NATIONAL
RESTAURANT
ASSOCIATION

Statement
On behalf of the
National Restaurant Association

HEARING: CHALLENGES FACING AMERICA'S BUSINESSES UNDER THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

BEFORE: SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
ENERGY & COMMERCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

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Statement for the hearing "Challenges Facing America's Businesses Under the Patient Protection and Affordable Care Act"

Before the

Subcommittee on Oversight & Investigations,
Energy & Commerce Committee,
U.S. House of Representatives

By
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On behalf of the
National Restaurant Association

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Chairman Murphy, Ranking Member DeGette, and members of the Subcommittee on Oversight & Investigations of the House Energy & Commerce Committee, thank you for this opportunity to testify before you today regarding the challenges restaurant and foodservice operators are facing in implementing the 2010 health care law.

My name is Michelle Neblett and I am the Director of Labor & Workforce Policy at the National Restaurant Association. The National Restaurant Association is the leading trade association for the restaurant and foodservice industry. Its mission is to help its members establish customer loyalty, build rewarding careers, and achieve financial success. The industry is comprised of 980,000 restaurant and foodservice outlets employing 13.1 million people who serve 130 million guests daily. Restaurants are job creators. Despite being an industry of predominately small businesses, the restaurant industry is the nation's second-largest private-sector employer, employing about ten percent of the U.S. workforce.[1]

In my role with the Association I am responsible for health care policy, but also to help educate the industry about the law and the implementing regulations. Since the law's enactment, I have traveled throughout the country to explain employers' responsibilities under the law and help our members understand the impact it will have on their employees and businesses.

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[1] *2013 Restaurant Industry Forecast*.

What I have learned is that this is one of the most challenging requirements placed on the restaurant and food service industry and it is clear that the law cannot stand as it is today. While the National Restaurant Association has worked since enactment to constructively shape the regulations, legislative action is needed as there are limits to what can be done through the regulatory process. With a little more than three months until open enrollment begins October 1st on the exchanges, and employee notification about the exchanges by employers, the time for restaurant and foodservice operators to get ready to comply is here.

The overarching challenge our members face in complying with the law is to first understand the complicated and interwoven requirements of the law. By far, the definition of full-time employee under the law poses the greatest challenge as it does not reflect current workforce practices and could have a detrimental impact on a restaurant operator's ability to continue to offer flexible schedules for some employees. The applicable large employer determination is too complex and stifles smaller employers' ability to manage their workforces, plan to expand their businesses and prepare to offer health care coverage. The automatic enrollment provision could cause financial hardship and greater confusion about the law for some employees, without increasing their access to coverage. Finally, transition relief without threat of penalty or subsidy recapture is needed for good faith compliance by employers and employees to provide time for employers to make plan and systems changes, and employees to understand their options.

COMPLYING WITH THE HEALTH CARE LAW IS CHALLENGING FOR RESTAURANT AND FOODSERVICE OPERATORS GIVEN THE UNIQUE CHARACTERISTICS OF THE INDUSTRY

Since the law was enacted in 2010, we have been taking steps to educate the restaurant and foodservice industry about the requirements of the law and the details of the Federal agencies' guidance and regulations. We have conducted numerous webinars, educational sessions in partnership with our state restaurant associations and during our annual trade show this past May, as well as detailed written materials. Through our Health Care Knowledge Center website, we are trying to provide a one-stop place an operator can go to understand the law's requirements. All these efforts are done to help operators breakdown the complex law as it is not easy to understand how the implementing rules from the three departments interconnect and relate to one another.

The unique characteristics of our workforce create compliance challenges for restaurant and foodservice operators within this law. As a result, many of the determinations employers must make to figure out how the law impacts them – for example the applicable large employer calculation – are much more complicated for restaurants than for other businesses who have more stable workforces with less turnover.

Restaurants are employers of choice for many looking for flexible work schedules and the ability to pick up extra shifts as available. As a result, we employ a high proportion of part-time and seasonal employees. We are also an industry of small businesses with more than seven out of ten eating and drinking establishments being single-unit operators. Much of our workforce could be considered "young invincibles," as 43 percent of employees are under age 26

in the industry.[2] In addition, the business model of the restaurant industry produces relatively low profit margins of only four to six percent before taxes, with labor costs being one of the most significant line items for a restaurant.[3]

Business owners crave certainty and one of the most difficult things to predict about the impact of this law are the choices employees will make. Will they accept restaurant operators' offers of minimum essential coverage more than they do today? Will exchange coverage be less expensive than what our operators can afford to offer under the law? Will our young workforce choose to pay the individual mandate tax penalty instead of accepting the employer's offer of coverage in 2014, 2015 and beyond? Future take-up rate of coverage is very hard to predict given many new factors, but could mean a significant increase in the costs restaurant and foodservice operators must take on when offering coverage.

All of these factors combine to complicate what a restaurant and foodservice operator must consider when implementing the necessary changes in their business to comply with the law. Below we walk through some of the challenges of the law in the order restaurant and foodservice operators would as they figure out how the law impacts their employees and their business.

APPLICABLE LARGE EMPLOYER DETERMINATION

The statute lays out a very specific calculation that must be used by employers to determine if they are an applicable large employer and hence subject to the Shared Responsibility for Employers and Employer Reporting provisions. Because of the structure of many restaurant companies, determining who the employer is may not be as easy as it would seem.

Aggregation rules in the law require employers to apply the long standing Common Control Clause[4] in the Internal Revenue Code (Tax Code) to determine if they are considered one or multiple employers for the purposes of the health care law. While these rules have been part of the Tax Code for many years, this is the first time many restaurateurs, especially smaller operators, have had to understand how these complicated regulations apply to their businesses. The Treasury Department has not issued, nor to our knowledge, plans to issue, guidance to help smaller operators understand how these rules apply to them. Restaurant and food service operators must hire a tax advisor to determine how the complicated rules and regulations associated with this section of the Tax Code apply to their particular situation. It is common that business partners of one restaurant company own multiple restaurant companies with other partners. These restaurateurs consider each operation to be separate small businesses, but because there is common ownership, under the rules many are discovering that all the businesses can be considered as one employer for purposes of the health care law.

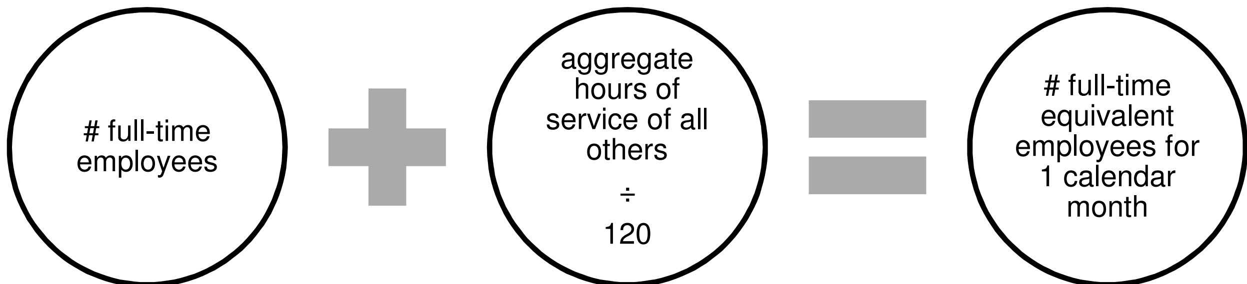
[2] Bureau of Labor Statistics, U.S. Department of Labor.
[3] *2013 Restaurant Industry Forecast.*
[4] Internal Revenue Code, §414 (b),(c),(m),(o).

Once a restaurant or foodservice operator determines what entities are considered one employer, they must determine their applicable large employer status annually. For larger employers, it is clear that they have more than 50 full-time equivalent employees employed on business days in a calendar year. However, given we are an industry of small businesses and that restaurants are labor intensive and require many employees to operate successfully, many small businesses will have to complete this calculation annually to determine their responsibilities under the law.

As you might imagine, operators on the bubble of 50 full-time equivalent employees are trying to understand what they must do to complete this complicated calculation each year. Generally, an employer must consider the hours of service of each of their employees in all 12 calendar months each year. However, the Treasury Department has allowed for transition relief in 2013 for businesses to use as short as 6 months to do this calculation. The Treasury Department recognized the fact that small businesses, who may not currently offer health coverage, will need time to determine their status and then negotiate a plan with an insurance carrier. However, there remain questions about the process in later years when January through December must be considered for status beginning the following January 1st. Will small employers just reaching the applicable large employer threshold find that they determine they are large on December 31, 2014, for example, and must offer coverage a day later on January 1, 2015? Rules are needed to clarify when such employers must offer coverage in future years.

The applicable large employer determination is complicated. Employers must determine all employees' hours of service each calendar month, calculate the number of FTEs per month, and finally average each month over a full calendar year to determine the employer's status for the following year. The calculation is as follows:

1. An employer must first look at the number of *full-time employees* employed each calendar month, defined as 30 hours a week on average or 130 hours of service per calendar month.
2. The employer must then consider the hours of service *for all other employees*, including part-time and seasonal, counting no more than 120 hours of service per person. The hours of service for all others are aggregated for that calendar month and divided by 120.
3. This second step is added to the number of full-time employees *for a total full-time equivalent employee* calculation for one calendar month.



4. An employer must complete the same calculation for the remaining 11 calendar months and average the number over 12 calendar months to determine their status for the following calendar year.

This annual determination is administratively burdensome and costly, especially for those employers just above or below the 50 FTE threshold who must most closely monitor their status – most likely smaller businesses. Many restaurant operators rely on third-party vendors to develop technology or solutions to help them comply with these types of requirements but vendors are backlogged and solutions are not easily accessible at this time.

OFFERING COVERAGE TO FULL-TIME EMPLOYEES

The health care law requires employers subject to the Shared Responsibility for Employers provision to offer a certain level of coverage to their full-time employees and their dependents, or face potential penalties. The statute arbitrarily defines full-time as an average of 30 hours a week in any given month. This 30-hour threshold is not based on existing laws or traditional business practices. In fact, the Fair Labor Standards Act does not even define full-time employment. It simply requires employers to pay overtime when nonexempt employees work more than a 40-hour workweek. As a result, 40 hours a week is generally considered full-time in many U.S. industries. Certainly in the restaurant and foodservice industry, operators have traditionally used a 40-hour definition of full-time. Adopting such a definition in this law would also provide employers the flexibility to comply with the law in a way that best fits their workforce and business models.

Compliance based on a 30-hour a week definition is further complicated by the fact that sometimes it is difficult to know who the full-time employees are in a restaurant or foodservice setting. For restaurant and foodservice operators who are applicable large employers, it is not easy to predict which hourly staff might work 30 hours a week on average and which will not. During the peak seasons, hourly employees can be scheduled for more hours as customer traffic increases, but then reduced as business slows. One of the attractive benefits of our industry is the flexibility to change your hours to suit your own personal needs. However, for the first time under this law, the federal government has drawn a bright line as to who is full-time and who is part-time. As a result, employers with variable workforces and flexible scheduling must be deliberate about scheduling hours because there is now a greater financial impact with potential liability for employer penalties if employees who work full-time hours are not offered coverage. If the definition is not changed to align better with workforce patterns, there is concern that the flexibility so many employees value will no longer be as widely available in the industry and structural changes to our labor market will occur.

The industry appreciates that the Treasury Department has recognized that it may be difficult for applicable large employers to determine employee's status as full-time or part-time on a monthly basis, causing churn between employer coverage and the exchange or other programs. Such coverage instability is not in the employee's best interest and so the restaurant and foodservice industry is pleased that the Lookback Measurement Method is an option that applicable large employers may use.

While the Lookback Measurement Method's implementing rules are complex it could be helpful for both employers and employees. Employers will be better able to predict costs and accurately offer coverage to employees they are required to do so. Employees whose hours fluctuate (variable hour and seasonal employees) have the peace of mind of knowing that if their hours do decrease form one month to the next, coverage will not be cut short before the end of their stability period.

CHALLENGES FOR APPLICABLE LARGE EMPLOYERS OFFERING COVERAGE TO THEIR FULL-TIME EMPLOYEES AND THEIR DEPENDENTS

Once an applicable large employer has determined to whom coverage must be offered, he must make sure that the coverage is of 60 percent minimum value and considered affordable to the employee, or he may face potential employer penalties.

Minimum value is generally understood to be a 60 percent actuarial test; a measure of the richness of the plan's offered benefits. This is a critical test for employers especially as it relates to what an employer's group health plan covers and hence what the premium cost will be in 2014. As I mentioned before, business owners like certainty, and that means the ability to plan for their future costs. Employers are eager to know what their premium costs will be under the new law. Minimum value is key to determining that information.

On February 25, 2013 the Health and Human Services Department did include the Minimum Value Calculator, one of the acceptable methods to determine a plan's value, in its Final Rule, Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation. Minimum value can now be determined using this calculator or other options, but still it is difficult to anticipate premium costs so far in advance. Data is not usually available until a few months before the employer's plan year begins. This gives operators a short timeframe within which to budget and make business decisions in advance of the new plan year.

Employers must also ensure at least one of their plans is affordable to their full-time employees or face potential penalties. A full-time employee's contribution toward the cost of the premium for single-only coverage cannot be more than 9.5 percent of their household income, or else the coverage is considered unaffordable. Employers do not know household income, nor do they want to know this information for privacy reasons. However, employers needed a way to be able to estimate before a plan is offered if it will be affordable to employees. What employers do know are the wages they pay their employees. Almost always, employees' wages will be a stricter test than household income. Employers are willing to accept a stricter test in the form of wages so that they know they are complying with the law and are provided protection from penalty under a safe harbor. The Treasury Department will allow employers to use one of three Affordability Safe Harbors based on Form W-2 wages, Rate of Pay or Federal Poverty Line. We believe that the option of utilizing these methods will be helpful to employers as they determine at what level to set contribution rates and their ability to continue to offer coverage to their employees.

The law speaks to affordability for employees but is silent regarding whether the coverage required to comply with the Shared Responsibility for Employers section of the law is affordable to employers. As restaurant and foodservice operators implement this law, considering all of the interlocking provisions, some will be faced with difficult business decisions between offering coverage which they cannot afford with a finite dollar for benefits, and paying a penalty – an option they do not want to take, but is equally unaffordable to them as well. We encourage policymakers to address the cost of coverage so that the employer-sponsored system of health care coverage will be maintained.

AUTOMATIC ENROLLMENT REQUIREMENT

Applicable large employers who employ 200 or more full-time employees are also subject to the Automatic Enrollment provision of the law. This duplicative mandate requires these employers to enroll new and current full-time employees in their lowest cost plan if the employees have not opted-out of the coverage. This provision also interacts with the prohibition on waiting periods longer than days and effectively means that on the 91st day, employers must enroll a new full-time hire in their lowest cost plan if they do not tell their employer that they do not want to be enrolled. Employee premium contributions will begin to be collected and the industry is concerned that it could cause financial hardship and greater confusion about the law, especially amongst our young employees. Since 43 percent of restaurant employees are under age 26 and more likely to be moving from job to job or eligible for enrollment in parents' plans, many are likely to inadvertently miss opt-out deadlines and will be automatically enrolled in their employer's health plan causing significant, unexpected financial hardship.

Automatically enrolling an employee and then shortly thereafter removing them from the plan when the employee opts-out only increases costs unnecessarily without increasing our employee's access to coverage as the law intended. Since the health care law's employer shared responsibility provision already subjects large employers to potential penalties if they fail to offer affordable health care coverage to full-time employees and their dependents, the auto-enrollment mandate is redundant. It adds a layer of bureaucracy and burdens businesses without increasing employees' access to coverage.

Some compare automatically enrolling employees in health benefit plans to automatically enrolling them in a 401(k) plan, but this isn't a good parallel. The financial contribution associated with health benefits can be much larger, for example: 9.5 percent of household income toward the cost of the premium for employees of large employers versus an average 3 percent automatic 401(k) contribution.[5] The financial burden on employees of automatic enrollment in health benefit plans would be much greater than that of 401(k) plans. Additionally, 401(k) rules allow employees to access their contributions when they opt-out of automatic enrollment; however health benefit premium contributions cannot be retrieved.

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[5] "Disparities in Automatic Enrollment Availability," Bureau of Labor Statistics, August 2010.

Restaurateurs 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, which can be a financial burden. Since the same full-time employees must be offered coverage by the same employers subject to the Automatic Enrollment provision and the Shared Responsibility for Employer provisions, we believe the automatic provision is unnecessary and should be eliminated.

Congressmen Richard Hudson and Robert Pittenger have introduced H.R. 1254, the Auto Enroll Repeal Act. Enactment of this measure would eliminate this requirement that could hurt both employees and employers.

NONDISCRIMINATION RULES NOW WILL APPLY TO FULLY-INSURED PLANS

The health care law applies the nondiscrimination rule that self-funded plans cannot offer benefits in favor of their highly-compensated individuals now to fully-insured plans. This rule is not in effect as the Treasury Department has put implementation on hold until further guidance has been issued in this complex area. Under the law, these rules apply to all insured plans, regardless of where they are offered by an applicable large employer or a small business. The restaurant and foodservice industry is watching this rule closely as it could impact what future plan offerings and compliance with the law.

Current group health plan participation rules often forces operators to carve out the group of employees who will participate in the plan. In our members' experience, these are almost always a group that would be considered in the top 25 percent based on compensation.

However, management carve-outs are not just for upper level executives who may receive richer benefit plans than the rest of the employees. In the restaurant and foodservice industry, management-only plans are sometimes the only option that operators have to provide health care coverage to those employees who want to buy it and pass participation requirements at the same time. As a result, these plans are quite common in the industry.

The rules the Treasury Department writes to apply non-discrimination testing to fully-insured plans could have an impact on our industry. Regardless of how they are written, restaurant and foodservice operators will need sufficient transition time to apply these rules as it could create upheaval for plans and employers alike.

APPLICABLE LARGE EMPLOYER REPORTING REQUIREMENTS

A key area of implementation that employers have received no guidance on are the employer reporting requirements: the required information reporting under Tax Code §6055 and §6056 from the Internal Revenue Service and the Treasury Department. These employer reporting requirements are a key link in the chain of the law's implementation. They represent a what could be a significant employer administrative burden.

Of particular concern is the flow of information and the timing of reporting employers must make to multiple levels and layers of government. Streamlining employer reporting will help ease employer administrative burden and simplify the process. The information provided by employers under Internal Revenue Code §6055 and §6056 is critical in this process and can be used by the Treasury Department to verify if an individual had an offer of affordable minimum essential coverage of minimum value from an applicable large employer. The information provided by employers must be compared by the Internal Revenue Service to verify eligibility determinations made by the Exchanges for premium tax credits or cost-sharing reductions. The information can also be used to determine employer penalty liability. The restaurant and foodservice industry, along with other employer groups, have advocated for a single, annual reporting process by employers to the Treasury Department each January 31st that would provide prospective general plan information and wage information for the affordability safe harbors, as well as retrospective reporting as required by Tax Code §6056 on individual full-time employees and their dependents.

We are anxious for guidance to be issued as employers cannot just flip a switch and produce the detailed information reports required by the statute. It will take time for employers to set up systems, or contract with vendors, to track and maintain the data needed to comply with the law. I recently spent time with our industry group of chief financial officers and tax directors and spoke with them about the detailed information they will have to track and report on all full-time employees and dependents. The reporting will include not only the employees who remain with the restaurant for the entire year, but even our seasonal staff and others who may only stay for a couple of months. Health plan benefit information as well as individualized payroll-sourced information may be required to be merged to produce the report needed under the law. Regardless, it is sure to be a large amount of data, and hard to know based just on the statute, how programmers or our vendors should set up internal systems now to be able to accurately track this information. Compliance with these requirements, once we see the final rule, will take time to plan, budget, and execute, even within the most sophisticated systems.

TRANSITION RELIEF

Until the January 2, 2013 *Federal Register* publication of the Treasury Department's Proposed Rule regarding the Shared Responsibility for Employers provision, employers did not have any firm rules on which they could plan and make business decisions. Up until this time, proposals and guidance had been issued with numerous opportunities for public comment, but nothing had the weight of regulation. This proposed rule, while not finalized, does provide employers assurances that the rules proposed can be relied upon until further rules are issued. Within this proposed rule, the Treasury Department provided targeted transition relief. While appreciated, we believe that further transition relief is critical.

The timeframe for compliance is short and getting shorter, and safe harbor protections for good-faith compliance by employers in the law's early phases is necessary. Employers are still missing essential pieces of guidance and regulation necessary to construct their systems, make plan design changes and communicate with their employees. Under the threat of tax penalties for not getting this exactly right the first time, some employers may opt-out of offering coverage

to their employees and choose to pay the penalties instead. This is not what the restaurant and foodservice industry wants, but it may be a result of employers having to make difficult decisions under very uncertain conditions. The process should not discourage employers and employees from participating in the new system and so a good-faith compliance standard is appropriate. As with implementation of any law this size, it will take some time for the hiccups in the processes to be worked out and employers and employees should be allowed adequate time to come into compliance and understand all their options.

CONCLUSION

Since enactment of the law, the National Restaurant Association has worked to constructively shape the implementing regulations of the health care law. Nevertheless, there are limits to what can be achieved through the regulatory process alone. Ultimately, the law cannot stand as it is today given the challenges restaurant and foodservice operators face in implementing it.

Broader transition relief is needed for employers and employees attempting to comply with the law in good-faith as time is short to make the significant changes required by the law and understand options. Key definitions in the law must be changed: The law should more accurately reflect the general business practice of 40 hours a week as full-time employment. The applicable large employer determination must be more workable. The duplicative automatic enrollment provision should be eliminated as it could unnecessarily confuse and financially harm employees.

The National Restaurant Association looks forward to working with this subcommittee and all of Congress on these and other important issues to improve health care for our employees. We continue our active participation in the regulatory process to ensure the implementing rules consider our industry workforce's unique characteristics.

Thank you again for this opportunity to testify today regarding the challenges restaurant and foodservice operators face as they implement the law. Uncertainty and fear of the unknown is prevalent but the National Restaurant Association is working to provide our industry clear, accurate information to understand the requirements of the law and regulations.