzing the employer data in order to identify errors and compliance gaps.

If the IRS identifies a possible ACA deficiency, it sends out a Letter 226-J to the employer. What generates most of the calls to CPAs and attorneys is that the Letter 226-J usually proposes a six-figure penalty and is drafted to look like a formal IRS tax assessment.

WHAT IS THE ESRP PENALTY?

The ESRP penalties are supposed to coerce employers into sponsoring a healthcare plan for the benefit of essentially all their employees. The coercion is accomplished by assessing large employers with an annual ESRP offer penalty that can equal $2,000 per full-time employee[1] if coverage is not offered to a large enough pool of employees. In the 2015 transition year, employers were required to offer coverage to 70% of their full-time employees, but for all subsequent years it's 95%. Consequently, the penalty can easily reach hundreds of thousands of dollars. In the event an employer-sponsored healthcare plan is in place and offered to enough full-time employees but the monthly plan costs payable by employees are too high relative to their earnings, a different ESRP may be imposed. The ESRP offer penalty tends to be the biggest risk for large employers.

What is important to remember is that the ESRP offer penalty is imposed on an employer that does not offer coverage to at least 95% of its full-time employees, regardless of the number of employees who may have been offered coverage and regardless of the number of employees who actually enroll in whatever employer-sponsored healthcare plan is being offered. For example, if an employer offers coverage to 94% of its full-time employees, the ESRP penalty counts the total number of the employer's full-time employees, as opposed to just the employees not offered coverage. This fact comes as a surprise for employers that offer reasonably strong benefits but inadvertently fail to meet the 95% threshold. Conversely, if coverage is offered to all full-time employees but for whatever reason no employee actually enrolls, no ESRP offer penalty is due. Actual enrollment in the plan being offered is not relevant for the purposes of the ESRP penalties.

Whether adequate coverage is offered to employees is only half the requirement of either ESRP penalty, however. In order for the IRS to be able to assess an ESRP penalty, it must also show during the same period that at least one full-time employee enrolled in an ACA plan that was, at least in part, subsidized.[2] If a large employer fails to offer any sort of employer-sponsored healthcare plan options but none of the employees actually get subsidized healthcare through a public option, then the IRS is unable to assess either ESRP penalty.

Although this limitation puts the possibility of an assessment out of the hands of an employer, the Obamacare subsidy requirement is an important limitation on the IRS's power to impose the ESRP penalties. All 226-J Letters will contain a breakdown of the individual employees who received Obamacare subsidies during each month of the tax year. If one employee received Obamacare subsidies for a particular month, a 1/12 fraction of the ESRP annual penalty is assessed for that month, assuming the employer also did not offer adequate coverage options.

CHAOTIC REPORTING

For large employers, the number of full-time employees can fluctuate as additions and subtractions are constantly being made from payroll. Employers should

[1] This number is increased each year with inflation.

[2] An employee who is eligible to participate in an employer-sponsored healthcare plan can always elect to go to an ACA exchange and obtain Obamacare coverage. But if a valid employer-sponsored plan is available to the employee already, then the employee's coverage is not eligible for any government subsidies. In almost all cases, the employer-sponsored plan will be cheaper than unsubsidized coverage available through Obamacare.

obtain a waiver from any employee declining coverage to ensure that if the employee later applies for Obamacare through an ACA exchange, he or she does not erroneously receive any subsidies. Reporting issues can also arise when variable-hour employees begin averaging more than 30 hours per week, as the ACA considers these employees to be employed full time.

As such, complying with the ACA involves tracking and actively monitoring a good deal of employee data on a monthly basis. This significant burden is substantially compounded by the complexity of reporting all the relevant data to the IRS. Forms 1094-C and 1095-C are difficult to understand, and the instructions are filled with jargon. For instance, on Form 1095-C, employers must populate for each separate employee and each month one of 18 different letter codes denoting employment status, status of coverage offers, and affordability data. Some letter codes combine multiple statuses into one field, whereas other employee statuses material to the employee's access to coverage, such as whether he or she has waived employer-sponsored plan participation, contain no separate letter code at all.

The confusing format of Forms 1094-C and 1095-C is in all likelihood a material factor in generating a significant number of the 226-J Letters currently being sent out by the IRS. In some cases, an employer receiving one of these letters may simply be able to correct reporting errors and avoid an ESRP penalty altogether.

FLAWED ASSESSMENT PROCESS?

Employers aren't the only ones having difficulty getting their ACA compliance right. The IRS has additionally struggled with meeting the standards required to impose the ESRP penalties. In particular, the 226-J Letter process currently in place cuts an important corner.

Recall that an ESRP penalty may not be assessed against an employer unless at least one of the employer's full-time employees is also enrolled in a subsidized Obamacare plan. Before any penalty may be assessed, the ACA requires that an employer receive something called "Section 1411 certification" confirming one of its employees has enrolled in such a plan and was allowed a subsidy.

ACA regulations created by the Department of Health and Human Services in 2013 set forth how the Section 1411 certification process is supposed to work. The regulations provide that an employer is supposed to receive notice from an ACA exchange when one of its employees applies for subsidized Obamacare coverage. The notice gives employers an opportunity to challenge any incorrect assertions made by employees on their Obamacare applications, such as an erroneous claim that he or she was not offered employer-sponsored coverage or that the coverage offered by an employer is not affordable. The process further

The reality right now is that the ACA is here to stay, and while it is in effect, the IRS will not stop looking for easy ESRP penalty targets.

alerts employers that their penalty exposure may grow if they do not begin offering ACA-compliant benefits to enough of their employees. Presumably, if the potential ESRP exposure is high enough, an employer in receipt of a Section 1411 certification may reasonably opt to expand its healthcare plan offerings.

In reality, the ACA exchanges more often than not never issue any notices to employers. This failure significantly limits employers' opportunities to contest erroneous employee claims, but perhaps more critically, causes the process to fall short of the Section 1411 certification requirement.

The IRS has attempted to gloss over the fact that the ACA exchanges in many cases have not issued valid Section 1411 certifications, by stating in the text of the standard 226-J Letter that the letter itself represents a Section 1411 certification. This statement is not consistent with the ACA's regulatory framework, however, and potentially impacts the IRS's ability to legally impose the ESRP penalties on employers.

RESPONDING AGGRESSIVELY

The failure of the ACA exchanges to send timely Section 1411 certifications to employers and the complexity of ACA information reporting makes responding to 226-J Letters challenging. Employers receiving 226-J Letters need to be prepared to provide detailed records to the IRS and push back on the specifics of each and every employee who may have enrolled in an Obamacare plan and claimed subsidies. Pushing back effectively means showing that the 95% offer-of-coverage threshold was met, or that all employees who enrolled in Obamacare were not actually entitled to receive subsidies, or potentially arguing that the 226-J Letter does not constitute a valid Section 1411 certification.

If you've received a 226-J Letter threatening a large ESRP penalty, it is highly advisable that you obtain representation from someone who is familiar with ACA parlance and compliance procedures. The reality right now is that the ACA is here to stay, and while it is in effect, the IRS will not stop looking for easy ESRP penalty targets. **FT**

MITIGATING RISKS DURING THE PRE-EMPLOYMENT HIRING PROCESS: AN EMPLOYER'S PRIMER

By Scott E. Regan, Esq.
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Though employers are understandably curious about their prospective employees' backgrounds, there are numerous federal and state laws that strictly limit which information employers can seek from job applicants, whether through job applications, interviews, and/or background/reference checks. In addition to needing a lawful basis for obtaining certain information from applicants, employers cannot make any employment-related decisions for an unlawful reason (e.g., refusing to hire someone based on certain information improperly obtained during the hiring process). While addressing every potential issue that employers may encounter is beyond the scope of this article, below are some issues that arise with enough frequency to warrant discussion.

UNLAWFUL AGE-RELATED INQUIRIES

With limited exceptions, Massachusetts and federal law forbid age discrimination against individuals who are 40 years of age or older. Generally, the only proper age-related question is whether an applicant is under 18, because there are certain laws specifically tailored to the employment of such individuals. Thus, in addition to not asking applicants clearly improper age-related questions (e.g., "How old are you?"), employers should avoid questions about an applicant's background and/or experiences that are designed to elicit information about the applicant's age.

IMPROPER RACE, COLOR, AND/OR GENDER-RELATED INQUIRIES

Generally, employers should avoid questions about the race and/or color of an applicant. In addition to not asking direct questions to elicit such information, at least one Massachusetts court has held that a job application requiring individuals to identify their friends/relatives who worked for the employer was improper because the applicants' responses would ostensibly require them to disclose their protected class status, if any. Accordingly, that court denied the defendant employer's request to dismiss the underlying complaints of discrimination.

Similarly, and absent the unlikely scenario where an applicant's gender is a legitimate and lawful requirement for a job, employers should avoid asking questions about an applicant's gender. By way of example, employers should not ask job applicants whether they have children and/or plan to have children because basing employment decisions on an individual's familial responsibilities may give rise to a claim of gender discrimination. Thus, even seemingly innocuous questions during the interview process may expose employers to potential claims.

UNLAWFUL DISABILITY-RELATED INQUIRIES

In Massachusetts, employers are prohibited from discriminating against individuals because of their handicap or perceived handicap. Accordingly, employers generally cannot ask job applicants whether they are disabled, or ask other disability-related questions, to make that determination. The Massachusetts Commission Against Discrimination ("MCAD"), which is the state agency charged with investigating and prosecuting complaints of discrimination, has indicated that a disability-related question is any question that is likely to elicit information about a handicap from the job applicant.

According to the MCAD, examples of improper disability-related questions include the following: (i) do you a have a handicap/disability?; (ii) have you ever been hospitalized for medical or mental treatment?; and (iii) have you ever been absent from work due to illness? Importantly, an employer also cannot ask an applicant about the nature or severity of, and/or treatment associated with, any disability (even if an applicant's handicap is obvious).

Though employers should be cautious regarding an applicant's potential disability, employers are permitted to ask certain questions to ensure that an applicant can perform specific job functions before being hired. For example, employers are generally allowed to ask (i) whether the applicant can perform the essential functions of a job with or without a reasonable accommodation (unless there is clearly a disability related to a certain job function); (ii) whether the applicant can meet the employer's attendance requirements for the position; and (iii) about the applicant's attendance record at his or her prior job. Employers should be mindful that there are situations in which a reasonable accommodation must be provided to a candidate during the hiring process.

In addition, there are situations in which an employer may have a valid need for certain medical information to ensure that the applicant can perform the essential functions of a job. While a job offer may be conditioned on a post-offer medical examination in such cases, for example, the examination must be required of all applicants for that job category (e.g., for all truck drivers). Importantly, the examination must be conducted solely to determine whether an applicant, with or without a reasonable accommodation, can perform the essential functions of the job.

Even if employers (and employees) may view certain questions as a good-natured effort to establish a rapport, they should refrain from requesting any information that could subject them to unnecessary liability. Given the numerous issues that can arise during the pre-employment process, employers should consider consulting with an experienced employment law attorney about their hiring practices. **FT**

21ST CENTURY ESTATE PLANNING – IT'S NOT AS SIMPLE AS YOU THINK

By Frederick M. Misilo, Jr., Esq.
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If you are a member of the baby boomer generation, you probably watched "Leave It to Beaver" or "The Andy Griffith Show." These TV programs painted an idealized view of family life, even for a single dad such as Sheriff Taylor. The reality then and now is that such portrayals of family life are a fantasy for most Americans.

I've spent the past 30 years working with families on trusts and estates. From this experience, I've observed a multitude of stresses and concerns people confront when planning for their legal and financial future and for the orderly transfer of property upon their passing. Individuals have become increasingly aware of their own longevity and concerned about the possibility of outliving their money or of the high cost of long-term care. It is common to ask, "What steps can I take to plan for the possibility of long-term care?" Also, as their children have matured into adulthood, many parents are mindful of the relatively high rate of divorce in our society and wonder whether their adult children will be among the 50% whose marriages end in divorce. They wonder, "Will the inheritance I pass on to my adult children eventually be distributed to a former son-in-law or daughter-in-law?" Young adults are carrying more debt than any earlier generation. According to a 2018 Northwestern Mutual study,* a majority of households headed by persons ages 25 – 34 are living paycheck to paycheck and have an average of $36,000 in debt, exclusive of mortgage debt. Many parents may feel an obligation to assist their adult children financially in times of need. They wonder, "If I do assist, will I do so at my own financial peril?" Parents may face another planning challenge when a son or daughter needs financial supervision and support, such as when a child has a developmental disability or mental health challenge. Parents whose children will need continued support and assistance over the course of their lifetime have multiple planning challenges. They ponder, "How will my adult child with a disability be supported when I'm no longer here?"

Fortunately, these questions and many others like them have answers. Contemporary estate planning is a collaborative process between the client with complex needs and a team of attorneys who have the knowledge and experience to craft an individualized estate plan. While many people have an estate plan, these plans were often developed many years ago when family dynamics and financial considerations were entirely different from what they are today. Relatively recent legal rulings regarding the use of trusts for asset protection purposes make a review of old estate plans a worthwhile exercise. For example, irrevocable, income-only trusts provide a viable option if one is concerned about future long-term care costs. In the context of protecting an inheritance in an adult child's divorce, a fully discretionary trust for the benefit of that adult child may be an excellent option to consider. When faced with the challenge of planning for an adult child with a lifelong disability, one needs to consider such critical issues as selection of a trustee of a supplemental needs trust and determining the amount of funding this type of trust should have.

Estate planning in the 21st century is not a simple process. Has your estate plan kept up with your life and the law? Reviewing your existing estate plan on a regular basis can help you answer that question. **FT**

ESTATE PLANNING CHECKUP

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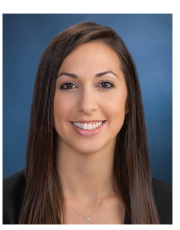

While most people understand the importance of scheduling an annual checkup with their doctor, fewer realize they should do periodic financial checkups. Reviewing your estate plan every few years helps to ensure that the administration of your estate upon your passing is smooth and drama-free. Not sure where to start? Here are a few questions to ask yourself:

1. **Do you have an estate plan?** If not, the state will create one for you. If you pass away without an estate plan, the intestacy statute dictates who receives your assets. If you have specific wishes, you should at least execute a will.
2. **If you have an estate plan, does it reflect your current wishes?** Do you want to add or remove any beneficiaries? Are your named agents (e.g., the personal representative of your will) still appropriate choices?
3. **Are you certain your estate plan complies with current law?** Depending on how long ago the plan was executed, documents may be missing crucial language for your estate plan to function according to your wishes.
4. **Was your estate plan executed in the state in which you are currently domiciled (i.e., spend more than six months each year)?** Each state has its own laws governing estate plans. So if you have moved to another state or now spend more than half of your time in Florida enjoying the warmer weather, you may need to update your estate plan. Choosing an attorney licensed in both Massachusetts and Florida is a cost-effective way to proceed. **FT**

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Michael Brangwynne is an associate attorney in the firm's Boston office. His practice focuses on complex commercial and tort litigation. He regularly represents businesses and individuals in construction, real estate development, leasing, and zoning disputes. Additionally, he has extensive experience in personal injury, medical malpractice, and wrongful death litigation. Mr. Brangwynne has also represented numerous clients involved in trust and estate disputes in the probate courts of Massachusetts.

Elena Despotopulos has joined the Transactional Group as an associate. She earned her B.A. in history from Assumption College and her J.D. from Northeastern University School of Law, with a concentration in business and commercial law. While in law school, Ms. Despotopulos served as a legal intern for Hon. Judge John T. Lu of the Superior Court, as an intern at the Massachusetts Securities Division and UMass Medical School's Commonwealth Medicine's Strategic Growth and Business Development Unit.

GIFTED ARTISTS WILL BE FEATURED AT OUR NOV. 2 SEMINAR, "How to Administer a Special Needs Trust"

These talented friends will exhibit and sell their work at the event:

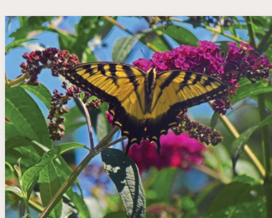
- **Dominic Killiany**, an artist living with autism
- **Peter Graves**, a watercolor painter
- **Filomena "Filly" Mastrangelo**, a gifted artist with autism
- **Sam Montanez**, a passionate photographer living with autism and Asperger's syndrome
- **Santon**, a musician

Even if you are not attending the seminar, feel free to stop by the Courtyard Marriott on Felton Street in Marlborough, MA, to visit the artists.

Painting by Dominic Killiany

Painting by Peter Graves

Art by Filly Mastrangelo



Photograph by Sam Montanez

UPCOMING SEMINARS

HOW TO ADMINISTER A SPECIAL NEEDS TRUST

Speakers: Frederick Misilo, Jr., Esq.; Theresa Varnet, Esq.; and members of the Fletcher Tilton Special Needs Practice Group.

Sat., Nov. 2: 8:00 a.m.-1:30 p.m.
Location: Courtyard Marriott, Marlborough, MA

ESTATE PLANNING - *Speaker:* Michael Lahti, Esq.

Tues., Nov. 5: 10 a.m. & 1 p.m.
Location: Lafayette House, Foxboro, MA

Tues., Nov. 12: 10 a.m. & 1 p.m.
Location: Conrad's Restaurant, Walpole, MA

Tues., Jan. 21: 10 a.m. & 1 p.m.
Location: DoubleTree by Hilton, Hyannis, MA

Tues., Feb. 11: 10 a.m. & 1 p.m.
Location: Crowne Plaza, Warwick, RI

For details and to register for these seminars and others, visit FletcherTilton.com/seminars-events.

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