

KENNETH H. RYESKY, ESQ., STATEMENT FOR THE RECORD, UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE WAYS & MEANS, SUBCOMMITTEE ON OVERSIGHT, TAX-RELATED PROVISIONS IN THE PRESIDENT'S HEALTH CARE LAW:

I. INTRODUCTION:

The House Ways & Means Committee, Subcommittee on Oversight, held a Hearing on 5 March 2013, regarding the tax-related provisions in the Patient Protection and Affordable Care Act and Health Care and Education Reconciliation Act of 2010. Public comments were solicited. This Commentary is accordingly submitted.

II. COMMENTATOR'S BACKGROUND & CONTACT INFORMATION:

Background: The Commentator, Kenneth H. Ryesky, Esq., is a member of the Bars of New York, New Jersey and Pennsylvania, and is an Adjunct Assistant Professor, Department of Accounting and Information Systems, Queens College of the City University of New York, where he teaches Business Law courses and Taxation courses. Prior to entering into the private practice of law, Mr. Ryesky served as an Attorney with the Internal Revenue Service ("IRS"), Manhattan District. In addition to his law degree, Mr. Ryesky holds BBA and MBA degrees in Management, and a MLS degree. He has authored several scholarly articles and commentaries on taxation, and on Adjunct faculty in academia.

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Disclaimer: Notwithstanding various discussions between the Commentator and other concerned individuals and organizations, this Commentary reflects the Commentator's personal views, is not written or submitted on behalf of any other person or entity, and does not necessarily represent the official position of any person, entity, organization or institution with which the Commentator is or has been associated, employed or retained.

III. COMMENTARY ON THE ISSUES:

A. *Employer's Shared Responsibility:*

The Patient Protection and Affordable Care Act provides for shared responsibility of large employers regarding Health coverage of their employees.¹ I.R.C. § 4980H, in imposing an excise tax² upon large employers who do not provide their employees with adequate health insurance coverage, establishes how employees who are not employed on a full-time ("full-time equivalents")³ and/or employees who are not employed on a steady basis throughout the year ("seasonal workers")⁴ are counted for determining whether the threshold for a "large employer" is exceeded. It is noted that I.R.C. § 4980H merely establishes the arithmetic for counting employees and seasonal workers in meeting the "large employer" threshold; it does not require that such employees actually be covered by the large employer's insurance plan.⁵

One type of employee with respect to whom the I.R.C. § 4980H "full-time equivalent" and/or "seasonal worker" provisions may be invoked and abused is the Adjunct faculty member engaged to teach at an educational institution.

This commentary will address the treatment of Adjunct faculty under the Patient Protection and Affordable Care Act.

B. *Engagement of Adjunct Faculty by Academia:*

Faculty members employed to teach at colleges and universities on a basis other than full-time tenured (or tenure tracked) are referred to in this Commentary as "Adjunct faculty."⁶ They

¹ Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1513, 124 Stat. 119, 253, *codified at* I.R.C. § 4980H.

² Though the characterization of this obligation as a tax has been met with much incredulity, and is arguably contrary to various Congressional assertions, it has passed muster from the United States Supreme Court as a valid exercise of Congress's Constitutional taxation power. *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

³ I.R.C. § 4980H(c)(2)(E).

⁴ I.R.C. § 4980H(c)(2)(B).

⁵ *Cf.* U.S. Constitution, Art. I, § 2, clause 3, which established the arithmetic for counting slaves and untaxed Indians for census purposes, without enfranchising such persons with the right to vote.

⁶ Other terms used include but are not limited to "Part-Time Faculty," "Contingent Faculty," "Ad Hoc Faculty," "Special Lecturers," and Sessional Instructors."

typically are engaged on a per semester basis.⁷ The percentage of Adjunct faculty at America's postsecondary schools now exceeds 50%, having significantly climbed over the past four decades.⁸

Academia's traditional rationale for employing Adjunct faculty was as a means to utilize real world experience and expertise of accomplished individuals who otherwise would not fit into the traditional full-time faculty mold.⁹ Over the years, however, all such pretense has largely disappeared, and now the colleges and universities unabashedly utilize Adjunct faculty as a source of cheap labor.¹⁰ This has been compounded and exacerbated by academia's unveiled intention of employing Adjuncts to reduce the costs of pension, insurance, and other outlays incidental to the engagement of full-time faculty members.¹¹

This Commentary shall not entangle itself with political correctness issues which occasionally induce various individuals to become exercised and anguished on account of the use of one particular term or another, *see, e.g.* Helm v. Ancilla Domini College, 2012 U.S. Dist. LEXIS 1661 AT *8 - *9 (N.D. Ind. 2012)..

⁷ *See, e.g.* Collins v. Cleveland State Univ. , 2008 U.S. Dist. LEXIS 117181 at *1 (N.D. Ohio 2008); Naval v. Herbert H. Lehman College, 2004 U.S. Dist. LEXIS 26007 at *18 (S.D.N.Y. 2004); Davis v. Maryville College, 1989 U.S. Dist. LEXIS 13982 at *4 (E.D. Mo. 1989); Prigmore v. Miracosta Community College District, 2004 Cal. App. Unpub. LEXIS 5429 at *4 (Cal.App. 2004).

⁸ National Center for Education Statistics, *Digest of Education Statistics, 2012*, Table 263, *advance release available at* <http://nces.ed.gov/programs/digest/d12/tables/dt12_263.asp>.

⁹ *See* Knight v. Alabama, 900 F. Supp. 272, 302 (N.Dist. Ala. 1995); Chang v. University of Rhode Island, 606 F. Supp. 1161, 1227 (D.R.I. 1985) ("URI is prone to hire adjunct or specialized clinical faculty in fields (e.g., nursing, dental hygiene) laden with heavy clinical components."); James Stenerson, et al., "The Role of Adjuncts in the Professoriate," *Peer Review*, p. 23, at 24 (Summer 2010); *see also* Shawn G. Kennedy, "College Changing along with the Students," *N.Y. Times*, March 29, 1981, p. LI-21 (quoting Jay J. Diamond, a dean at Nassau County Community College: "Many of our adjunct faculty members are lawyers, businessmen and engineers and we consider their expertise and experience valuable ... They allow us to stay up-to-date.").

¹⁰ *See, e.g.* NLRB v. Cooper Union, 783 F.2d 29, n. 3 at 32 (2d Cir. 1986), *cert. denied* 479 U.S. 815 (1986); Barnabas v. Board of Trustees of the University of the District of Columbia, 686 F. Supp. 2d 95, 99 (D.D.C. 2010); Vandever v. Junior College District, 708 S.W.2d 711 (Mo. App. 1986); Cheryl Halcrow & Myrna R. Olson, "Adjunct Faculty: Valued Resource or Cheap Labor?" *Focus on Colleges, Universities, and Schools* 2(1), p. 1 (2008); Robin Wilson, "Contracts Replace the Tenure Track for a Growing Number of Professors," *Chronicle of Higher Education*, June 12, 1998, p. A-12; Phyllis Bernstein, "Colleges Use More Adjuncts," *N.Y. Times*, November 17, 1985, p. LI-25).

¹¹ *See, e.g.* Tubergen v. Western Piedmont Comm. College, 2004 U.S. Dist. LEXIS 6955 at *8 (W.D. N.C. 2004); Davis v. Maryville College, 1989 U.S. Dist. LEXIS 13982 at *4 (E.D. Mo. 1989). *Pennsylvania Highlands Community College v. State Employees' Retirement System*, 2012 Pa. Commw. LEXIS 337 (Pa. Commw. 2012).

C. *Academia's Abuse of Adjunct Faculty*:

America's colleges and universities have degenerated beyond the aforementioned measures taken in the name of fiscal economy by failing to adequately provide their Adjunct faculty members with resources and support traditionally considered to be indispensable to teaching faculty, including access to office space,¹² and library and information databases.¹³ And while academics have long insisted that academic freedom for is a sine qua non of the educational process,¹⁴ the tentative nature of an Adjunct faculty member's employment all but precludes any semblance of academic freedom to more than half of the individuals who teach at America's colleges and universities.

And though the university is supposed to be a social system, the efficient operation of which imparts and propagates knowledge and wisdom,¹⁵ academia has failed to integrate its Adjunct faculty members into its social system, and many in academia have even denigrated and pejorated their Adjunct colleagues.¹⁶

¹² See, e.g. Matter of Sylvester L. Tuohy, N.Y.S. Tax App. Trib., DTA No. 818430 (February 13, 2003), available on the Internet at <<http://www.nysdta.org/Decisions/818430.dec.htm>> ; Davis v. Maryville College, 1989 U.S. Dist. LEXIS 13982 at *4 (E.D. Mo. 1989) ; John Soares, "Office Hours in the Pool Hall," *Chronicle of Higher Education*, 11 January 2013, p. D18; *Report to the [John Jay] College Comprehensive Planning Committee on Phase II Space Requirements for the Dept. of Sciences* (Spring 2000), <<http://web.archive.org/web/20040903235307/http://web.jjay.cuny.edu/~phase2/asmentrep/cpreport.htm>> (accessed July 30, 2006) ("Over 50 adjunct faculty share the 3 adjunct offices available to the [Sciences] Department making the offering of office hours unpredictable. Most adjunct faculty have no discernable work areas.").

¹³ See, e.g. Emory University School of Law, Library, "Borrowing Privileges for Adjunct Faculty at Law" <<http://library.law.emory.edu/for-visitors/non-law-faculty-adjuncts/#c21790>> ("Some resources, such as Lexis Nexis and WestLaw require individual passwords. Databases requiring individual passwords are not available to non- full time faculty."); Anthea Tillyer, *Educational Technology and "Roads Scholars"*, ACADEME (Amer. Assn. of Univ. Professors), July/August 2005, available on the Internet at <<http://www.aaup.org/publications/Academe/2005/05/ja/05jatill.htm>>; Susie Coggin, Adjunct professor resigns position, GW HATCHET, 3 May 2001, (reporting that an Adjunct at George Washington University had no computer in his office and had to drive 45 minutes to his home in order to access course administration materials); Kenneth H. Ryesky, *Information & Instructional Technology: Bringing Adjunct Faculty into the IT Fold* (monograph from Conference presentation, *Instructional/Information Technology in CUNY* (14 November 2003), ERIC Document No. [ED490813](http://www.eric.ed.gov/fulltext/ED490813), <<http://media.centerdigitaled.com/cuny-casey/Ryesky-CUNY.doc>>.

¹⁴ See, e.g. James W. Brown & James W. Thornton, Jr., *College Teaching: Perspectives and Guidelines* at 43 - 46 (McGraw-Hill, 1963).

¹⁵ See, e.g. Fred B. Millett, *Professor*, 118 - 119 (Macmillan, 1961).

¹⁶ See, e.g. Kenneth H. Ryesky, *Part Time Soldiers: Deploying Adjunct Faculty in the War against Student Plagiarism*, 2007 BYU EDUC. & L. J. 119 (2007) <<http://writingatqueens.org/files/2011/11/KHR->

D. The Adjunct Faculty Dilemma in applying I.R.C. § 4980H:

The paltry salaries of Adjunct faculty are typically reckoned based upon the credit hours taught in a given semester.¹⁷ But the time spent lecturing to the class does not constitute the totality, or even a majority, of the time during which one is engaged in teaching. Many hours are spent in preparation for the lectures, composing examinations, grading examinations and class assignments, conferring with students, and attending to other administrative matters.

It is noted that at the time this Commentary is being composed and submitted, there remains open a rulemaking proceeding by the IRS and the Treasury to implement the provisions of I.R.C. § 4980H.¹⁸ Submissions in that rulemaking proceeding have been tendered by various Adjunct faculty individuals and groups, including this Commentator;¹⁹ indeed, public comments regarding the full-time or part-time status of Adjunct faculty members were specifically solicited.²⁰ The Commentator has requested and intends to speak at the public hearing slated for 23 April 2013, and has been apprised that other Adjunct individuals and groups are also seriously considering giving oral testimony at that hearing.

Moreover, in the explanation of the Proposed Regulations, the Treasury/IRS have recognized that there are deep issues regarding Adjunct faculty, and have explicitly stated that "[i]t is not a reasonable good faith interpretation of the term seasonal employee to treat an employee of an educational organization, who works during the active portions of the academic year, as a seasonal employee."²¹

[PTSoldier-Art-1.pdf](#)>; *see also* Pollis v. New School for Social Research, 829 F. Supp. 584, 594 (S.D.N.Y. 1993) (denying preliminary injunction), *relief calculated after verdict for plaintiff* 930 F. Supp. 899 (S.D.N.Y. 1996), *verdict vacated in part and affirmed in part* 132 F.3d 115 (2d Cir. 1997) ("[I]t is insulting and degrading to be listed as an adjunct.").

¹⁷ *See, e.g.* Sobba v. Pratt Community College & Area Vocational School, 117 F. Supp. 2d 1043, 1046 (D. Kans. 2000); Delbridge v. Maricopa Community College District, 893 P.2d 55, 57 (Ariz. 1994); Sferlazza v. Commissioner of Labor, 69 A.D.3d 1184, 891 N.Y.S.2d 757, (3d Dep't 2010); *but see* Saulsberry v. St. Mary's University, 318 F.3d 862, 863 - 864 (8th Cir. 2003) (reciting that the Adjunct faculty member was compensated on a per student capitation basis).

¹⁸ Docket ID: IRS-2013-0001, REG-138006-12, RIN 1545-BL33, 78 F.R. 218 (2 January 2013).

Treasury Regulations are promulgated by the IRS and the Treasury using an interactive process, Treas. Reg. § 601.601.

¹⁹ Kenneth H. Ryesky, REG-138006-12, RIN 1545-BL33 Document ID: IRS-2013-0001-0023 (28 January 2013) <<http://www.regulations.gov/contentStreamer?objectId=09000064811d5ea2&disposition=attachment&contentType=pdf>>.

²⁰ 78 F.R. at 225.

²¹ REG-138006-12, RIN 1545-BL33, Explanation of Provisions, § II.C.2.b, at 78 F.R. 227.

All of this being so, many colleges and universities have already limited the number of classes their Adjuncts may teach, and indeed, have cut back on individual Adjuncts' hours from prior semesters, in order to avoid the penalties imposed by I.R.C. § 4980H for failing to provide health care coverage for full-time employees. This has been poignantly noted in some of the comments received in the aforementioned rulemaking proceeding.²²

Adjunct faculty are thus faced with a dilemma. If, for the purposes of determining their full-time status under I.R.C. § 4980H, they are credited with the true number of hours they actually work, then they will have their available work reduced if not eliminated. If, on the other hand, they allow academia to undercredit the work they actually do, then this will invite further abuses of Adjunct faculty by academia, as well as facilitate the colleges and universities' evasion of responsibility under the Patient Protection and Affordable Care Act.

E. Abuse of Adjunct Faculty and its Deleterious Effects upon America:

The taxation scheme of I.R.C. § 4980H exacerbates certain deleterious effects stemming from academia's policies and practices regarding its Adjunct faculty members. In addition to the unfavorable economics perpetuated upon the paychecks of the Adjuncts themselves, America as a whole is negatively impacted:

1. Noncoverage of Adjunct Faculty Members:

Congress has promulgated a national policy goal of near-universal if not universal health care coverage.²³ By limiting and cutting back on Adjunct faculty members' teaching assignments (and ergo, their paychecks) in order to avoid/evade the I.R.C. § 4980H tax, academia is impeding this Congressional goal.

2. The Impairment of the Postsecondary Education System:

It is axiomatic that America's prosperity and greatness are inextricably intertwined with the sound functioning of its educational system. Academia's failure to integrate its Adjunct faculty into its own fold impairs the sound and efficient functioning of the educational processes.²⁴

²² E.g. IRS-2013-0001-0009 Dorey Diab, Stark State College, 14 January 2013 <<http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0009>>; IRS-2013-0001-0055, Yvonne Marie Brandon, 22 February 2013 <<http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0055>>; IRS-2013-0001-0074, James Lynn Johnson, 7 March 2013 <<http://www.regulations.gov/#!documentDetail;D=IRS-2013-0001-0074>>.

²³ See, e.g. Patient Protection and Affordable Care Act, Pub. L. 111-148, § 1501(a)(2)(D), (E) & (G), 124 Stat. 119, 243, *codified at* 42 U.S.C. § 18091(2)(D), (E) & (G).

²⁴ Steve Street, Maria Maisto, Esther Merves and Gary Rhoades, Who is Professor "Staff" and How can this Person Teach so Many Classes? (Center for the Future of Higher Education, August 2012)

As noted above, Adjunct faculty are often denied basic resources such as office space and access to libraries and databases. This obviously impedes the Adjunct's ability to confer with students, and to obtain and process important information related to the teaching function.

As the Commentator has expounded upon at length elsewhere, academia's policies toward its Adjunct faculty severely impede the Adjunct's ability and motivation to detect and penalize plagiarism and other academic dishonesty.²⁵ The implications of this should be quite troubling. When the students invariably realize that the university has consigned its Adjuncts to *Untermenschen* status, such a realization facilitates the rationalization of academic dishonesty. Students who have successfully committed academic dishonesty will only find it easier to rationalize in the future, and to rationalize other forms of dishonesty as well, thereby predisposing them, as graduates in the working world, to commit such dishonest acts as bank fraud, tax fraud, insurance fraud, identity theft, and other nefarious acts which pose such severe threats to our social and financial systems.

IV. CONCLUSION:

Complaints now emanate from diverse quarters that graduates of America's postsecondary schools lack some very basic skills which should have been attained as part of the educational experience.²⁶ Whatever else may or may not need to be done, the problem cannot be adequately addressed until academia adequately integrates and supports its Adjunct faculty.

A key objective of the Internal Revenue Code has long been to foster economic growth and a high standard of living for America.²⁷ As Ricardo observed, taxation "frequently operates

<http://futureofhighered.org/wp-content/uploads/2012/08/ProfStaffFinal1.pdf>>.

²⁵ Kenneth H. Ryesky, *Part Time Soldiers: Deploying Adjunct Faculty in the War against Student Plagiarism*, 2007 BYU EDUC. & L. J. 119 (2007) <<http://writingatqueens.org/files/2011/11/KHR-PTSoldier-Art-1.pdf>>.

²⁶ E.g., Commission on the Future of Higher Education, *A Test of Leadership: Charting the Future of U.S. Higher Education*, at x (September 2006) <<http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf>>; Kevin L. Flores, et al., Deficient Critical Thinking Skills among College Graduates: Implications for Leadership, 44 Educational Philosophy & Theory 212 (March 2012); Zane K Quible, *Error Identification, Labeling, and Correction in Written Business Communication*, 46 Delta Pi Epsilon Journal 155 (Fall 2004); What do They Learn?, Washington Times, 30 November 2009, p. A-17.

²⁷ H. R. Rpt. 83-1337, at 1 - 2 (9 March 1954), (reprinted in 1954 U.S.C.C.A.N. 4017, 4025); 83rd Cong., Sen. Fin. Comm. Report on Internal Revenue Code of 1954 (1954), (reprinted in 1954 U.S.C.C.A.N. 4629, 4629). The introductory materials to the respective House and Senate documents were mostly verbatim to one another.

The Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2095 (1986), redesignated the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986. The 1986 Code was "not intended to change any substantive provision of the [1954 Code] not otherwise modified by [the Tax Reform Act of 1986]," H. Conf. Rep. No. 99-841 at II-837, reprinted at 1986 U.S.C.C.A.N. 4925.

very differently from the intention of the legislature by its indirect effects." ²⁸ The indirect effects of the I.R.C. § 4980H have already begun to inflict deleterious effects upon not only the basic objective behind the statutory section's enactment, and not only upon the basic objective behind the Internal Revenue Code as a whole, but also upon America's educational system.

As matters currently stand, America's colleges and universities can be expected to apply I.R.C. § 4980H in a manner that will continue academia's abusive policies and practices towards its Adjunct faculty, including but not limited to denying Adjuncts participation in employer-sponsored healthcare plans.

The Internal Revenue Code does have provisions which are tailored to the particular atypical situations of certain classes of employees, including but not limited to soldiers in combat zones,²⁹ military reservists,³⁰ clergypersons³¹ and state legislators.³² The atypical employment situations of Adjunct faculty members at America's colleges and universities need accommodation by the Internal Revenue Code in general, and by the tax-related provisions in the Patient Protection and Affordable Care Act in particular.

11 March 2013
Respectfully submitted,



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²⁸ David Ricardo, *The Principles of Political Economy and Taxation*, ch.. 16, p. 157 (Everyman's Library, no. 590, J. M. Dent & Sons, London, 1969).

²⁹ I.R.C. § 112.

³⁰ I.R.C. § 162(p).

³¹ I.R.C. § 107

³² I.R.C. § 162(h).