ACA Reporting and the Elusive Social Security Number

The IRS has issued proposed regulations addressing one of the most irksome issues related to Affordable Care Act (ACA) reporting, for employers sponsoring self-insured plans: making adequate efforts to collect enrollees’ Social Security numbers (SSNs) or other taxpayer identification numbers. The proposed regulations prescribe a “three tries” process, with a special accommodation for certain individuals already enrolled and for whom the employer does not yet have an SSN.

Background

Employers providing self-insured coverage to employees and their dependents report that coverage in Part III of Form 1095-C. The form asks not just for the covered person’s name and months of coverage, but also for SSN or other tax identification numbers.

It’s important that the forms include the SSNs (or an acceptable substitute) and that the information on the forms – including the SSNs – be correct, because the IRS can impose penalties for incorrect or incomplete tax filings, like the Forms 1095-C.

These penalties can be waived where the employer can show reasonable cause. One way for the employer to prove reasonable cause with respect to missing or incorrect SSNs is to demonstrate that it made adequate efforts to collect the SSNs. How does the employer do that?

Missing SSNs

A tax form like Form 1095-C is said to have a missing SSN if there’s no SSN at all or the reported SSN has fewer than nine digits or includes one or more alpha characters.

The Rule for 2015

The IRS had issued prior guidance explaining, with respect to a self-insured employer’s Forms 1095-C for 2015 (filed in 2016), what efforts the employer should make or have made to
collect missing SSNs. The IRS wanted the employer to make three tries:

- First request for the SSN at an individual’s first enrollment or, if already enrolled on Sept. 17, 2015, during the next open enrollment period
- Second request a reasonable time thereafter
- Third request by Dec. 31 of the year following the initial request

Happily, an employer was not required to request an SSN from an individual, such as a former employee, whose coverage was terminated before Sept. 17, 2015.

After three unsuccessful attempts, the employer was allowed to use the date of birth in lieu of the SSN on Form 1095-C.

The Rule for 2016 and Beyond

Recently the IRS issued proposed regulations addressing how an employer demonstrates that it made an adequate effort to collect missing SSNs, with respect to Forms 1095-C the employer will file for 2016 and later years. Although these regulations are only proposed, employers can rely on them to establish a “reasonable cause” defense for missing SSNs on 1095-Cs the employer will file for 2016.

The proposed regulations retain the same “three tries” approach, but the timing for the second request is a bit different. There’s also a special rule to help employers meet the three tries requirement for individuals already enrolled for 2016.

Here is the timing of the three attempts the employer should make to collect missing SSNs:

1. **Initial Request.** The initial request should be made when the individual applies for coverage (when the health plan “receives a substantially complete application for coverage”).

   **Example:** Joe is hired by MegaWorld, Inc., on Aug. 5, 2016. Mega’s health plan imposes a waiting period to the first day of the month following date of hire, so Joe’s coverage would be effective Sept. 1, 2016, if he enrolls on a timely basis.

   Mega sends Joe an email on Aug. 10, 2016, with enrollment instructions and asks for the SSNs for Joe and any family members he wants to enroll. Mega has satisfied the initial solicitation requirement.

2. **Second Request.** A second attempt must be made on or before the 75th day after the initial request. If the coverage effective date will be retroactive, the IRS says the 75-day clock begins to run on “the date the determination of retroactive coverage is made,” apparently meaning the date the employer processes the application.

   **Example:** Joe enrolls himself and his spouse in coverage on Aug. 15 (with an effective date of Sept. 1). Joe provided his SSN, but not his spouse’s. Mega asks Joe for his spouse’s SSN no later than Oct. 24 (75 days after the initial solicitation on Aug. 10). Mega has satisfied the second request requirement.

3. **Third Request.** The final attempt to get the missing SSNs must be made by Dec. 31 of the year following the initial request. No further attempts are required for future years.
**Example:** Joe ignores the second request for his enrolled spouse’s SSN. Prior to Dec. 31, **2017**, Mega again asks Joe for the spouse’s SSN. Mega has satisfied its obligation to make the third request.

Note that this third request can, in most cases, simply be made as part of the next open enrollment period following the second request. For example, assume Mega’s plan operates on a calendar year basis, and Mega holds open enrollment every November. Mega’s third request could be made of Joe during open enrollment in 2016 for the 2017 year, or even in late 2017, for the 2018 year.

There are some additional wrinkles to the newly proposed rules:

- Where the plan is missing an SSN from a dependent, the plan doesn’t need to make the SSN request of the dependent *directly*. The rules consider requests made to the employee as being made to any covered family members.

- Obviously, when an employee adds a new family member to coverage, the employer has an obligation to request the newly added individual’s SSN up to three times.

- SSNs can be requested in a variety of ways, including electronically. If the request is made by mail, a return envelope is required. The request for an SSN does not have to be accompanied by an IRS Form W-9, *Request for Taxpayer Identification Number and Certification.*

- An employer’s obligation to make a second or third request for a missing SSN is not required if the individual’s coverage lapses before the deadline to make the request.

**Example:** Joe terminated employment on Nov. 1, 2016 (and did not elect COBRA), and still had not provided his spouse’s SSN. Mega is not required to make its third request of Joe. If Joe had lost coverage on Oct. 10, Mega would not have had to make its second request, either.

**What to Do About Your 2016 Enrollees for Whom You Have No SSNs**

The proposed rules say they’ll apply for the 2016 year (for reporting to be made in early 2017) and later years. What if an employer has already enrolled for 2016 an individual for which the employer didn’t ask for an SSN, or asked for it once but didn’t make a second request within 75 days? Will the employer be viewed as having failed to meet the three tries requirement?

**Example:** Assume Mega hired Joe on April 5, 2016, didn’t ask for (or asked for but didn’t receive) the SSN for Joe’s spouse, or made an initial request but didn’t make a second request for the SSN within 75 days. What now?

The proposed regulations contain a special rule for persons with missing SSNs enrolled on any day prior to July 29, 2016:

- Assuming the employer has made an initial request for the SSN, make the second request within a reasonable time after July 29. If the request is made within 75 days of July 29 (i.e., by Oct. 12) it will be deemed to have been made within a reasonable time.

- If the employer never did make an initial request for the SSN, jump to the timing rule
described above for the second request.

**Incorrect SSNs**

An *incorrect* SSN occurs when the IRS notifies the employer that the SSN provided on the Form 1095-C does not match the information in its database. Generally speaking, the IRS applies a similar three tries rule in this case.

Where the IRS notifies the employer that an SSN on a Form 1095-C is incorrect, the IRS wants the employer to make a second request for the SSN by Dec. 31 of the year in which the IRS gives its notice (or by Jan. 31 of the following year if the notice from the IRS is in the preceding December). For many employers, this second request could be made as part of the open enrollment process for the upcoming plan year.

If the IRS again notifies the employer, in the year following the employer’s second request, that the SSN is incorrect, the IRS wants the employer to make a third request in that year.

*Lockton Comment:* After submitting the 2015 Forms 1095-C to the IRS, many employers received notices of incorrect SSNs (e.g., the employers’ filings were “accepted with errors”). But precisely what the employer is supposed to do in response is not entirely clear. A footnote in the proposed regulations on *missing* SSNs says that simply receiving this error message does not, in and of itself, trigger an obligation on the employer’s part to try to correct the SSNs and refile with the IRS.

Yet unless the employer is satisfied that the SSNs it submitted were accurate, we think it makes sense for the employer to make the effort to confirm and correct the SSNs, if feasible. It’s possible, although we suspect not likely, that the IRS might one day circle back to the employer and ask what efforts the employer made to correct its 2015 filings. The employer would be in the best position if it could show it made an effort.

**What Do We Make of This Missing/Incorrect SSN Business?**

Perhaps the easiest way for a self-insured plan sponsor to avoid a *missing* SSN issue is to require SSNs of every enrollee, as a condition of enrollment or continued coverage.

In any event, self-funded employers attempting to obtain missing SSNs or fix incorrect SSNs, should be sure to follow the IRS protocols for doing so and should document those attempts, in case the IRS ever asks. If an employer outsources this process, it should seek assurances – and indemnity – from the service provider.

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