



A not-for-profit health and tax policy research organization

Testimony on

**The Employer Mandate:
Examining the Delay and Its Effect on Workplaces**

**Subcommittee on Health, Employment, Labor and Pensions and
the Subcommittee on Workforce Protections
of the Committee on Education and the Workforce**

**Phil Roe, M.D., Chairman
Subcommittee on Health, Employment, Labor, and Pensions**

**Rep. Tim Walberg, Chairman
Subcommittee on Workforce Protections**

Tuesday, July 23, 2013

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The Employer Mandate: Examining the Delay and Its Effect on Workplaces

Subcommittee on Health, Employment, Labor, and Pensions
and the Subcommittee on Workforce Protections

Chairman Roe, Chairman Walberg, and Members of the Committee, thank you for the opportunity to testify today on the delay of the reporting requirements for the employer mandate and the effect on American workplaces. My name is Grace-Marie Turner and I am president of the Galen Institute, a non-profit research organization focused on market-based health reform.

Across the country, large and small businesses have been making painful decisions to lay off employees, cut workers' hours, and make do with fewer workers than they really need. This is not what you would expect in a recovering economy.

The clear distorting factor is the Affordable Care Act, especially the employer mandate that requires businesses with more than 50 employees to provide health insurance or pay a fine.

The decision by the administration to delay the reporting requirements for the mandate that this hearing addresses today creates new questions and concerns for business owners and workers.

The announcement, which was made on a blog post by Assistant Treasury Secretary Mark J. Mazur late on July 2, relies on legal authority that is at best questionable.¹ The statute clearly says that the mandate, with the resulting reporting system, is to begin in 2014, not 2015, as the administration has now directed.²

The House of Representatives, on July 17, passed legislation by a sizeable margin of 264 to 161 to give the administration legal authority to postpone the mandate. The House also voted, by 251-174, to extend the delay to the individual mandate. However, the administration said in a puzzling Statement of Administration Policy that the president would veto the legislation that would delay the employer mandate that he himself is delaying by administrative directive.³

Who made the decision? Marilyn Tavenner, the administrator of the Centers for Medicare & Medicaid Services, said at a House subcommittee meeting on July 17 that she was not consulted on the Obama administration's decision to postpone this key part of the health law.⁴ She said she was "made aware" that the Obama administration was postponing the employer mandate on June 24 or 25, a week before it was publicly announced.

I understand that you had invited Howard Shelanski, the administrator of the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA), to

testify today to answer your questions about the OMB's role in the decision. In a call to committee staff, OIRA indicated it was not involved in the decision to delay enforcement of the employer mandate and therefore would not testify today.

Vice Chairman of the Health and Oversight and Investigations Subcommittee of the Energy and Commerce Committee, Michael C. Burgess, M.D., questioned the Treasury Department's Deputy Assistant Secretary for Retirement and Health Policy Mark Iwry on July 18 regarding the timeline of the administration's decision and the process by which that decision was made. Iwry was not able to provide the date the decision was made, nor who made the final decision to delay the mandate and whether that person was a Treasury Department or a White House official.⁵

Certainly a decision with such significant implications should have been reviewed by those in the administration with responsibility for implementing the law to determine its legality, its implications on other provisions of the law, and its implications for businesses and their employees.

Now, employers are more confused than ever about what their responsibilities and liabilities are during this period of "transition relief" from the reporting requirements. Regulations explaining the details of this announcement are not expected until later this summer, adding further to the uncertainty in their attempts to comply with the law.

What business is saying

When it does take effect, small businesses say the employer mandate will have a negative effect on their companies and employees. According to a recent survey by the U.S. Chamber of Commerce, 71% of small businesses say the health care law makes it harder to grow. Only 30% say they are prepared for the requirements of the law, and a quarter say they don't even know what is required of them. Among small businesses that will be impacted by the employer mandate, one-half say they either will cut hours to reduce full time employees or replace full time employees with part-time workers to avoid the penalties. Twenty-four percent say they will reduce hiring to stay under 50 employees.⁶

An earlier Gallup poll found that 41% of small businesses surveyed had frozen hiring because of the health law. One in five said they already had reduced the number of employees in their business "as a specific result of the Affordable Care Act."⁷

The Congressional Budget Office estimated that as many as 11 million workers could lose their health insurance from employers who pay the penalty rather than pay the cost of insurance.⁸ Other estimates, such as one from the American Action Forum, suggest that the number could be as high as 35 million.⁹ Clearly this law is having far-reaching implications, and I applaud this committee for calling this hearing today to delve more deeply into this decision and its implications.

Employers have been providing health insurance for their workers voluntarily for more than 70 years. It's good business because offering health insurance attracts good workers and helps to keep workforces healthy. But the ACA places significant new burdens on employers, including onerous reporting requirements and higher costs because of new mandated benefits, that are causing employers to rethink this arrangement.

Most employers want to provide health insurance but not all can afford it and still keep their prices competitive. For companies that operate with very tight profit margins, the mandate to provide health insurance can send their bottom line from black to red. Many of them, especially businesses in the retail and hospitality industries, have no choice but to restructure their businesses to avoid the added costs of either the fines or providing expensive mandated health insurance.

Some critics have argued that if all businesses are forced to provide health insurance and raise prices, they will not lose customers because all of their competitors will be operating under the same requirements. But customers are smarter than that: They will buy less, substitute more, and more business transactions will simply vanish.

Employer response to the mandate

Backers of the health law have said that the one-year delay in reporting requirements for the employer mandate is largely irrelevant because the great majority of employers with 50 or more workers who would be subject to the mandate already offer health insurance. But offering isn't the same as accepting. Almost half of the nation's nearly 28 million uninsured workers are employed by firms that are mandated to provide health coverage.

The federal government's Medical Expenditure Survey (MEPS) shows that 96.8% of large firms (defined as workers with 50 or more employees) offer health benefits. However, Professor Chris Conover of Duke University has examined the distribution of the nation's 27.9 million uninsured workers age 18-64 by firm size, and he finds that 46.1% are employed at firms subject to the mandate.¹⁰

Not every worker at a firm offering benefits is eligible for coverage, or a worker may be eligible for benefits but be stuck in a waiting period before their benefits actually can begin. And even if employees are eligible, they may not sign up for the coverage. Therefore, to say that delaying the mandate is inconsequential is belied by the facts.

Cutting hours: There are countless news reports of companies that are being forced to cut hours for their workers to fit within the constraints of the ACA. The health law is redefining a full-time work week as 30 hours rather than the traditional 40. Because there is a look-back period, many employers already have begun scaling back employee hours. And many of them are cutting workers back to 25 hours a week to provide a cushion in case employees' shifts run over.

That is a significant income loss for workers, many of whom are at the lower-end of the income scale. But employers, especially in the restaurant and retail industries, say that their decisions are driven by an attempt to keep their doors open. Many say that even paying the \$2,000 per employee per year fines for not providing health coverage would more than consume their profit margins, giving them little reason to open for business at all.

And a one-year delay in the employer mandate will not change the hiring behavior of employers. They won't hire full-time workers while knowing they would have to let those workers go a year from now. If anything, the delay gives employers more time to figure out how to restructure their businesses and workforces to avoid the added costs of the health law.

Redefining 30 to 40 hours: Some business groups are advocating a change in the law to move the definition from 30 to 40 hours. While that seems logical, many businesses will continue to build a cushion into their schedules and that would likely mean the full-time work week would be 35 rather than 40 hours. I would recommend that Congress not make this change. The only solution to avoid these and other distortions in the labor market is to repeal the employer mandate.

Incentives to drop coverage: While the health law tried to lock-in employer coverage, it may very well have the opposite effect of incentivizing employers to drop coverage instead.

The Wegmans grocery chain, for example, is cutting health benefits for its part-time employees and plans to send them instead to the ObamaCare exchanges where they may get more generous benefits and subsidies than the company says it can offer.

Several Wegmans employees confirmed part-time health benefits had been cut and said the company said the decision was related to changes brought about by the Affordable Care Act, according to a report in *The Buffalo News*.¹¹

Wegmans is one of thousands of employers likely to make the same decision. Part of the reason employers are looking for the exits is the rising cost of health insurance caused by the ACA's mandates on coverage and new taxes. For example, the ACA's new health insurance tax alone will increase premiums by \$8 billion next year, increasing an average family's premium by more than \$350 in 2014.¹²

Labor unions unhappy

Those who say that the employer mandate has little or no effect on businesses also should listen to those who represent organized labor. Representatives of three of the nation's largest unions recently warned Democratic leaders in Congress that Obamacare would "shatter not only our hard-earned health benefits, but destroy the foundation of the 40 hour work week that is the backbone of the American middle class."¹³

The letter was from James P. Hoffa, general president of the International Brotherhood of Teamsters; Joseph Hansen, international president of the United Food and Commercial Workers International Union; and Donald “D.” Taylor, president of UNITE-HERE, a union representing hotel, airport, food service, gaming, and textile workers.

“When you and the President sought our support for the Affordable Care Act,” they begin, “you pledged that if we liked the health plans we have now, we could keep them. Sadly, that promise is under threat...Perverse incentives are causing nightmare scenarios. First, the law creates an incentive for employers to keep employees’ work hours below 30 hours a week. Numerous employers have begun to cut workers’ hours to avoid this obligation, and many of them are doing so openly. The impact is two-fold: fewer hours means less pay while also losing our current health benefits.”

Last week, Laborers International Union of North America President Terry O’Sullivan wrote that the law has “destructive consequences” for the types of health plans that cover millions of unionized construction workers and their family members. Mr. O’Sullivan focused on the impact on unionized construction workers who are typically covered by multiemployer plans. Costs are rising for such plans because of the law’s benefit mandates and taxes.

But the delay of the reporting requirements for the employer mandate does not mean that businesses can take a year off from other provisions of the law.

Other provisions of the ACA slated to go into effect in or before 2014 include:

- a 90-day maximum on eligibility waiting periods
- monetary caps on annual out-of-pocket maximums
- total elimination of lifetime and annual limits (including expiration of waivers that permitted certain “mini-med” plans and stand-alone Health Reimbursement Arrangements to stay in place through plan years beginning in 2013)
- new wellness plan rules
- revised Summary of Benefits and Coverage templates
- Patient Centered Outcomes Research Institute (PCORI) excise taxes and transitional reinsurance program fees
- a notice informing employees of the availability of the new health insurance Exchanges (a model notice is available on the U. S. Department of Labor website), and
- insurance market reforms

The president is offering businesses no relief from these requirements which will further burden businesses with compliance costs and distract them from their core business activities. This is severely hampering the jobs recovery our economy so desperately needs.

Next steps

The evidence is growing that three years was not long enough to implement the sweeping change to our health sector required under the ACA. One of the things that businesses had most hoped to get from the law was more affordable coverage through the small business exchanges called for in the law. But the administration announced in April that it would delay until at least 2015 implementation of these exchanges.¹⁴

And in a 606-page regulation issued late on July 5, the administration announced that income and employment verification in the state-run exchanges in 2014 would be waived. The administration acknowledged the difficulty of getting verification systems up and running, saying “large amount of systems development on both the federal and state side...cannot occur in time for October 1, 2013.” Therefore, income verification “is not feasible for implementation for the first year of operations.” The administration will instead rely on an “honor system” for reporting.¹⁵

This presents a significant potential for fraud and waste of taxpayer funds if applicants misstate their income and get a larger subsidy for health insurance than they are legally eligible to receive. Taxpayers are at risk, presenting a strong argument for delay of the subsidies until the income verification systems are in place.

Additionally, very little information has been provided by the administration about the status of the exchanges that the federal government is creating in those states that have declined to create their own. Seeing the difficulty that individual states are having in getting their exchanges ready does not inspire confidence that the federal government’s exchanges will be ready by the October 1 deadline. That’s yet another reason to delay the exchanges.

The risks, complexities, delays, and confusion surrounding the ACA strongly indicate that the only responsible path is to delay implementation of the rest of the law. In the meantime, Congress could authorize funds to help states develop or strengthen high-risk pools so people with pre-existing conditions who are waiting for the exchange coverage to begin on January 1 can get coverage immediately.

I thank you for the opportunity to testify today and look forward to your questions and discussion.

Endnotes

¹ The Treasury blog post, “Continuing to Implement the ACA in a Careful, Thoughtful Manner,” is available at <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx>

² The “Shared Responsibility for Employers” provision is Section 1513 of the Patient Protection and Affordable Care Act (P.L. 111-148), as amended by the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152).

³ The Statement of Administration Policy was issued by the Executive Office of the President on July 16, 2013 and can be found at http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr2667r_20130716.pdf

⁴ “Tavener Wasn’t Consulted On Delaying Health Law’s Employer Mandate,” Ankita Rao, Kaiser Health News, July 17, 2013 (<http://capsules.kaiserhealthnews.org/index.php/2013/07/tavener-wasnt-consulted-on-delaying-health-laws-employer-mandate/>)

⁵ Video of the hearing and witness testimony can be found at <http://energycommerce.house.gov/hearing/patient-protection-and-affordable-care-act-implementation-wake-administrative-delay>

⁶ “United States Chamber of Commerce Q2 Small Business Outlook Study,” United States Chamber of Commerce, July 16, 2013 (<http://www.uschamberssmallbusinessnation.com/community/q2-2013-small-business-survey>)

⁷ “Half of U.S. Small Businesses Think Health Law Bad for Them,” Dennis Jacobo, Gallup, May 10, 2013 (<http://www.gallup.com/poll/162386/half-small-businesses-think-health-law-bad.aspx>)

⁸ “CBO and JCT’s Estimates of the Effects of the Affordable Care Act on the Number of People Obtaining Employment-Based Health Insurance,” Congressional Budget Office, March 2012 (http://cbo.gov/sites/default/files/cbofiles/attachments/03-15-ACA_and_Insurance_2.pdf)

⁹ “Labor Markets and Health Care Reform: New Results,” Douglas Holtz-Eakin & Cameron Smith I, American Action Forum, May 27, 2010 (http://americanactionforum.org/sites/default/files/OHC_LabMktsHCR.pdf)

¹⁰ “New Flash: 46% Of Working Uninsured Are In Large Firms Subject To Employer Mandate,” Chris Conover, Forbes, July 5, 2013 (<http://www.forbes.com/sites/theapothecary/2013/07/05/news-flash-45-of-working-uninsured-are-in-large-firms-subject-to-employer-mandate/>)

¹¹ “Wegmans cuts health benefits for part-time workers,” Samantha Maziarz Christmann, The Buffalo News, July 10, 2013 (<http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20130710/BUSINESS/130719892/1003>)

¹² “Quick Facts about Health Care Reform and Premiums,” America’s Health Insurance Plans, July 18, 2013 (<http://www.ahipcoverage.com/2013/07/18/quick-facts-about-health-care-reform-and-premiums/>)

¹³ This text comes from a letter written by James P. Hoffa, General President of the International Brotherhood of Teamsters, Joseph Hansen, International President of UFCW, and D. Taylor, President of UNITE-HERE, and can be found on Corporate Intelligence blog of the Wall Street Journal (<http://blogs.wsj.com/corporate-intelligence/2013/07/12/union-letter-obamacare-will-destroy-the-very-health-and-wellbeing-of-workers/>)

¹⁴ “Small Firms’ Offer of Plan Choices Under Health Law Delayed,” Robert Pear, The New York Times, April 1, 2013 (http://www.nytimes.com/2013/04/02/us/politics/option-for-small-business-health-plan-delayed.html?_r=2&)

¹⁵ The full text of this rule can be found on the Federal Register at <https://www.federalregister.gov/articles/2013/07/15/2013-16271/medicaid-and-childrens-health-insurance-programs-essential-health-benefits-in-alternative-benefit>