

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

**NFIB**  
The Voice of Small Business.®

Testimony of

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before the

**Senate Small Business and Entrepreneurship Committee**

on the subject of

**The Small Business Struggle Under Obamacare**

on the date of

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Thank you Chairman Vitter, Ranking Member Shaheen, and members of the Senate Small Business & Entrepreneurship Committee for the invitation to testify before you today concerning how the Patient Protection and Affordable Care Act (ACA) has impacted small business owners and employees. My name is Kevin Kuhlman, I am a Director of Legislative Affairs at the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business advocacy association.

The ACA is the most significant federal overhaul of the individual and small group health insurance markets ever<sup>1</sup> and the most significant change to the federal tax code in more than 20 years.<sup>2</sup> As a result, the law impacts small businesses in multiple ways. Adding confusion, there are even multiple statutory definitions of small business in the ACA (table below).

ACA Provision	Small Business Size Definition	Notes
Employer Responsibilities Regarding Health Insurance Coverage		
Employer Mandate (§1513)	50 employees	100 emp. in 2015, 50 emp. in 2016
Auto-Enrollment (§1511)	200 employees	Repealed by Congress
Employer Reporting Requirements		
W-2 Reporting Requirements (§9002)	250 employees	Delayed for firms <250 W-2s until further regulations
Employer Mandate Reporting Requirements (§1514)	50 employees and self-insured employers	50 employees for 2015 tax year
Cadillac Tax (§9010)	All offering employers	Delayed by Congress until 2020
Insurance Markets		
Small Group Market (§1304(b)) & SHOP Exchange (§1311(b)(1)(B))	50 or 100 employees	Congress delegated decision to states
Full Small Business Tax Credit (§1421)	10 employees	
Partial Small Business Tax Credit (§1421)	25 employees	
Employee Paperwork Requirements		
Notice of Coverage Options (§1512)	All employers	DOL not enforcing penalties at this time
Summary of Benefits and Coverage (§2715)	All offering employers	

NFIB has closely tracked the impact of the ACA on small businesses by collecting member stories and by conducting four scientific research surveys.<sup>3</sup> The ACA did contain certain provisions intended to help small businesses, but those provisions were either too limited to be effective or were not prioritized during the implementation process. Ultimately, the costs to small businesses outweighed the benefits, and

<sup>1</sup> Mach and Fernandez, *Private Health Insurance Market Reforms in the Patient Protection and Affordable Care Act*, Congressional Research Service, February 10, 2016, <https://www.fas.org/sgp/crs/misc/R42069.pdf>.

<sup>2</sup> *Affordable Care Act: Planning Efforts for the Tax Provisions of the Patient Protection and Affordable Care Act Appear Adequate; However, the Resource Estimation Process Needs Improvement*, Treasury Inspector General for Tax Administration, June 14, 2012, <https://www.treasury.gov/tigta/auditreports/2012reports/201243064fr.pdf>.

<sup>3</sup> *Small Business's Introduction to the ACA*, NFIB Research Foundation, <http://www.nfib.com/surveys/aca-2015/>; and *PPACA: One Year Later, Small Business Owners Expect Costs to Rise*, NFIB Research Foundation, <http://www.nfib.com/surveys/healthcare-year1/>.

ACA has led to higher premiums, increased compliance burdens, and decreased flexibility. Congress deserves credit for addressing some small business concerns, but NFIB urges Congress to provide further relief for small business owners and employees.

### **Small Business Assistance Provisions**

Certain provisions within the ACA were intended to help small businesses offer health insurance to employees. A temporary, targeted small business health insurance tax credit was intended to incentivize more small businesses with fewer than 25 employees to offer group health insurance.<sup>4</sup> The IRS mailed four million postcards to small businesses advertising the credit,<sup>5</sup> and CBO originally estimated \$2 billion in tax credits annually beginning in 2010. In practice, the results were underwhelming. In 2014, 181,000 employers claimed the credit totaling \$541 million in premium relief.<sup>6</sup> The credit has too many limitations to be effective, including a size limitation, an average salary limitation, an additive structure limitation (adding average wages and number of employees together), an average state small group market cap limitation, a temporary duration, and a limited market availability. It failed to induce new employers to begin offering insurance, but instead serves as a temporary windfall for small businesses already offering benefits. The credit windfall expires for those businesses this year, meaning they will see significant premium increases.

The small business health insurance tax credit is now available exclusively through the Small Business Health Options Program (SHOP) exchange marketplace. The SHOP exchange marketplace was intended to provide more offering arrangements to small businesses with fewer than 50 employees, and require insurance companies to compete for small business customers.<sup>7</sup> Due to the technical glitches of the individual exchange marketplace (healthcare.gov), online functionality of the SHOP exchange marketplace was delayed for over a year. Innovative offering arrangements did not come to fruition, either. Employee choice may never be fully implemented,<sup>8</sup> and defined contribution plans were prohibited during the regulatory process.<sup>9</sup> Only 10,700 small businesses and 85,000 employees were enrolled in SHOP exchange marketplaces, as of July, 2015.<sup>10</sup> SHOP exchange marketplaces have failed to make a significant impact because the offerings are virtually no different than the outside small group marketplace for employers. Together, these provisions did not provide cost relief to a substantial number of small businesses.

### **Higher Costs**

Forty-one percent of small business owners purchase health insurance in the individual market and 33 percent purchase insurance through their business.<sup>11</sup> The ACA added insurance requirements and taxes to individual and small group market health insurance plans. These new costs are passed along to small business owners and employees in the form of higher health insurance premiums. Temporary reprieve was given through grandfathered and grandmothered plan extensions, but few grandfathered plans exist anymore and grandmothered plans will expire this year or next year. The biggest premium increases for

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<sup>4</sup> § 1421, Credit for Employee Health Insurance Expenses, ACA, P.L. 111-148.

<sup>5</sup> IRS, April 19, 2010, <https://www.irs.gov/pub/irs-pdf/n1397.pdf>.

<sup>6</sup> *Small Employer Health Tax Credit, Limited Use Continues due to Multiple Reasons*, Government Accountability Office, <http://www.gao.gov/assets/680/675969.pdf>.

<sup>7</sup> § 1311, Affordable Choices for Health Benefit Plans, ACA, P.L. 111-148.

<sup>8</sup> SHOP exchange enrollees can select multiple plans from within an actuarial metallic level and within an insurance company's plan offerings, but not from multiple actuarial metallic levels or any insurance company.

<sup>9</sup> Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, Final Rule, Public Inspection, HHS, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2012-06125.pdf>.

<sup>10</sup> Counihan, Update on SHOP Marketplaces for Small Businesses, The CMS Blog, July 2, 2015, <https://blog.cms.gov/2015/07/02/update-on-shop-marketplaces-for-small-businesses/>.

<sup>11</sup> *Small Business's Introduction to the ACA*, NFIB Research Foundation, <http://www.nfib.com/assets/nfib-aca-study-2015.pdf>.

small businesses occur when plans must first come into full compliance with the ACA. Insurance requirements such as community rating and a federal essential health benefits package drive up plan costs.

New taxes and fees on fully-insured health insurance products also drive up costs. Congress thankfully suspended the health insurance tax for 2017, saving small businesses and employees from an additional 1-3 percent in increased premiums,<sup>12</sup> but the tax restarts in 2018 and escalates in future years.

Insurance companies just filed initial premium requests for 2017, and early reports indicate they are requesting significant increases for individual market plans and moderate increases for small business plans. Small business owners must nervously wait as filings are reviewed and approved later this year.

### **Increased Compliance Burdens**

Inevitably, any major legislative overhaul is complex and much of implementation is delegated to the agencies. ACA implementation by the Departments of Health and Human Services (HHS), Labor (DOL), and Treasury has increased compliance and paperwork burdens for small businesses.

All businesses, regardless of size, were required to provide employees with a Notice of Coverage Options document describing the health insurance exchange marketplaces.<sup>13</sup> All offering employers must additionally provide employees with an annual Summary of Benefits and Coverage document describing the employer-sponsored insurance the company offers.<sup>14</sup>

The biggest current compliance headache is the employer mandate. Businesses with 50 or more employees – considered large by the ACA but small by the Small Business Administration (SBA) – must offer affordable and adequate health insurance coverage to employees, or pay penalties. It seems intuitive, and the provision reads only 4 pages in the statute.<sup>15</sup> But the proposed regulation spans 144 pages,<sup>16</sup> and the final regulation is 227 pages long with 50 definitions, many of which are new.<sup>17</sup>

This requirement, which was fully phased-in this year, has a significant compliance aspect. The compliance provision in the statute was 3 pages long,<sup>18</sup> the proposed regulation was 72 pages long,<sup>19</sup> the final regulation was 84 pages long,<sup>20</sup> and the IRS form instructions are 17 pages long.<sup>21</sup> Businesses must track the offers and cost of coverage to each employee monthly, provide current and former employees with a transmittal form, and provide the IRS with another form. Smaller, self-insured businesses must also comply using this method.<sup>22</sup>

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<sup>12</sup> *Drivers of 2017 Health Insurance Premium Changes*, Issue Brief, American Academy of Actuaries, May 9, 2016, <http://www.actuary.org/files/publications/IB.Drivers5.15.pdf>.

<sup>13</sup> § 1512, Employer Requirement to Inform Employees of Coverage Options, ACA, P.L. 111-148.

<sup>14</sup> § 2715, Development and Utilization of Uniform Explanation of Coverage Documents and Standardized Definitions, ACA, P.L. 111-148.

<sup>15</sup> § 1513, Shared Responsibility for Employers, ACA, P.L. 111-148.

<sup>16</sup> Shared Responsibility for Employers Regarding Health Coverage, Notice of Proposed Rulemaking, Public Inspection, Department of Treasury, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2012-31269.pdf>.

<sup>17</sup> Shared Responsibility for Employers Regarding Health Coverage, Final Regulations, Public Inspection, Department of Treasury, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-03082.pdf>.

<sup>18</sup> § 1514, Reporting of Employer Health Insurance Coverage, ACA, P.L. 111-148.

<sup>19</sup> Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Insurance, Notice of Proposed Rulemaking, Public Inspection, Department of Treasury, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2013-21791.pdf>.

<sup>20</sup> Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Insurance, Final Regulations, Public Inspection, Department of Treasury, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-05050.pdf>.

<sup>21</sup> Instructions for Forms 1094-C and 1095-C, IRS, 2015, <https://www.irs.gov/pub/irs-prior/i109495c--2015.pdf>.

<sup>22</sup> Information Reporting of Minimum Essential Coverage, Final Regulations, Public Inspection, Department of Treasury, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-05051.pdf>.

I only list all those figures in order to demonstrate that the IRS estimation of 4 hours and 12 minutes to conduct research, complete paperwork, and file forms is grossly understated. In reality, it takes much more time to comply.

Treasury also disagreed with NFIB and the SBA Office of Advocacy<sup>23</sup> that the employer mandate requirement and compliance would have a significant economic impact on a substantial number of small businesses, triggering a regulatory impact analysis. That is frustrating for small business owners.

The federal government has not met their responsibilities on this issue, either. The individual exchange marketplaces were required to notify employers when an employee receives an advanced premium tax credit (APTC).<sup>24</sup> Because the healthcare.gov backend functions are still not functional, not a single business has received a communication from CMS informing them that their employees accepted APTCs on the individual exchange marketplace,<sup>25</sup> subjecting them to potential fines. Businesses also do not know what the notification and appeals process will look like from IRS. That is perplexing to small business owners.

If you think that is burdensome, compliance with the Cadillac tax will make employer mandate compliance appear simple. According to Notices issued by Treasury,<sup>26</sup> employers will be responsible for calculating the tax, reporting the tax obligation to insurance companies and the IRS, and paying the tax obligation to the insurance companies who then remit the tax to the IRS. Thankfully, Congress delayed the Cadillac tax for two years, but NFIB encourages legislators to further rollback the tax or, at a minimum, to work toward providing compliance relief from it.

Small businesses do not commonly employ human resource professionals, so compliance responsibilities fall on the business owner. Some of these functions can be outsourced to third party administrators, benefits advisors, or payroll companies, but those services are costly.

## **Decreased Flexibility**

IRS regulations limited flexible arrangements that were a common market practice for employers and employees. Many small businesses are unable to afford the high cost of group health insurance. Instead, to assist employees with healthcare costs, small businesses directly paid for or reimbursed employees' individual market health insurance plans and qualified medical expenses. This arrangement worked for both employers and employees. NFIB estimates 16 percent of businesses reimbursed employees for insurance they purchase on their own in 2015.<sup>27</sup>

In 2013, the Internal Revenue Service (IRS) published sub-regulatory guidance that prohibited employers from further assisting employees with these employer payment plans, stating the arrangements violate the ACA's group health plan requirements.<sup>28</sup> One year later, in a frequently-asked-questions (FAQ) document, IRS attached a \$100 per employee per day penalty<sup>29</sup> for continuing the practice.<sup>30</sup> Enforcement began July 1, 2015, so this tax season will be the first time both employers and employees are filing returns at the same time, inviting increased audits and fine exposure. Penalties of this magnitude would be catastrophic for small businesses, forcing many to close their doors. And these

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<sup>23</sup> Wilkins, Letter to IRS re: Shared Responsibility for Employers Regarding Health Coverage (REG-138006-12), Small Business Administration Office of Advocacy, February 11, 2013, [https://www.sba.gov/sites/default/files/files/IRS\\_Employer\\_Mandate\\_Letter\\_2\\_11\\_2013.pdf](https://www.sba.gov/sites/default/files/files/IRS_Employer_Mandate_Letter_2_11_2013.pdf).

<sup>24</sup> § 1411, Procedures for Determining Eligibility for Exchange Participation, Premium Tax Credits and Reduced Cost-Sharing, and Individual Responsibility Exemptions, ACA, P.L. 111-148.

<sup>25</sup> Some state exchange marketplaces have notified employers that their employees received APTCs.

<sup>26</sup> Notice 2015-16, IRS, <https://www.irs.gov/pub/irs-drop/n-15-16.pdf> and Notice 2015-52, IRS, <https://www.irs.gov/pub/irs-drop/n-15-52.pdf>.

<sup>27</sup> *Small Business's Introduction to the ACA*, NFIB Research Foundation, <http://www.nfib.com/assets/nfib-aca-study-2015.pdf>.

<sup>28</sup> Notice 2013-54, IRS, <https://www.irs.gov/pub/irs-drop/n-13-54.pdf>.

<sup>29</sup> IRC Section 4980D penalty.

<sup>30</sup> Employer Health Care Arrangements, Frequently Asked Questions, IRS, <https://www.irs.gov/Affordable-Care-Act/Employer-Health-Care-Arrangements>.

businesses are trying to help their employees. Certainly, lawmakers who drafted the ACA did not intend to punish small businesses in this manner.

Fortunately, bipartisan, bicameral legislation exists to right this wrong for small businesses. NFIB thanks Senator Heitkamp for introducing *the Small Business Healthcare Relief Act* (S. 1697), along with Senator Grassley, which would provide relief from the penalties and allow the flexible practice to continue. Just yesterday, the sponsors of the House of Representatives version of the bill testified in support of the proposal. NFIB encourages Congress to consider the bill, and protect small businesses from significant harm.

## **Conclusion**

Small business owner optimism remains near historic lows.<sup>31</sup> The political climate continued to be the second most frequently cited reason for why owners think the current period is a bad time to expand. Congress can pass certain bills that would provide substantial relief for small business owners, restoring some much needed confidence in the small business economy.

Thank you again for allowing me to share NFIB concerns before the committee today. I look forward to answering any questions and working with you to help provide further relief for small businesses.

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<sup>31</sup> *Small Business Economic Trends*, NFIB Research Foundation, April 2016, <http://www.nfib.com/surveys/small-business-economic-trends/>.