

Congress of the United States

U.S. House of Representatives

Committee on Small Business

2361 Rayburn House Office Building

Washington, DC 20515-6315

February 1, 2013

The Honorable Timothy Geithner
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220
Submitted via www.regulations.gov

Re: Shared Responsibility for Employers Regarding Health Care Coverage; RIN 1545-BL33; 78 Fed. Reg. 218 (January 2, 2013)

Dear Secretary Geithner:

On January 2, 2013, the Internal Revenue Service (“IRS” or “the Agency”) published a proposed rule¹ (“proposed rule” or “the rule”) to implement the employer mandate provisions of the Patient Protection and Affordable Care Act² (“health care law” or “the law”).

Small business owners face a myriad of responsibilities and requirements under the law and its regulations. Simply put, compliance with the health care law could become a full-time job for them. Each year, they will be forced to make multiple decisions and calculations just to determine if one provision – the employer mandate -- applies to them.

I. Definition of “Full-Time Employee” Overly Broad and Confusing

Beginning in 2014, the health care law will require employers with at least 50 full-time or full-time equivalent employees to offer affordable health insurance that provides at least a minimum level of coverage, or pay a penalty.³ According to the law, as well as guidance provided by the IRS,⁴ a full-time employee is one who works an average of at least 30 hours per week. If a business employs over 50 full-

¹ 78 Fed. Reg. 218, available at <http://www.gpo.gov/fdsys/pkg/FR-2013-01-02/pdf/2012-31269.pdf>.

² Pub. L. No. 111-148, 124 Stat. 119 (2010).

³ Internal Revenue Code § 4980 H, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleD-chap43-sec4980H.pdf>.

⁴ INTERNAL REVENUE SERVICE, DETERMINING FULL-TIME EMPLOYEES FOR PURPOSES OF SHARED RESPONSIBILITY FOR EMPLOYERS REGARDING HEALTH COVERAGE (§ 4980H), Notice 2012-58, available at <http://www.irs.gov/pub/irs-drop/n-12-58.pdf>. (describing the safe harbor methods that employers may, but are not required to, use to determine which employees are considered full-time). As specified in the guidance document and the proposed rule, the guidance may be relied upon at least through the end of 2014.

time or full-time equivalent workers, it is considered to be “large,” and subject to the employer mandate. Many small business owners (and others) would argue that 30 hours per week is not a full-time work week. But neither the law nor the proposed rule is that simple.

For example, employers are not required to offer part-time employees who work less than 30 hours per week insurance coverage. But these part-time employees and their hours are counted toward the 50 full-time employee threshold when determining whether the employer must offer insurance to full-time employees.

Another example: if an employer with 50 or more full-time employees does not offer coverage, and at least one full-time employee receives a tax credit to purchase coverage on the health exchanges, the employer penalty is \$2,000 per full-time employee.⁵ Under the proposed rule, employers must also offer coverage to full-time employees’ dependents that are under the age of 26.⁶

And another: If the employer does offer coverage to employees and dependents, but the coverage is not deemed “affordable” or doesn’t provide at least “minimum value,” the penalty is \$3,000 per full-time employee receiving tax credits for coverage on the exchanges (but the penalty would not exceed \$2,000 per full-time employee). However, according to the proposed rule, the penalty would be waived by a safe harbor if coverage is offered to at least 95% of employees.⁷

According to a Mercer consulting study, about a quarter of the businesses they surveyed don’t offer health coverage to employees who currently work at least 30 hours per week.⁸ The study also found that retail or wholesale employers not currently offering coverage to all employees working at least 30 hours per week were more inclined to change their workforce strategy so that fewer employees meet the 50-employee threshold.⁹ In fact, economist Mark Zandi, chief economist for Moody’s Analytics, said he expects the health care law will have a “negative impact on job creation” in 2013.¹⁰

Under the proposed rule, 1530 hours of service in a calendar year would be equivalent to working 30 hours per week, or full-time status. The guidance that IRS issued in concert with the proposed rule¹¹ suggests a number of combinations of hours of service that could result in a full-time employee’s work week, even if some employees are only considered to be “part-time.” For example, 40 full-time employees employed an average of 30 or more hours per week plus 20 half-time employees employed an average of 15 hours per week are equivalent to 50 full-time employees.¹²

⁵ § 4980H (c) (2)

⁶ 78 Fed. Reg. at 231.

⁷ 78 Fed. Reg. at 232.

⁸ Mercer Consulting, *Health Care Law Poses Biggest Challenges to Companies with the Most Part-Time and Low-Paid Employees* (August 8, 2012), available at <http://www.mercer.com/press-releases/1472805>.

⁹ *Id.*

¹⁰ Paul Davidson, *Health Care Law May Mean Less Hiring in 2012*, USA TODAY (January 3, 2012), available at <http://www.usatoday.com/story/money/business/2012/12/30/health-care-law-jobs/1785641/>.

¹¹ INTERNAL REVENUE SERVICE, QUESTIONS AND ANSWERS ON EMPLOYER SHARED RESPONSIBILITY PROVISIONS UNDER THE AFFORDABLE CARE ACT, available at <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>.

¹² INTERNAL REVENUE SERVICE, QUESTIONS AND ANSWERS ON EMPLOYER SHARED RESPONSIBILITY PROVISIONS UNDER THE AFFORDABLE CARE ACT 1, available at <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>.

For hourly employees, employers must determine the actual number of hours worked using records of hours worked, minus any hours spent for vacation, holidays, illness, disability, jury duty, or leave of absence.¹³ And this process must be done annually.

II. Annual Burdens

It's no secret that small business owners have been struggling with existing taxes, regulations and mandates in a slow economy just to keep the doors open and the lights on. Now, under the law and this rule, they must take on the added and recurring burden of time-consuming calculations to see if they may be subject to the expensive employer mandate. For example, an employer must average their number of employees each year across the months in the year to see whether they meet the large employer threshold.¹⁴ As a result, one year a business may not be subject to the mandate, and the next they may be. Although at first blush an annual determination may seem to be accommodating to the small business owner, or just one simple determination, it is not. It is, in fact, an additional annual burden, and one that arrives on top of the myriad of other compliance tasks the owner undertake, since most small business owners do not have a human resources department, a compliance officer, accountant or general counsel to handle them.

The rule provides three ways to calculate hours for employees who are not paid on an hourly basis; the first, the same method as for hourly employees; the second, a days-worked equivalency, where each employee would be assigned eight hours for each day worked; and the third, a weeks-worked equivalency, where the employee is assigned 40 hours per week worked.¹⁵ Again, allowing three different methods for determining whether an employee is full-time may be considered flexibility; however, three methods of determination may mean that employers must calculate their employee count all three ways to definitively determine whether they are over the 50-employee threshold and subject to the employer mandate.

There are other considerations, too, that make these determinations difficult for small business owners. For the many employers who have workers who are on leave, on disability, or temporary, and for those who do not have professional assistance to help make these decisions, these calculations will be a confusing, time-consuming and burdensome task.

III. Definition of "Affordable Coverage" and "Minimum Value" Problematic

Under the health care law, an employer with 50 or more employees must offer health insurance that is affordable.¹⁶ An employer's coverage is considered "affordable" if the employee's contribution for self-only coverage does not exceed 9.5% of the employee's household income for that tax year.

¹³ 78 Fed. Reg. at 223.

¹⁴ INTERNAL REVENUE SERVICE, QUESTIONS AND ANSWERS ON EMPLOYER SHARED RESPONSIBILITY PROVISIONS UNDER THE AFFORDABLE CARE ACT 2, available at <http://www.irs.gov/uac/Newsroom/Questions-and-Answers-on-Employer-Shared-Responsibility-Provisions-Under-the-Affordable-Care-Act>.

¹⁵ 78 Fed. Reg. at 224.

¹⁶ Internal Revenue Code § 4980 H, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title26/pdf/USCODE-2011-title26-subtitleD-chap43-sec4980H.pdf>.

Because of privacy concerns, many small business owners hesitate to ask an employee to share the amount of his annual household income. The proposed rule does allow the employer several safe harbors. He may, for example, substitute an employee's Form W-2 wages for the employee's household income. For an employee who was not a full-time employee for the entire calendar year, the proposed rule permits an employer to adjust the Form W-2 wages by making various calculations. Once again, the law and proposed rule assume that a small business owner is aware of and equipped to make these many decisions and adjustments, when the simple truth is, he may not be. Even if he is aware of these requirements, they are burdensome and time consuming tasks.

Allowing small businesses to use the employee's Form W-2 wages does not, however, relieve or reduce the burden on an employer of providing affordable coverage or the administrative burden of complying with the law or its regulations. Furthermore, what is considered affordable for one employee may be unaffordable for another. None of the coverage options may be affordable for the employer.

To determine whether insurance coverage offers minimum value, employers will need to access a "minimum value calculator" which will be provided by the IRS or the U.S. Department of Health and Human Services ("HHS" or "the department").¹⁷ This calculator is said to be similar to the one that is currently in use by the Centers for Medicare and Medicaid Services for determining actuarial value.¹⁸ This will require the employer to enter information into several fields and reach a decision as to whether the plan offers minimum value.

IV. Small Business Owners Believe the Employer Mandate is Burdensome

Through hearing testimony and the web portal, "Open Mic," the Committee has received numerous comments from small business owners regarding the deleterious effect of the health care law generally, and the employer mandate specifically. These are the small business owners across our nation who we are counting on to create jobs and expand our economy. Yet many are not hiring or expanding due to the demands of the health care law generally and the employer mandate specifically. Here are some examples:

We are a small business in Pennsylvania, that [sic] would love to grow and has opportunity to do so, however, the uncertainty of Washington and the impending health care legislation has caused us to remain at our current level of operations.

Tammi Schaible (Souderton, PA) V-Talese Incorporated, April, 2012

Increased taxes, regulations and health care costs make it increasingly difficult to the point that there's no sense in running a business....Whenever the economy recovers and business picks up, I'll likely keep my staffing as low as possible....

Barry Lewis (Mechanicsville, MD) Lewis Engineering Associates, Inc. April, 2012

¹⁷ INTERNAL REVENUE SERVICE, DETERMINING FULL-TIME EMPLOYEES FOR PURPOSES OF SHARED RESPONSIBILITY FOR EMPLOYERS REGARDING HEALTH COVERAGE (§ 4980H), Notice 2012-58, *available at* <http://www.irs.gov/pub/irs-drop/n-12-58.pdf>.

¹⁸ CENTER FOR CONSUMER INFORMATION AND INSURANCE OVERSIGHT, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ACTUARIAL VALUE CALCULATOR, *available at* <http://cciio.cms.gov/resources/EHBBenchmark/av-calculator-methodology.pdf>.

I own a small business in health care. We are doubly burdened by decreasing revenues from Medicare reimbursement cuts in the ACA, simultaneously not daring to hire and grow because of the escalating taxes imposed by the affordable care act. My staff is pleading for raises and we have to make cuts instead; people are leaving for the first time in our 9-year history. This is the most "anti small business" administration ever.

David H. (Brewer, ME) Nurse Anesthesia of Maine, April, 2012

There is a significant opportunity to grow business and I would like to expand the business further. However, due to the uncertainties with the new health care law, questions about the Obama Administration's wanting to 'spread the wealth' via taxation and the question about sequestration (cutting funds for medical research), I have decided to allow only modest growth of the company keeping it small to avoid the ramifications of high taxes and requirements for corporate health care.

David Bagley (Poway, CA) Advanced BioMatrix, September, 2012

Another important step would be to eliminate the so-called employer mandate to require employers to offer plans with certain coverage requirements. The mandate changes the meaning of "full-time" and leaves the unelected bureaucrats to define "minimum health coverage," leaving small business owners uncertain about their future.

Matt Tynan, Tynan's VW and Tynan's Nissan, Aurora, CO

Hearing: "The Health Care Reform Law: Its Present and Future Impact on Small Businesses and Job Creation," March 12, 2012

What this warfare on the "rich" means to us is this - we cut our employees wages to try to escape the ACA rules from crushing our bottom line, we do not hire any more employees, for the same reasons, we do not expand our business because any funds we would have used to do so are going to go into our tax planning as we see some of the beneficial tax cuts and advantages expiring.

Kristina Faier (Hesperia, CA) Diversified Glass, Inc., December, 2012

[T]he effects of the new law are anti-small business growth, by inadvertently discouraging many franchisees from owning and operating multiple locations, creating a competitive disadvantage for franchisees who do own more than one or two locations, and barriers to entrepreneurs who are looking to capitalize on the franchise business model to grow their business and hire more workers. The real irony here is that in the name of expanding health care coverage, Congress and the administration are making it more difficult for workers to enter and eventually be promoted in the workforce at a time when we need job growth.

Mark Rogers, President and Chief Operating Officer of Roaring Fork Restaurants, Castle Rock, CO

Hearing: "The Health Care Reform Law: Its Present and Future Impact on Small Businesses and Job Creation," March 12, 2012

The Affordable Care Act greatly expands the number of employees who would need to be covered by our plan by defining a "full-time" employee as an employee who has averaged at least 30 hours of service per week over the course of a month. According to the "Shared Responsibility" provisions of the

Affordable Care Act, we must either provide such individuals with coverage or pay a penalty of \$2,000 per full-time employee. Prior to the Affordable Care Act, we would not have considered employees who work 30 hours per week "full-time" and consequently we would not offer them the opportunity to enroll in the plan. This provision alone increases the number of eligible individuals in our plan from 65 to around 250. If we were to continue coverage, even if our medical trend costs were to stay stable, which is likely not the case, the costs of our plan beginning in 2014 would skyrocket to around \$2,000,000. Again, the Affordable Care Act penalty for discontinuing coverage is \$2,000 per full-time employee disregarding the first 30 "full-time" employees. If the 30 hour a week definition stands, our total number of employees defined to be "full-time" for health benefits purposes would rise to roughly 250. Thus, our liability under the "Shared Responsibility" provision would equal \$440,000.

John LeEVERS, LeEVERS Supermarkets, Inc., Franktown, CO

Hearing: "The Health Care Reform Law: Its Present and Future Impact on Small Businesses and Job Creation," March 12, 2012

V. Conclusion

One of the stated goals of supporters of the health care law was to increase the number of Americans covered by health insurance. Not coincidentally, one of its effects may be fewer jobs created and reduced expansion by small firms. Studies by the Small Business Administration¹⁹ and others have found that America's small businesses bear a larger burden from regulations than large businesses.²⁰ Entrepreneurs were already frustrated and pessimistic²¹ before implementation of the health care law.

To speed our nation's economic recovery, we must encourage an environment in which small businesses can hire and expand. I encourage you to remember the concerns of small business owners and minimize their burdens as you consider these regulatory alternatives.

Sincerely,



Sam Graves
Chairman
House Committee on Small Business

¹⁹ Nicole V. Crain and W. Mark Crain, *The Impact of Regulatory Costs on Small Firms* (2010), available at [http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20\(Full\).pdf](http://www.sba.gov/sites/default/files/The%20Impact%20of%20Regulatory%20Costs%20on%20Small%20Firms%20(Full).pdf).

²⁰ *Id.* at iv.

²¹ December Report: Small-Business Owner Confidence Plunges More than Five Points; One of the Lowest Optimism Readings in Survey History, NFIB (December 2012), available at <http://www.nfib.com/research-foundation/surveys/small-business-economic-trends>.