



July 24, 2013

The Honorable Tim Murphy
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy & Commerce
U.S. House of Representatives
2125 Rayburn House office Building
Washington, DC 20515-6115

**Re: Responses to: Questions for the Record from Chairman Tim Murphy,
Subcommittee on Oversight and Investigations (July 12, 2013)**

Dear Chairman Murphy,

Thank you for the opportunity to testify, on behalf of the National Restaurant Association, before the Subcommittee on Oversight and Investigations on June 26, 2013, at the hearing entitled “Challenges Facing America’s Businesses Under the Patient Protection and Affordable Care Act.”

I am writing in response to your July 12, 2013 letter with a request for me to answer questions for the record submitted by Members of the Subcommittee. Below, please find my responses.

The Honorable Tim Murphy:

Q. 1: Why is the current definition of a full time employee (30 hours), incorrect? What number of hours would your organization prefer?

Internal Revenue Code Section 4980H, as added by Section 1513(d)(4) of the Patient Protection and Affordable Care Act (PPACA) (PL 111-148), defines a full-time employee “with respect to any given month, an employee who is employed on average at least 30 hours of service per week.” This definition is problematic for the restaurant and foodservice operators as 30-hours a week does not reflect traditional business practices in the industry that consider 40-hours a week to be full-time employment.

The Fair Labor Standards Act does not define full- or part-time employment but does require employers to pay overtime when nonexempt employees work more than a 40-hour workweek. As a result, restaurant and foodservice operators have structured their businesses around this definition. Given these facts, many other industries have also followed this approach. **For these**

and the additional reasons stated below, we would prefer the definition of full time employee in PPACA to follow the conventional 40-hour per week approach.

Also, it is common for restaurant and foodservice operators to categorize team members as salaried and hourly employees and not use full- or part-time definitions. Salaried employees are generally those in management positions. Hourly employees generally hold a number of other positions within a restaurant's operations and for many; their hours of service can vary week to week depending on a number of factors.

As a result, it is difficult to predict which hourly employees will be considered full-time or part-time each month, and hence who must be offered coverage so to avoid an employer penalty. It is the reason the industry supports the Treasury Department's "Lookback Measurement Method" to determine if variable hour and seasonal employees are full-time.

Beyond the complication of figuring out who is full- or part-time, the law's definition of 30-hours – drastically different than what was generally used before this law – has the potential to impact our workforce and businesses beyond health care. One reason so many employees are drawn to restaurant jobs is the flexibility to change your hours to suit your own personal needs.

However, the law's definition of full-time employee at 30-hours a week may limit restaurant operators' ability to continue to offer their hourly employees these flexible schedules. The reason being, that employers with variable workforces and flexible scheduling must be deliberate about scheduling hours because there is now a greater financial impact of potential employer penalties for not offering coverage to full-time employees.

If the definition of full-time employee is not changed to 40-hours a week, which aligns better with our workforce patterns, the flexibility that so many employees value from employment in our industry may no longer be as widely available, and structural changes to labor markets could occur. Such changes could have workforce implications beyond the employer-sponsored health benefits the law addresses.

The Honorable Tim Murphy:

Q. 2: Your testimony discusses at length the problematic nature of automatic enrollment – can you describe why this will be such a problem for your industry?

The Automatic Enrollment provision of the law is problematic for restaurant and foodservice operators and their employees for two reasons. First, it could cause confusion and potential financial harm for some employees, and second, it will increase restaurant and foodservice operators' compliance burden without increasing employees' access to coverage.

Automatic enrollment interacts with the requirement that waiting periods cannot be longer than 90 days. This means that certain employers must enroll new full-time employees in their lowest-cost plan unless the employee opts-out before their 91st day.

In the restaurant and foodservice industry, health care benefits are generally administered through a central Human Resources department, not by the general manager of each restaurant location. Enrollment options and plan materials are mailed to the employee's residence. If the mail is not opened in time and employees understand they must opt-out if they do not wish to enroll in coverage, employee premium contributions, possibly in the form of payroll deductions, may begin to be collected on the 91st day.

Restaurant and foodservice operators will educate their employees about how this provision impacts them, but if an employee misses the 90-day opt-out deadline, a premium contribution is a significant amount of money – up to 9.5 percent of wages – that would be an unexpected financial burden. Unlike 401(k) automatic enrollment contributions that average 3 percent and can be retrieved by the employee, health care benefit premium contributions would constitute a larger percentage of an employee's wages and cannot be retrieved.

The automatic enrollment provision also places additional burdens on certain employers without any additional benefit to the employee. This redundant requirement duplicates the offer of coverage these same employers must make under the Employer Shared Responsibility provision or face penalties.

Said another way, the full-time employees an employer is required to automatically enroll are the same employees to whom the employer must offer coverage under the employer mandate. The only difference is that automatic enrollment is not an opt-in benefit, it is an opt-out based on the law.

Similar to our concerns about how cost of coverage could increase if variable hour employees churned between employer coverage and exchange coverage, we are concerned about how the cost of coverage could be impacted for all employees if new hires do not opt-out in time, are enrolled and then ask to be taken off the plan the next month.

Much like the expanded 1099 reporting requirement that was repealed, this requirement adds a layer of bureaucracy and burdens restaurants as the enrollment and cancellation process must be done manually since benefit administration is not done electronically. Employee access to a computer in their restaurant location for benefits purposes is not common in the industry.

For both these reasons, the Automatic Enrollment provision is problematic and potentially harmful to employees and employers. It is duplicative; burdening restaurant and foodservice operators without increasing employees' access to coverage.

The Honorable Tim Murphy:

Q. 3: Why is the definition of a "large employer" so difficult for your industry? What would you recommend be done to make this definition more workable?

To determine the law's impact on a restaurant, business owners must first determine if they are one or multiple employers – usually done by an CPA or tax attorney – and then calculate whether they are considered small or large businesses under the law. The statute prescribes a

very specific and unique calculation that is complex and forces even small businesses with just fewer than 50 full-time equivalent employees to track employees' hours of service by calendar month.

Once the employer has been established, employees' hours of service must be tracked on a calendar month basis. The employer then uses the calculation monthly to determine the number of full-time equivalent employees and then average each monthly calculation over all 12 calendar months to determine if they are considered large or small. This process must be completed annually.

Operators on the cusp of 50 full-time equivalent employees are struggling to understand how to complete this complicated calculation each year. It is especially difficult because our systems (scheduling, payroll, etc.) are not set up to do this unique tracking on a calendar month basis and calculation annually. Many operators rely on third-party vendors to help them comply with such a requirement and options have been slow to come to market. This delays an operator's ability to understand the impact of the law on their business and employees and make decisions about offering coverage.

Our members tell us that this calculation needs to be simplified to reduce the burden of figuring out whether you are a small or large employer under the law. While we have not determined the best way to address the complexity of the applicable large employer determination, there are several options.

First, the tracking and aggregation of part-time employees' hours of service is the greatest challenge for operators. Removing the equivalents from the calculation would eliminate this challenge.

Second, the threshold could be raised from 50 full-time equivalent employees to a higher point where more employers have the resources to track and complete the calculations, and fewer small businesses would be impacted.

Third, the calculation itself could be changed so that it uses another, simpler way to count employees or hours of service that would align with methods commonly used in payroll systems or other employer systems.

Finally, we believe that at the very least an administrative period is needed between when a small employer determines they are large, and when their coverage must be effective. Will a small employer who determines on December 31, 2016 that they are now a large employer and have to find a plan and offer coverage that is effective the next day on January 1, 2017, or face employer penalties? Currently, that is how the law is written and if not addressed could create further confusion for small businesses after the first year of implementation of the law.

Congress should remove the unnecessary burden created for small businesses by the complex, annual calculation used to determine if an employer is an applicable large employer under the law.

The Honorable Tim Murphy
July 24, 2013

Thank you again for the opportunity to testify before the Subcommittee and to respond to the above questions for the record. The National Restaurant Association looks forward to working with you and all your colleagues in Congress to address the challenges our members face as they implement this law.

Sincerely,

A handwritten signature in black ink, reading "Michelle Reinke Neblett". The signature is written in a cursive, flowing style.

Michelle Reinke Neblett
Director
Labor & Workforce Policy

Cc: The Honorable Diana DeGette, Ranking Member, Subcommittee on Oversight and Investigations