

TESTIMONY BEFORE THE UNITED STATES CONGRESS
ON BEHALF OF THE
NATIONAL FEDERATION OF INDEPENDENT BUSINESS

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Testimony of

Mr. William J. Dennis, Jr.

before the

Health Subcommittee

on the subject of

the Delay of the Employer Mandate

on the date of

July 10, 2013

When you are ill-prepared, the wise thing to do typically is to delay, postpone, or even cancel. The Administration's one-year delay in the employer mandate somewhat improves a bad situation, despite raising such questions as –

How will delay affect small business confidence that the mandate will be implemented rationally and with maximum efficiency?

Will the Administration be ready in another year?

Why was the Administration so ill-prepared in the first place? and

Is it legal to delay implementation of the employer mandate when the law specifically states that it will “shall apply to the months after December 31, 2013?”¹

I cannot answer the last of these three questions, though they are highly relevant to the topic at hand. But I can address the first with some confidence – small-business owners are likely to be relieved that they will not have to immediately comply with legal obligations about which they have few, if any, details, holding out hope, though not necessarily confidence, that the second time around there will be adequate information on which to make sound judgments.

The information NFIB has on member opinion to date is largely anecdotal. It comes from NFIB staff speaking with members in groups and individually, from Administration call-ins which typically yield many questions and few concrete answers, and NFIB staff's own inability to obtain useable responses despite plowing through pages of advisory notices, proposed regulations, and similar material. For example, considerable confusion lies in the business aggregation provisions of the law. The concept is simple: if a small-business owner has multiple firms, regardless of industry, whose total employment adds to 50 or more, the business must offer full-time employees health insurance. The issue is relevant because 39 percent of small-business owners currently holding one small business employing 20 or more people also own at least 10 percent of at least one or more other businesses.² Not long ago, a member called asking for information about his multiple business situation. After listening to his story, we could only advise him to talk to his lawyer or accountant. He already had, and they were absolutely clueless. And, as our member got off the phone, he was left to the vagaries of a ERISA definition whose interpretation was now transferred to a condition for which it was clearly not developed.

This member is far from an isolated example. But to ascertain the current condition on a nationally representative basis, the NFIB Research Foundation this spring organized a three year longitudinal study to track the implementation of the Affordable Care Act on small businesses. One section of the first survey is devoted to awareness and knowledge of the Act (ACA). That instrument is currently in the field. Within a month or two, we will be able to provide you empirical data on ACA awareness by small employers. Moreover, since about 30 percent of responses were obtained prior to the July 2 employer mandate-delay announcement, we will be able to offer a before and after examination of the announcement's impact on small-employer thinking and reaction to various aspects of the ACA.

Learning and the Educational Process

The Administration indicated that it would provide further guidance in the next few weeks.³ One can only hope that that the guidance will be clear, specific, and soon. Small employers are normally most likely to discover what government requires of them through secondary channels.⁴ Those channels include accountants and lawyers, other affected business owners, and trade Web sites. A necessary

¹ Affordable Care Act, Section 1513(d).

² Businesses Within Families, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 12, Iss. 4, 2012.

³ See, Mark J. Mazur, “Continuing to Implement the ACA in a Careful, Thoughtful Manner,” blog post, July 2, 2013. www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner Accessed 7/5/2013.

⁴ Regulation, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 12, Iss. 6, 2012.

process is therefore “teaching the teachers” before understanding and compliance can be expected from the population. These key points of contacts must first understand what the ACA requires, not in generalities, but in specifics. And, they are not yet aware. If clear and specific guidance does come in the next few weeks, and the delay just experienced offers no confidence to that effect, it will still be difficult to fully inform the affected population before the next deadline, now presumably January 1, 2015.

Some might suggest that the IRS or some other agency of government simply send a notice to all affected taxpayers containing compliance instructions (once they have been developed) and all would be satisfied. Indeed, wide dissemination of that nature would be helpful. But don’t expect immediate awareness and knowledge as a result. Despite broad outreach by the IRS,⁵ including mailing over four million notices post cards about the Small Business Health Insurance Credit in 2011,⁶ only about half of eligible small businesses were even aware of the credit shortly thereafter,⁷ let alone familiar enough to know if they were eligible.

Inherent Mandate Problems

Delay of the employer mandate for one-year, possibly more, does not erase the inherent problems with the employer mandate. It only postpones addressing them. A few examples should suffice:

*Full-time employees – Full-time employees must be offered coverage by the mandate; the same does not apply to part-time employees. A full-time employee according to the ACA works more than 30 hours a week. The Bureau of Labor Statistics (BLS) classifies full-time employees as working 35 hours a week or more and part-time employees as 1 – 34 hours per week.⁸ That is also common usage of the terms in the private sector. Further, it has been policy to provide additional compensation after extended hours, such as time and one-half (overtime pay) after 40 hours.

The ACA’s differential classification has already caused employers to start juggling hiring practices and forcing employee hours to fall under 30 hours.⁹ Already we have seen employers reduce or announce reduction in hours to escape the mandate, and not just small employers as illustrated by the actions of the Commonwealth of Virginia¹⁰ and some colleges.¹¹ This is not to be confused with the hiring caution currently exhibited by small employers due to mandate uncertainty.¹²

Further, proposed regulations complicate matters unnecessarily by designating monthly totals for full-time employees as 130 hours/month and for full-time equivalent employees as 120 hours/month. So, do we have a weekly standard or a monthly standard, and does the latter differ between February (28 days) and March (31 days)? And, why is it essential to differentiate hours between full-time employees and full-time equivalent employees?

*Look-Back Rules – Given that employee hours can fluctuate from month to month, a proposed regulation would allow employers to utilize a 3 - 12 month look-back period to determine whether

⁵ Small Employer Health Tax Credit: Factors Contributing to Low Use and Complexity, Government Accountability Office (GAO-12-549), May 2012, p. 16.

⁶ http://www.irs.gov/pub/irs-news/health_care_postcard_notice.pdf accessed 7/8/2013

⁷ Small Employer Health Tax Credit: Factors Contributing to Low Use and Complexity, *op. cit.*

⁸ <http://www.bls.gov/cps/lfcharacteristics.htm#fullpart> accessed 7/8/2013

⁹ Obamacare Putting Millions of Part-time Workers at Risk of Seeing Cut Hours: Study, Huffington Post, July 9, 2013.

http://www.huffingtonpost.com/2013/05/07/part-time-workers-obamacare_n_3210321.html accessed 7/9/2013

¹⁰ Bill Sizemore, “Va. workers’ part-time hours capped due to health law,” PilotOnline.com, Feb. 8, 2013.

<http://hamptonroads.com/2013/02/state-workers-parttime-hours-capped-due-health-law> accessed 7/8/2013.

¹¹ Colleen Flaherty, “So Close Yes So Far,” Inside Higher Ed., Nov. 20, 2012,

www.insidehighered.com/news/2012/11/20/college-cuts-adjuncts-hours-avoid-affordable-care-act-costs accessed 7/8/2013.

¹² See, “Small Business Economic Trends,” NFIB Research Foundation, Washington, DC, series.

employees work full-time (130 hours/month, not 120 hours/month). Though reporting may add paperwork depending on the requirements method of implementation, counting and recording hours for hourly employees is not an issue. Employers already do it. Salaried employees are a different matter, and small businesses have a considerable number of salaried employees. Fifty-five (55) percent of small businesses employing 20 or more people pay at least some employees' salaries.¹³ Salaries mean that an entirely new administrative structure and record-keeping procedure must be established by these firms. The new paperwork represents a business cost and the type of hassle that small business owners constantly complain about. My guess is that salaried employees are not going to be thrilled about it, either.

Presumably, the Administration will provide new rules on the way that the data should be collected, maintained, and reported.

*Affordability Determination -- Businesses of all sizes that offer health insurance to their employees must satisfy an affordability test in order to keep employees in their employer-sponsored insurance plans.¹⁴ Employees with an offer of unaffordable coverage could leave employer-sponsored coverage in favor of individual exchange coverage. The law defines affordable coverage as less than 9.5 percent of *household* income. But no employer wants to ask employees about household income, that is, income not only of the employee but other members of the household, for legal, ethical, and human relations reasons. So, the household affordability test has conveniently been transformed into a self-only test (still 9.5 percent of income), thereby also skipping the possibility of additional income among approximately seven million multiple job holders.¹⁵ (What's changing the law by fiat among friends?)

Once the employer has established that his insurance plan is not affordable for a particular employee, what then? What are the reporting requirements? Is the employer liable for an error, by excluding an employee when the employee should not have been, or vice-versa? The affordability determination has nothing inherently to do with offering health insurance. Rather, the employer is now being required to become part of the country's social welfare structure, somewhat akin to the new navigator's role.

Employers NEVER had the rules or regulations on how to report the offer of affordable and adequate coverage.¹⁶ That makes compliance difficult.

*Aggregation – An aggregation rule's presumed purpose is to prohibit small employers from subdividing their firms into multiple parts in order to avoid the mandate. An aggregation rule might work if the world consisted of individual small employer owning individual small firms. But the world consists of single firms with multiple owners and owners with multiple firms. For example, just 35 percent of small businesses employing 20 or more people have a single owner (counting a husband/wife

¹³ Compensating Employees, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 3, Iss. 2, 2003.

¹⁴ Considerable concern has been expressed that employers will purposefully design their health insurance packages to push lower income employees into the individual exchange, thereby reducing business costs and making insurance cheaper (less out-of-pocket) for affected employees. See, for example, Amy B. Monahan and Daniel Schwarcz, Saving Small Employer Health Insurance, University of Minnesota Law School, Legal Studies Research Paper No. 12-36, 2012.

¹⁵ <http://www.bls.gov/cps/cpsaat36.htm> accessed 7/8/2013.

¹⁶ The following is typical: "The ACA includes information reporting (under section 6055) by insurers, self-insuring employers, and other parties that provide health coverage. It also requires information reporting (under section 6056) by certain employers with respect to the health coverage offered to their full-time employees. We expect to publish proposed rules implementing these provisions this summer, after a dialogue with stakeholders - including those responsible employers that already provide their full-time work force with coverage far exceeding the minimum employer shared responsibility requirements - in an effort to minimize the reporting, consistent with effective implementation of the law." Mazur, *op. cit.*

combination as a single person).¹⁷ Earlier we noted that 39 percent of people owning a small business with 20 or more employees also held a 10 percent or more share in at least one other venture separate and distinct from the enterprise about which they were initially interviewed. Adding to the complication is the degree of control owners have over each business. For example, 70 percent who have family member owners indicate that these family member/owners actively participate in the firm's critical decisions.¹⁸ At the same time, owners are likely to participate in the critical decisions of a second firm they own and somewhat less likely to participate in the critical decision of a third firm that they own.¹⁹

The rules proposed to handle these complexities are ERISA rules. The problem is that ERISA rules are intricate, meant for interpretation by legal specialists in benefits law, not for the general public or even attorneys generally. That means that perhaps as many as 100,000 small businesses will need an interpretation from a specialist in benefits law to be confident about his or her status.

*Tying Health Insurance to Employers – The employer mandate makes little sense per se. It is a relic of the past and limits future options. Health insurance became tied to employment through an historical quirk. Many now think that health insurance should move away from the current employer based system, to an individually based system offering people more options that better fit their unique situations. The employer mandate moves in exactly the wrong direction.

Thank you.

¹⁷ Business Structure, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 4, Iss. 7, 2004.

¹⁸ Businesses Within Families, *National Small Business Poll*, (ed.) William J. Dennis, Jr., NFIB Research Foundation, Vol. 12, Iss. 4, 2012.

¹⁹ Ibid.