

NATIONAL RESTAURANT ASSOCIATION



Statement of the National Restaurant Association

HEARING: THE TREASURY DEPARTMENT'S FINAL EMPLOYER MANDATE AND
EMPLOYER REPORTING REQUIREMENTS REGULATIONS

BEFORE: SUBCOMMITTEE ON HEALTH
COMMITTEE ON WAYS & MEANS
U.S. HOUSE OF REPRESENTATIVES

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Statement for the record for the hearing
“The Treasury Department’s Final Employer Mandate and Employer Reporting Requirements Regulations”

Before the

**Subcommittee on Health,
Committee on Ways & Means,
U.S. House of Representatives**

By the

National Restaurant Association

April 7, 2014

Chairman Brady, Ranking Member McDermott, and members of the Subcommittee on Health of the Committee on Ways and Means. Thank you for the opportunity to submit comments for the record regarding the April 8, 2014 hearing, “The Treasury Department’s Final Employer Mandate and Employer Reporting Requirements Regulations.” We are pleased to share the views of the members of the National Restaurant Association on these regulations.

THE RESTAURANT AND FOODSERVICE INDUSTRY

The National Restaurant Association is the leading trade association for the restaurant and foodservice industry. Our mission is to help our members establish customer loyalty, build rewarding careers, and achieve financial success. The industry is comprised of 990,000 restaurant and foodservice outlets employing 13.5 million people who serve more than 130 million guests daily. Restaurants are job-creators. While small businesses comprise the majority of restaurants, the industry as a whole is the nation’s second-largest private-sector employer, employing about one in ten working Americans.¹

The unique characteristics of our workforce create compliance challenges for restaurant and foodservice operators under the health care law. It’s difficult for restaurants to determine how the law impacts them and hence what they must do to comply. Many of the determinations employers must make to figure out how the law impacts them – for example, the applicable large employer and full-time employee determinations – are much more complicated for restaurants than for other businesses that have more stable workforces with less turnover.

¹ *2014 Restaurant Industry Forecast.*

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 — more than seven out of ten eating and drinking establishments are single-unit operators. Much of our workforce could be considered “young invincibles,” as 43 percent of employees are under age 26.² Hence, high turnover is the norm. In addition, the restaurant business model 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, because it enables them to plan for the future and make decisions that benefit their employees, customers, and their communities. 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 coverage more than they have in the past?

Will our young workforce choose to pay the individual mandate tax penalty instead of accepting the employer’s offer of coverage in 2015, 2016, and beyond?

Will those under 26 years of age choose to remain on their parents insurance, rather than accepting the employer’s offer of coverage?

Will exchange coverage be less expensive than what is currently available and can operators afford to offer the coverage required by the law?

The overarching challenge restaurant and foodservice operators face in complying with the law is to first understand its complicated and interwoven requirements. By far, the definition of “full-time employee” under the law poses the greatest challenge. It does not reflect current workforce practices and could have a detrimental impact on a restaurant operator’s ability to offer flexible schedules for his or her employees.

In addition, the applicable large employer determination is too complex. It stifles smaller employers’ ability to manage their workforces, 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, the employer information reporting requirements are confusing for restaurant and foodservice operators and lack flexibility for employers with workforces like ours. Our industry has never needed to track such a massive amount of employee and dependent data, nor take on the administrative and monetary burden of putting a new system in place with 9 months time – raising great concerns for many.

² Bureau of Labor Statistics, U.S. Department of Labor.

³ *2014 Restaurant Industry Forecast*.

All of these factors combine to complicate what a restaurant and foodservice operator must consider when adapting their business to comply with the law.

THE REGULATORY PROCESS

The National Restaurant Association has actively participated in the regulatory process, from the beginning, to ensure that the implementing regulations and federal agencies’ guidance consider the implications for businesses that are not just one type or size. As co-leaders of the Employers for Flexibility in Health Care (E-Flex) coalition, the National Restaurant Association partners with other businesses and organizations with similar workforce characteristics. Together we advocate for greater flexibility and options within the implementing regulations, especially for those that employ many part-time, seasonal, or temporary employees. The E-Flex Coalition also submitted comments for the record to this hearing and the National Restaurant Association concurs with those comments.

From the beginning, we viewed the development of implementing regulations for all of the employer requirements in totality as restaurant and foodservice operators must do as they determine how to operationalize the implementing regulations in their own businesses. To that end, our comment letters reiterated the point that it was imperative that the Administration examine all of the employer provisions as a whole because the employer requirements are inextricably linked. We think of IRC § 4980H as the front half- and IRC §§ 6055 and 6056 as the back half of the process employers follow to comply. Simply put, IRC § 4980H contains the rules about offering what kind of coverage, to whom, when and how; while IRC §§ 6055 and 6056 are all about IRS data collection from employers and insurers to assist the IRS in the enforcement of the individual and employer mandates, and to administer the premium tax credits. Together these rules make up the bulk of the employer requirements under the law.

The statute and implementing regulations are complex, and it is difficult for restaurant and foodservice operators to easily determine how to comply with the law. A contributing factor to the uncertainty many feel about the law is the complexity of the rules and how difficult it is for many to determine what they must do to comply under them.

EMPLOYER SHARED RESPONSIBILITY (IRC § 4980H)

The Department of Treasury first issued a request for comments under IRC § 4980H in May 2011 with IRS Notice 2011-36. Throughout the two and a half year process, the E-Flex Coalition and the National Restaurant Association submitted ten comment letters in response to various IRS Notices, and proposed rules from the Departments of Treasury and Health and Human Services concerning details of IRC § 4980H. The Treasury Department adopted many of our ideas about how to provide flexibility for employers with workforces with variable hour and seasonal employees.

We appreciate that the Final Rule on Employer Shared Responsibility provided flexibility for employers with variable hour and seasonal workforces, like that in the restaurant and

foodservice industry. For example, early on, the Treasury Department recognized that an alternative way to determine full-time employee status was needed as a monthly determination “may cause practical difficulties for employers, employees, and the State Exchanges...[including] uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential § 4980H liability.”⁴

Thus, the optional Lookback Measurement Method was proposed and we are pleased to see it maintained in the Final Rule. The Affordability Safe Harbors for Employers are also important as employers cannot know employees’ “household income” to determine if their offered plan(s) meet the affordability standard in the law. While complex, these rules will help provide predictability for restaurant and foodservice operators to know which employees they must offer coverage to or face a penalty, and if the employee contribution they set will meet the affordability test. The rules also provide predictability especially for variable hour and seasonal employees as to when coverage would be offered and for how long.

We appreciate that the targeted transition relief provided for in the January 2, 2013, Proposed Rule on Employer Shared Responsibility was extended in the Final Rule. New procedures, provided in the Final Rule on how small employers transitioning into applicable large employer status, help smaller employers transition into the large employer requirements. The transition relief for non-calendar year plans was also included in the Final Rule and will be helpful as many in our industry want to maintain focus on customer service rather than administering benefits throughout the end of year holiday season when traffic peaks. Many have non-calendar year plans for that reason.

The Administration announced⁵ July 2, 2013, and, subsequently, on July 9th, through IRS Notice 2013-45, broader transition relief and voluntary compliance in 2014 for the Employer Reporting requirements under IRC §§ 6055 and 6056, and, hence, the Employer Shared Responsibility requirements under IRC § 4980H. Early on in the regulatory process, we recognized that employers will need a significant amount of time to make changes, communicate with employees and get systems ready to implement the law. The broader transition relief allows employers time to learn the § 4980H rules and to implement the law within their operations.

The restaurant and foodservice industry welcomed the broad transition relief as well, after asking the Administration and Congress for more time to receive, understand, and comply with the complex implementing regulations for IRC §§ 6055 and 6056. As early as October 2011, the National Restaurant Association, as part of the E-Flex coalition, submitted comments to the Administration requesting transition relief and time to implement the reporting requirements under IRC §§ 6055 and 6056, once the rules were issued.

⁴ IRS Notice 2011-36, page 13.

⁵ “Continuing to Implement the ACA in a Careful, Thoughtful Manner,” Mark Mazur, Treasury Notes Blog, July 2, 2013: <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>

Employers need the rules for these reporting requirements to set up the systems that will track data on each full-time employee and their dependents, which will then be reported to the IRS and to employees annually. While the first report was not originally required to be submitted to the IRS until January 31, 2015, six months (July-Dec 2013) was too short a time frame for employers to receive the rule, set up systems or engage vendors to develop information technology systems that would begin tracking the necessary data as of January 1, 2014. We welcome transition relief that will allow restaurant operators more time to learn the rules and implement the law.

While we are pleased overall with the flexibility provided in the Final Rule on IRC § 4980H, issues remain that cannot be addressed by regulation and must be addressed by an act of Congress. Within IRC § 4980H, these include the definition of full-time employee – defined under the law as 30 hours of service per week on average. Aligning the health care law’s definition of full-time status with current levels would help avoid any unnecessary disruptions to employee’ wage and hours, and would provide significant relief to employers.

We thank Congressman Todd Young for championing, as well as the Committee on Ways and Means and the entire U.S. House of Representatives, for passing H.R. 2575, the “Save American Workers Act.” We look forward to working in a bipartisan way with your colleagues in the Senate on this issue. In the Senate, Senators Susan Collins and Joe Donnelly have introduced S. 1188, the “Forty is Full Time Act.”

The definition of applicable large employer (ALE) is also overly complex. This annual determination is administratively burdensome and costly, especially for those employers just above or below the 50 full-time equivalent employee (FTE) threshold who must most closely monitor their status.⁶ As a step towards helping employers comply with the law, Congressman Luke Messer introduced, H.R. 2577, the “Small Business Job Protection Act,” that would change the definition of small business from under 50 FTEs to under 100 FTEs. Senator Heidi Heitkamp recently introduced a similar bill in the Senate, S. 2188, the “Small Business Stability Act.”

Restaurant and foodservice operators also seek clarity regarding the treatment of seasonal team members when determining whether the employer is an applicable large employer and associated requirements for offering coverage under IRS § 4980H. The statute and regulations now contain multiple confusing definitions of seasonal worker, the seasonal worker exemption, as well as new and ongoing seasonal employees under the optional Lookback Measurement Method. Our members need greater simplification and uniformity of the seasonal provisions under the law to better enable compliance and reduce confusion.

In addition to compliance challenges within IRC § 4980H, there remain concerns with other provisions of the law that only Congress can address. Namely, the automatic enrollment provision that requires employers with 200 or more full-time employees to enroll full-time

⁶ In 2015, employers with 50-99 FTEs may qualify for transition relief and may not be required to offer coverage or pay a penalty until 2016.

employees in coverage unless they opt-out within the first 90 days. Congressman Richard Hudson introduced a bill, H.R. 1254, the “Auto Enroll Repeal Act,” that would eliminate the duplicative and potentially financially burdensome auto-enroll requirement for employers with 200 or more full-time employees.

INFORMATION REPORTING ON HEALTH INSURANCE COVERAGE (IRC §6055) AND EMPLOYER HEALTH INSURANCE COVERAGE (IRC §6056)

The employer reporting requirements are a key area of implementation for employers – the required information reporting under IRC §§ 6055 and 6056. These employer reporting requirements are a critical link for employers in the chain of the law’s implementation. This information will be used by the IRS to enforce the employer shared responsibility and individual shared responsibility provisions, and to administer the premium tax credits. The requirements represent what could be a significant employer administrative burden and compliance cost.

Final Rules on Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans (IRC § 6056) and Information Reporting of Minimum Essential Coverage (IRC § 6055) were published in the *Federal Register* by the Internal Revenue Service and the Department of Treasury on March 10, 2014. Previously, Proposed Rules were issued on September 9, 2013, but, unlike the IRC § 4980H proposed rule that provided employers certainty of the rules when they were issued, the reporting rules provided no guidance on which employers could rely.

As a result, employers were not able to start working in advance of final rules to prepare to comply with these complex information reporting requirements. Prior to the proposed rule, the IRS’ first request for comment was issued in mid-2012 with IRS Notices 2012-32 and 2012-33. The E-Flex Coalition, the National Restaurant Association and many of our state restaurant association affiliates, submitted comments prior to that first request, as early as October 2011, with ideas on how to simplify and streamline the employer reporting requirements.

Our long-standing goal has been the creation of a streamlined reporting process that helps individuals by minimizing employees’ exposure to the recapture of advance premium tax credit overpayments at the end of the tax year by providing, upfront to the Exchanges, accurate and timely information about employer-provided health insurance -- and that helps employers by reducing unnecessary administrative burdens while facilitating simplified administration of the IRC § 4980H employer requirements. We have brought forward to the Treasury and IRS a number of policy proposals to achieve this goal.

The National Restaurant Association is disappointed that the IRS did not adopt our proposals to simplify and streamline the information reporting requirements.

Through the regulatory process, the National Restaurant Association put forward several alternatives. The two most significant structural ideas included voluntary prospective reporting and a certification process paired with targeted reporting that would benefit employers of all sizes and structures. First, prospective reporting would allow employers to voluntarily report

general information into the IRS about coverage options and to whom coverage is available so that the IRS might have the most accurate employer coverage information on file. As part of this proposal, the IRS could modify its data sharing agreement with the Centers for Medicare and Medicaid (CMS) to allow for Exchange access to verify general information about employer offers of coverage through the federal data hub. This would ensure better accuracy of the up-front advanced premium tax credit eligibility determinations and minimize recapture of advanced premium tax credits by the IRS at the end of the tax year.

Second, we proposed a certification process paired with targeted information reporting on only certain employees (i.e., exceptions-based reporting), not on the entire employee population. We envisioned a simplified method in which employers could certify that they have offered minimum essential coverage to all full-time employees and dependents, as the statute states. Targeted reporting could then be applied, in which individuals’ statements are sent only to employees for whom the employer receives notification from an Exchange that the employee received a premium tax credit. This would reduce the number of statements sent to employees, helping to reduce the employer’s administrative burden and cost. Under our proposal, this streamlined reporting option could be used by any employer and would not be limited to certain groups of employees within an employers’ workforce.

The Final Rule did provide simplified reporting methods, but limited the use of these options narrowly to employers who can satisfy certain requirements. The IRC § 6056 Final Rule lays out two methods for employer reporting – the General Reporting Method and the Simplification Methods. The General Reporting Method requires applicable large employers to tabulate and track offers of coverage by employee tax identification number, by calendar month, beginning January 1, 2015, and report this information both to the IRS and to full-time employees at the beginning of 2016 for the first time. Thirteen individual data points alone must be tabulated by calendar month. Employers’ systems are generally not set up to track information by calendar month, but by payroll period. This will only add to the administrative burden of compliance with the law for applicable large employers, especially for smaller operators. The Simplification Methods laid out in the Final Rule are limited in scope and it is not likely restaurant operators will be able to utilize these on a large scale and, instead, will be forced to use the General Reporting Method.

In addition to the complexity and volume of data required under these rules, we are also concerned about data privacy, as both reporting requirements require employers to track and report the data by tax identification number. This goes against employers’ attempts in recent years to move away from using social security numbers or tax identification numbers to identify employees within their own company systems. It also raises concerns about transmission and retention of such data.

We encourage the Subcommittee to examine ways to simplify the reporting requirements under IRC §§ 6055 and 6056 and provide flexibility for employers like restaurant and foodservice operators. The National Restaurant Association supports a bill by Senator Mark Warner as a first step in determining how the rules may be simplified. S. 2176, the “Commonsense Reporting Act,” would: (1) allow self-funded employers, insurers and others providing minimum essential coverage to report in only the name and dates of birth of

dependents, unless they are already collecting the tax identification number, (2) simplify the process for electronic delivery of the IRC §§ 6055 and 6056 statements to employees, and (3) require the Treasury Department to work with Departments of Health and Human Services and Labor to report to Congress about the barriers and steps necessary to create an employer voluntary prospective reporting system.

CONCLUSION

Thank you for holding this hearing to examine the Final Rules for the employer requirements under IRC §§ 4980H, 6055 and 6056. We appreciate the flexibility allowed for under IRC § 4980H, however, the complexity of the information reporting regulations under §§ 6055 and 6056 must be addressed. Many restaurant and foodservice operators will have to use the general reporting method, especially if they want to use one method of reporting for all of their employees. These rules are confusing and lack flexibility for employers with workforces like ours and now operators must prepare their systems to track this data beginning January 1, 2015 – less than 9 months away.

Thank you again for the opportunity to submit this written statement for the record regarding the Treasury Department’s final employer mandate and employer reporting requirements regulations. We are committed to working with Congress to find solutions to the challenges our members face as they implement the health care law.