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OBAMACARE'S EMPLOYER PENALTY AND ITS IMPACT ON TEMPORARY WORKERS

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH CARE, DISTRICT OF COLUMBIA, CENSUS AND THE NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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OBAMACARE'S EMPLOYER PENALTY AND ITS IMPACT ON TEMPORARY WORKERS

THURSDAY, OCTOBER 6, 2011

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HEALTH CARE, DISTRICT OF COLUMBIA, CENSUS AND THE NATIONAL ARCHIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:33 a.m. in room 2154, Rayburn House Office Building, Hon. Trey Gowdy (chairman of the subcommittee), presiding.

Present: Representatives Gowdy, Gosar, Burton, Davis, Clay, Murphy and Cummings (ex officio).

Staff present: Brian Blase, professional staff member; Molly Boyl, parliamentarian; Drew Colliatie, staff assistant; Sery E. Kim, counsel; Jaron Bourke, minority director of administration; Yvette Cravins, minority counsel; Devon Hill, minority staff assistant; and Jennifer Hoffman, minority press secretary.

Mr. GOWDY. Good morning.

This is a hearing on Obamacare's employer penalty and its impact on temporary workers. The committee will come to order. I will recognize myself for an opening statement and the distinguished gentleman from Illinois, Mr. Davis.

Two months ago, this committee heard from five business owners that the new health care law will cause them to reinvest less in their companies, reduce the number of workers on their payrolls, automate more services and move workers into part-time status to minimize compliance costs. The testimony revealed that job loss from the law might be considerably worse than the CBO predicted which was 800,000 jobs lost by the end of the decade.

Today, we will hear from professionals in the staffing and temporary worker industry that will highlight the negative impact of Obamacare on their industry and the economy as a whole. This hearing will provide a better understanding of the vital role that staffing firms and temporary workers play in our economy and will also reveal the negative effects of burdensome statutes in President Obama's healthcare law.

American staffing companies are an extremely important component of our economy. As a sector, they employ nearly 3 million workers per day and over 10 million workers annually. For many workers and businesses, staffing firms provide an on-the-job interview that often leads to permanent employment. Even workers who do not gain permanent employment from their position earn a paycheck and improve upon a skill set.

Perhaps most importantly, staffing firms promote flexibility in the labor market which is an essential feature of job creation. In fact, between June 2009 and June 2011, the staffing industry added nearly half a million jobs accounting for over 90 percent of all total non-farm job growth.

Unfortunately, this industry is threatened. The new healthcare law was bad for temporary workers and it will harm America's ability to have a more flexible labor force to better compete in the global economy.

The President's healthcare law, Obamacare, contains many reasons for this pessimism. The employer mandate provision places a tax penalty on businesses that fail to offer their full-time workers a health insurance package with terms dictated by the Department of Health and Human Services. This employer mandate places the burden of carrying out the President's vision of healthcare reform on the backs of businesses.

The law defines a full-time worker as an employee who works at least 30 hours per week with respect to any month. Because of the high administrative costs of doing calculations for each worker each month, the Department of Treasury does not think this provision is workable and is proposing a lookback period of 3 to 12 months for the purposes of calculating the employer mandate tax penalty.

The law's non-discrimination rules prohibit an employer from providing different health insurance to different classes of workers. The penalty for violating this non-discrimination rule is $100 per day per affected employee. The administration is currently writing this regulation and is seemingly oblivious that it is commonsense to compensate different classes of workers differently.

However, there is a common sense economic principle that everyone can understand. As something gets more expensive, people tend to buy less of it. With the employer mandate tax penalty, the minimum essential benefit package and the non-discrimination rules, this healthcare law has made the cost of labor more expensive. These provisions will result in fewer jobs and lower wages for many Americans and unfortunately, those most affected will be younger workers and those with fewer skills.

Many of these workers are just now starting their career paths and because of this irrational law, they will have more difficulty getting their feet in the door which will delay or prevent them from learning the skills necessary to move up the economic ladder. In reality, for many Americans, the American dream will be replaced by government dependency.

The witnesses before us today may testify about the urgent need to exempt temporary workers from the employer mandate and non-discrimination rules. They may also call for a longer look-back period. In essence, there will be more calls for Obamacare waivers. A government by waiver environment, as Richard Epstein calls it, creates uncertainty and breeds favoritism. Uncertainty translates into economic stagnation and only promulgates the distrust in our Federal Government.

Rather than issuing waivers to particular industries, the healthcare law should be repealed and common sense reforms at lower healthcare costs should be pursued. This is the only way to

combat the negative effects of the Affordable Care Act currently rippling across our economy.

With that, I will recognize the distinguished gentleman from Illinois, the ranking member of this committee, Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman.

I want to begin by thanking the witnesses for their appearance today. I appreciate the fact that you traveled quite a distance to share your concerns about the Affordable Care Act and for that, we are grateful.

We want to listen to you. Our discussions with the American people led to the Affordable Care Act. We learned there is nothing more important and precious than good health. This should not be a privilege afforded to just a few. The Patient Protection and Affordable Care Act provided a pathway to accessible health care for the masses.

In an effort to balance the needs of businesses and workers, we understand that the administration is listening too and it has opened the process for crafting the implementation of ACA. Innumerable hours have been spent communicating with stakeholders, employers and employees. Several government agencies, including the Internal Revenue Service, have solicited public comment on a range of employment issues. This has been and continues to be a fair, transparent and flexible process.

The ACA was clearly designed with temporary workers in mind. Because in America, most people have obtained health insurance through their employer, and temporary workers have been at a disadvantage. For many temporary work has meant working for minimum wage or slightly higher, by the hour with generally no access to health care. These are among the workers receiving primary care in the emergency room. These are among the workers that are forced into bankruptcy due to a tragic accident.

The ACA has provided a solution to that problem for temporary workers. The ACA is immeasurable progress, but no one here believes that it is perfection. That is why the public input is crucial in this process of developing and implementing regulations for this law. Let us not lose sight of the major achievement for temporary workers that the ACA represents.

We look forward to your testimony. Again, I thank you for your appearance.

I yield back the balance of my time.

Mr. GOWDY. I thank the gentleman from Illinois.

It is my pleasure now to introduce our witnesses. I would ask you to come up at this time. On behalf of all of us, we are delighted to have you. We appreciate your willingness to lend us your expertise. I will introduce you from my left to right, your right to left, and after the introductions are complete, you will be recognized for your 5 minute opening statement.

There may be a series or panel of lights in front of you. Those lights mean what they traditionally mean in society—a green is go; yellow is speed up and see if you can get through the stop light quickly; and red means, see if you can wind up your thought. By way of reminder, make sure you turn on your mic so we can hear you loud and clear.

Mr. Ed Lenz is senior vice president, American Staffing Association. Thank you for joining us, Mr. Lenz. John Uprichard is president/CEO, Find Great People International and a resident of the State of South Carolina, I hasten to add. Mr. Tav Gauss, president/CEO, the Action Group-Human Resources Solution. Mr. Christopher Spiro, managing director, health policy, the Center for American Progress Action Fund. Welcome to each of you.

We will now recognize Mr. Lenz for his opening remarks.

STATEMENTS OF ED LENZE, SENIOR VICE PRESIDENT, AMERICAN STAFFING ASSOCIATION; JOHN UPRICHARD, PRESIDENT/CEO, FIND GREAT PEOPLE INTERNATIONAL; TAV GAUSS, PRESIDENT/CEO, THE ACTION GROUP-HUMAN RESOURCES SOLUTION; AND CHRISTOPHER SPIRO, MANAGING DIRECTOR, HEALTH POLICY, THE CENTER FOR AMERICAN PROGRESS ACTION FUND

STATEMENT OF ED LENZ

Mr. LENZ. Thank you, Mr. Chairman. We greatly appreciate the opportunity to testify this morning. I appreciate your excellent overview of the issue that confronts the staffing industry and I do appreciate Mr. Davis' comments as well. Thank you to the other members of the subcommittee as well.

I am senior vice president for Legal and Public Affairs of the Association which represents staffing firms throughout the United States. I will try not to repeat all of the points the chairman made but I will try to touch the highlights.

Staffing firms play a vital role in the economy, as you mentioned, Mr. Chairman. We provide critical employment flexibility for employees and businesses. We provide services in every sector of the economy in a wide range of jobs. Mr. Davis noted the low income workers but I think it is also important to point out that staffing firms today provide services in health care, information technology, engineering and scientific sectors including professional and managerial services. The low income worker is certainly a part of our work force but by no means is necessarily representative of it.

We are also playing a vital role in the current economy by keeping people working. Without the temporary work option, U.S. unemployment rates would be much higher. You noted, Mr. Chairman, that almost 3 million people work on any given day but over the course of a year, 10 million go through our doors, showing the high turnover in the temporary work force.

The reason for that primarily is that most people use temporary work as a short term, stop gap on their way to permanent employment. We facilitate that. One of the things we are most concerned about the impact of this law is it would put a dampening effect on our ability to bridge people into permanent work.

Of course we are concerned about the impact of the employer tax penalties. As you mentioned, they are assessed in one of two ways. If you do offer coverage to your workers, you only pay a tax on those people getting subsidies. If you don't offer coverage, you pay the tax on all of your full-time employees.

Staffing firms are uniquely exposed to the penalties for two reasons. One is the unpredictable nature of temporary work which

means that staffing firms have no way of knowing who will be a full-time employee and therefore, won't have any way of knowing what their penalties will be or who to enroll in coverage.

The second is that they have limited health insurance options for covering their temporary workers which means they might not have a practical way to offer coverage to everybody which means they would pay penalties on all their full-time employees, not just those getting subsidies, so it is a conundrum.

The historical reason for why there is limited overage for temporary employees is simple. It stems from the fact that they are short term, high turnover workers and when given the option of health coverage, they generally refuse it. Only a tiny fraction of temporary employees accept coverage from their employer even when it is available. It is hard to get insurance companies to write that kind of coverage.

The result has been that the low cost, so-called mini-med plans have been the only practical option for most staffing firms. If they are abolished, staffing firms may not have an economical way to offer coverage, especially if the new non-discrimination rules limit their ability to provide flexible coverage for workers as they need it and to the extent they need it.

To address these issues, we need two things to happen. I should say parenthetically and without minimizing the point, we are strongly in favor of health care insurance for people and for reform in general. We think many of the aspects of this bill are sound and to be applauded but as structured, it creates enormous problems for employers that need to be addressed and we are hoping that they can be.

First, we need a sensible definition of who is a full-time employee. You mentioned the look-back rule Treasury is currently considering. We strongly support that. It ought to be a look back of at least 12 months we believe.

Second, we need to have viable health insurance options for temporary employees meaning that the non-discrimination rules have to be drafted so as to permit that. We are working with the administration, as I mentioned to do that but our concern is that the statute may not afford enough leeway for them to do what they need to do to fix the problem. Our preference would be for the employer penalties to be repealed entirely or substantially reduced or modified.

Staffing firms operate on razor thin margins and they cannot afford to put those costs through to employers. If they do, as you pointed out, the result will be fewer temporary jobs. The elimination of the penalties would resolve that problem and we hope that Congress would consider doing that.

We appreciate the opportunity to testify. We look forward to working with you in the future. Thank you.

[The prepared statement of Mr. Lenz follows:]

Introduction

The American Staffing Association represents the U.S. staffing industry. ASA member companies provide a wide range of employment and work force services and solutions, including temporary and contract staffing. Staffing firms employ approximately 2.6 million temporary and contract workers every day and about 10 million workers annually.

ASA supports health care reform to expand access to health insurance coverage and reduce health care costs. However, the Patient Protection and Affordable Care Act presents unique operational and compliance challenges for staffing firms that will increase their cost of doing business and potentially harm their ability to create jobs.

ASA and other groups are working with the administration on rules to mitigate the impact of the employer tax penalties on staffing firms and other businesses whose employees' work on a short-term, variable, and unpredictable basis.[1] But we are concerned that the Act may not afford sufficient regulatory leeway to provide adequate relief. Therefore, we urge Congress to repeal those penalties.

Positive Role of Staffing Services in the Economy

Temporary and contract staffing firms play a vital role in the U.S. economy by providing employment flexibility for employees and businesses.[2] Staffing firms recruit, screen, select, and employ workers and assign them to support or supplement the work force of their clients in various work situations such as employee absences, skill shortages, seasonal workloads, and special assignments or projects. Employees work in virtually every job category, including industrial labor, office support, health care, engineering, information technology, and various professional and managerial positions.

---

[1] ASA is a member of *Employers for Flexibility in Health Care*, a broad-based coalition representing businesses that employ large numbers of part-time, temporary, and seasonal workers.

[2] "Contract staffing" often is used to describe work performed by higher-skilled employees, especially in the engineering and information technology areas, and often involves longer-term, project-based assignments. "Temporary" is used herein to include contract staffing except where necessary to differentiate them.

Staffing firms generally are the employers of record for the workers they assign to clients and are responsible for paying their wages, withholding and remitting employment taxes (including Social Security and unemployment insurance), and providing workers' compensation coverage.

The advantages of temporary work to individuals are widely recognized by employees, businesses, economists, and policy makers. It affords flexibility, training, and supplemental income for millions of individuals and provides a bridge to permanent employment for those who are just starting out, changing jobs, or out of work.

Temporary work also benefits business. The use of temporary staff gives employers the flexibility to adjust the size of their work forces to meet business and economic exigencies and seasonal fluctuations quickly and at a predictable cost.[3] Labor market flexibility is recognized by economists as a key factor in innovation and job creation.[4]

In weak or recovering economies, temporary work plays a vital role by employing millions of people while allowing companies to gauge business and economic conditions before committing to permanent hires. As economic conditions improve, most temporary workers move into permanent jobs.

Temporary Work Reduces Unemployment

Temporary employment also serves an important role in reducing U.S. unemployment rates. In 1999, Alan Krueger, the recently appointed chairman of the president's Council of Economic Advisors, co-authored a study which concluded that the staffing industry's expertise in matching individuals and their skills to available work assignments accounted for nearly half of the decline in the U.S. unemployment rate during the period of economic expansion that ended in 2000.[5] Temporary

[3] The Conference Board, HR Executive Review: Contingent Employment (Vol. 3, No. 2, 1995); Peter F. Drucker, They're Not Employees, They're People; Harvard Business Review (2002).
[4] See testimony of Alan Greenspan, U.S. Senate Committee on Banking, Housing, and Urban Affairs (Jan. 26, 2000), S. Hrg. 106–526 at p. 21; and see Edward J. Lazear, Why the Job Market Feels So Dismal, Wall Street Journal, May 16, 2011.
[5] See Katz & Krueger, The High-Pressure U.S. Labor Market of the 1990s, Princeton University

employment continues to play an important role in mitigating unemployment in the current economy.

Unique Characteristics of Temporary Work

Temporary employment with a staffing firm is contingent on client demand and therefore is generally short-term, intermittent, highly variable, and unpredictable. Many temporary employees work on short-term projects or assignments for multiple clients, sometimes in the same pay period. Some work on multiple assignments for the same client. And because individuals can register for work with more than one staffing firm, an individual may be employed by more than one staffing firm in the same pay period.

Temporary work is a vital bridge to permanent employment. This, however, contributes to high overall employee turnover—typically over 300% annually. As described below, the inherently unpredictable and transient nature of temporary work presents major operational challenges for the staffing firm in providing health insurance coverage and other benefits.

Challenges in Providing Health Insurance to Temporary Workers

High employee turnover and the limited availability to staffing firms of health insurance products for temporary workers create major challenges for staffing firms seeking to comply with PPACA.

Because temporary work generally is a form of supplemental employment, the majority of temporary workers get health coverage from sources other than their employer. According to the U.S. Bureau of Labor Statistics, 56% of temporary workers are covered under the health policies of a parent or spouse, or are covered by Medicare or other government programs.[6]

Working Paper #416 (May 1999) at pp. 40–4.1

[6] U.S. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (2005).

The BLS data show that even for staffing firms that find it logistically feasible to offer health insurance benefits to their temporary and contract employees, only 25% of those employees opt to take the coverage. Participation is lowest (8%) among short-term temporary workers and highest (49%) among contract employees, who tend to work in higher-paid, longer-term professional, health care, and IT jobs.

A survey conducted by ASA in 2006 showed that most employees (77%) view temporary work as a good way to find a permanent job. Employees using temporary work as a bridge to a permanent job generally refuse coverage because they do not expect to work for long periods of time and want to maximize their cash income during their short tenure. This accounts for the extremely low rate of participation among short-term temporary workers.

The unpredictable nature of temporary work and low employee participation in staffing firm health plans present serious underwriting challenges for health insurance carriers. As a result, the only health plans most staffing firms have been practically able to offer are so-called "mini-med" plans. If those plans are abolished in 2014, it will be virtually impossible for staffing firms to offer temporary workers minimum essential coverage unless alternative insurance plans can be designed to meet the unique needs of those workers.

One solution to the lack of adequate health insurance coverage options for temporary workers might be to allow staffing firms to offer coverage through the state health insurance exchanges. However, since PPACA currently limits access to the exchanges to "small" employers, i.e., those with fewer than 100 employees, the great majority of staffing firms would not qualify unless Congress changes the law. [7] Moreover, even if coverage is available through an exchange, staffing firms will continue to face serious obstacles in obtaining coverage if health insurance issuers continue to apply traditional underwriting practices (e.g., minimum participation rules) in the case of temporary workers.

[7] Because temporary employees make up the vast majority of a staffing firm's work force (temporary to permanent staff ratios typically range between 10-to-1 and 20-to-1) staffing firm headcounts relative to revenue are much larger than most employers. Hence, a small staffing firm measured by revenue rarely can qualify as a small business under a headcount test.

Nondiscrimination Rules Must Allow Employers Flexibility in Health Plan Design

A serious potential obstacle to covering temporary workers, whether in the private health insurance market or through state exchanges, are the new PPACA nondiscrimination provisions. Those provisions, for the first time, prohibit insured group health plans from discriminating in favor of highly compensated individuals with respect to eligibility and benefits. Employers that violate the rules face heavy penalties.[8]

The new nondiscrimination provisions technically became effective Jan. 1, 2011 for most (non-grandfathered) health plans, but enforcement has been deferred while the administration wrestles with the complex policy issues involved. Whatever regulations are ultimately issued, it is critical that they provide appropriate "safe harbors" that give staffing firms and other employers flexibility to design plans with varying benefit and premium contribution levels to accommodate diverse groups of workers with different coverage needs—for example a staffing firm's full- time headquarters and branch staff and the temporary workers it assigns to clients.[9]

Staffing Firms Are Uniquely Exposed to Employer Tax Penalties

Because staffing firms have few practical or economic options for providing health coverage to their temporary workers, they are more exposed than most employers to tax penalties under the employer shared responsibility provisions of the Act.

Section 4980H of the Act provides that "large employers" (more than 50 full-time equivalent employees) are liable to pay an excise tax if any full-time employee is certified to receive a tax

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[8] See PPACA §10101(d), which added §2716 to the Public Health Service Act. Section 2716 provides that insured plans must satisfy the requirements of §105(h)(2) of the Internal Revenue Code under nondiscrimination rules similar to those currently applicable to self-insured plans. An insured group health plan found to be discriminatory may be subject to an excise tax of $100 per day per affected individual.

[9] For decades, staffing firms that offer self-insured health benefits and cafeteria plans have satisfied the Sec. 105(h) testing rules by covering a nondiscriminatory classification of employees—i.e., their regular, full-time staff employees—in all compensation ranges with the lower and middle ranges covered in more than nominal numbers. To ensure consistency and fairness between insured and self-insured plans, the nondiscrimination rules applicable to insured plans should allow similar flexibility.

subsidy to buy health coverage in a state exchange. Penalties are assessed in one of two ways, depending on whether an employer does or does not offer health coverage:

1. Section 4980H(a) provides that an employer that fails to offer "minimum essential health coverage" to its full-time employees (and their dependents) will pay a tax on all of its full-time employees (excluding the first 30 employees);
2. Section 4980H(b) provides that an employer that does offer coverage will pay the tax only on those full-time employees who have been certified to receive a subsidy.[10]

A key question in determining an employer's liability for tax penalties is who is a "full-time employee?"

Section 4980H(c)(4) defines full-time employee as an employee who is employed on average at least 30 hours of service per week *with respect to any month.* Given the inherent unpredictability of temporary employee work patterns and tenure, staffing firms cannot reasonably predict who should be counted as full-time in any month for purposes of the penalty assessments. The Treasury Department recognizes the problem and, in a request for public comment issued last May, has suggested ways to address it.[11]

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[10] Employees may be eligible for subsidies if their annual household income does not exceed 400% of the federal poverty level for a family of four ($89,400 under 2011 guidelines), and the employee's share of the premium under the employer's plan is either "unaffordable" (more than 9.5% of household income) or the plan does not provide "minimum value. Proposed Treasury regulations issued on Aug. 17 (76 F.R. 50931) clarify that plan affordability will be based on the employee's portion of the annual premium of a "self-only plan." Because employers have no way of knowing an employee's household income, the proposed regulations also contemplate a "safe harbor" that would allow employers to determine whether its plan is affordable based on their employee's current W-2 wages, not household income. The meaning of the "minimum value" prong of the eligibility test is unclear.

[11] Treasury Notice 2011-36; 2011-21 I.R.B. 792 (May 23, 2011). According to Treasury, month to month determinations of full-time status may cause employer "uncertainty and inability to predictably identify which employees are considered full-time and, consequently, inability to forecast or avoid potential § 4980H liability." It also creates coverage problems because, as the Notice states, "employees might move in and out of employer coverage as frequently as monthly."

Proposed "Look-Back" Rule for Determining Full-time Status

To address the problems stemming from the monthly penalty assessment language, Treasury requested comments on a "look-back/stability period safe harbor" that would give employers a way to predictably determine full-time employee status for penalty assessment purposes—as well as flexibility in determining who is eligible to enroll in their health plans.

The look-back/stability period safe harbor would allow an employer to elect a "measurement period" (the look-back period) of between three and 12 consecutive months, in which employees working full-time (130 hours per month) during the period would be treated as full-time during a subsequent "stability period" of at least six months. Employees would be deemed to be full-time during the stability period regardless of the number of hours of service during the stability period as long as he or she remained an employee.

Exception for Temporary Workers from "Offer" and "Auto-Enrollment" Requirements

In its request for comments, Treasury also asked whether the challenges in offering health coverage to temporary workers warrant an exception allowing employers to exclude such workers in determining whether an "offer of coverage" is made under §4980H(a).

ASA strongly supports such an exception.[12] Without it, a staffing firm could be assessed a penalty on all of its full-time headquarters and branch staff employees irrespective of whether they are getting subsidies and even if they are covered under the firm's group health plan. Such "double payments" would create a major disincentive to offering coverage to any workers. Of course, as previously noted, the nondiscrimination rules would have to allow such an exception since the penalties for violating those rules could exceed the penalties under §4980H.

[12] See ASA comments on Treasury Notice 2011-36 (attached hereto as Appendix A).

A corollary to any exclusion of temporary workers from the offer of coverage provisions is an exclusion from the auto-enrollment requirement.[13] Mandated automatic enrollment in employer health plans for workers who come and go with such high frequency and unpredictability, and who will mostly opt out in any event, would be virtually impossible to administer and would impose administrative and compliance costs on staffing firms with no meaningful benefit to the workers.

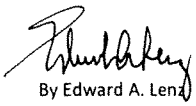
Employer Tax Penalties Should Be Repealed

While ASA strongly supports a look-back rule for determining full-time employee status under Code § 4980H, their final form and ability, in practice, to provide substantial relief is uncertain.
The employer tax penalties will increase employer costs and drive up the price of goods and services. Job losses are inevitable—hundreds of thousands by the most conservative estimates—mostly affecting low income workers.[14] The actual toll may not be known for some time, but the specter of those penalties, and the uncertainty regarding their financial impact, is a significant present damper on economic activity and job creation. Therefore, we urge Congress to repeal those penalties.

We appreciate the opportunity to testify and look forward to working with the committee and others in Congress on these complex issues.

Respectfully submitted,

AMERICAN STAFFING ASSOCIATION



By Edward A. Lenz
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[13] PPACA §1511, which added §18A of the Fair Labor Standards Act, requires employers with more than 200 full-time employees who offer enrollment in one or more health plans to automatically enroll new employees in one of the plans offered.
[14] See "A Job-Killing Law?" FactCheck.Org, http://factcheck.org/2011/01/a-job-killing-law

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Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2011-36)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

RE: Request for Comments on Shared Responsibility for Employers Regarding Health Coverage (Section 4980H)

Dear Sir or Madam:

These comments are submitted by the American Staffing Association in response to the request by the Treasury Department and the Internal Revenue Service in Notice 2011-36[1] for comments under the following provisions of the Patient Protection and Affordable Care Act (PPACA)[2]:

i. Section 1513, adding Internal Revenue Code (the "Code") § 4980H (relating to Employer Responsibility);

ii. Section 1201, adding new Public Health Service Act ("PHS Act") § 2708 (capping group health plan waiting periods at 90 days).

The American Staffing Association represents the U.S. staffing industry. ASA members provide a wide range of employment and work force services and solutions, including temporary and contract staffing, recruiting and permanent placement, outplacement, training, and human resource consulting. Staffing firms employ approximately 2.6 million temporary and contract workers every day and about 10 million workers annually.

Summary of Comments

We submit the following recommendations in response to the requests for comments contained in Notice 2011-36 (Notice):[3]

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[1] 2011-21 I.R.B. 792 (May 23, 2011).
[2] Pub. L. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152.
[3] ASA is a member of *Employers for Flexible Health Care*, a coalition representing businesses that employ large numbers of part-time, temporary, and seasonal workers. ASA supports the coalition's comments on Treasury Notice 2011-36.

(1) That employers be given the option of using the date on which an individual first performs an "hour of service" within the meaning of Labor Reg. § 2530.200b-2(a) as the commencement of the measurement period used to establish full-time status (for Code § 4980H purposes) under the "look-back/stability period" rules described in Section V of the Notice.

(2) That employees who are deemed full-time by virtue of their service during the look-back period be required to meet a minimum threshold number of hours worked during the stability period in order to retain their full-time status for Code § 4980H purposes.

(3) That applicable large employers be permitted to exclude temporary employees with respect to whom there is no offer of coverage when calculating assessable payments under Code § 4980H(a).

(4) That employers be granted, for purposes of applying the 90-day waiting period under PHS Act § 2708, discretion to treat employees hired in temporary or variable-hour categories of employment as ineligible for enrollment in the employer's group health plan, despite otherwise satisfying the plan's eligibility requirements for the employer's regular employees, unless the employee's status changes to a benefits-eligible classification.

(5) That employers be allowed an administrative grace period following the close of the look-back period to allow sufficient time to enroll their full-time employees in coverage.

Background

The PPACA's employer responsibility, auto-enrollment, and waiting period provisions present unique and significant compliance issues for the staffing industry and its employees, the vast majority of whom are "temporary" workers whose hours are variable and unpredictable.[4] The Notice recognizes the difficulties in applying a month-by-month method of calculating assessable payments under Code § 4980H and in coordinating the enforcement of those provisions with the waiting periods under PHS Act § 2708. We applaud the constructive approaches set out in the Notice for addressing many of these issues.

To assist in the further development of guidance, we offer below a detailed background on the nature of the temporary work force along with suggestions on how the approaches described in the Notice should be applied to this segment of the work force.

[4] The requirements of PHS Act § 2716 (imposing non-discrimination requirements on fully-insured group health plans) pose similar, and particularly difficult, compliance challenges, which also fall most heavily on staffing firms and other industries with large numbers of part-time, seasonal, and temporary employees. These rules, the implementation of which have been delayed by Notice 2011-1, 2011-2 I.R.B. 259 (Jan. 10, 2011), are not covered by Notice 2011-36 and are not further discussed in this comment.

Role of Temporary and Contract Staffing Services in the Economy

Temporary and contract staffing firms play a vital role in the U.S. economy by providing employment flexibility for employees and businesses.[5] Staffing firms recruit, screen, select, and employ their own employees and assign them to support or supplement the work force of their clients in various work situations such as employee absences, skill shortages, seasonal workloads, and special assignments or projects. Employees work in virtually every job category, including industrial labor, office support, health care, engineering, information technology, and various professional and managerial positions.

Staffing firms generally are the employers of record for the workers they assign to clients and are responsible for paying their wages, withholding and remitting all employment taxes (including Social Security and unemployment), and providing workers' compensation insurance.

The advantages of temporary work to individuals are widely recognized by employees, businesses, economists, and policy makers. It affords flexibility, training, and supplemental income for millions of individuals and provides a bridge to permanent employment for those who are just starting out, changing jobs, or out of work.

Temporary work also benefits business. The use of temporary staff gives employers the flexibility to adjust the size of their work forces to meet business and economic exigencies and seasonal fluctuations quickly and at a predictable cost.[6] Labor market flexibility is cited by economists as a key factor in innovation and job creation.[7]

Unique Characteristics of Temporary Work

Individuals seeking temporary work generally apply with a staffing firm by completing a formal application, either at the staffing firm office or online. Depending on the availability of work and the individual's interests, qualifications, and experience, qualified applicants may wait some time before being contacted by the staffing firm with an offer of work. Some individuals may not get an assignment, generally because suitable work is unavailable or because the individual accepts work elsewhere, often with another staffing firm.

Temporary work generally is short-term, intermittent, highly variable, and unpredictable. Many temporary employees work on short-term projects or assignments for multiple clients, often in the same pay period. Some work on multiple assignments for the same

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[5] "Contract staffing" often is used to describe work performed by higher-skilled employees, especially in the engineering and information technology areas, and often involves longer-term, project-based assignments. "Temporary" is used herein to include contract staffing, except where necessary to differentiate them.

[6] The Conference Board, HR Executive Review: Contingent Employment (Vol. 3, No. 2, 1995); Peter F. Drucker, They're Not Employees, They're People; Harvard Business Review (2002).

[7] See testimony of Alan Greenspan, U.S. Senate Committee on Banking, Housing, and Urban Affairs (Jan. 26, 2000), S. Hrg. 106–526 at p. 21; and see Edward J. Lazear, Why the Job Market Feels So Dismal, Wall Street Journal, May 16, 2011.

client. Because individuals can register for work with several staffing firms, individuals may work for more than one firm in the same pay period. Temporary work is inherently contingent on client demand and assignments can sometimes end abruptly, with little or no notice. As a result, temporary workers can experience varying periods of unemployment between assignments.

Most individuals use temporary work as a bridge to a permanent job, which contributes to high overall employee turnover in the industry—more than 277% in 2010. But some project-based assignments, generally in the health care, information technology, or engineering areas, can last a year or more.

Full-time employee status for purposes of calculating employer assessable payments under Code § 4980H is determined month-to-month. As the Notice observes (p. 13), this may cause employer "uncertainty and inability to predictably identify which employees are considered full-time and, consequently inability to forecast or avoid potential § 4980H liability." It also creates coverage problems because, as the Notice states, "employees might move in and out of employer coverage as frequently as monthly." [8]

The Notice recognizes that these difficulties are particularly acute in the case of "employees whose hours vary from month-to-month or who are employed for a limited period." Because those employees are the vast majority of a staffing firm's work force (temporary to permanent staff ratios typically range between 10-to-1 and 20-to-1), staffing firms would face a heavy burden if full-time employee status had to be determined monthly.

To address these concerns, the Notice suggests as an option an elective "look-back/stability period safe harbor method" that would provide employers with a predictable way to determine full-time employee status for the purpose of calculating their potential assessable payment liability, as well as flexibility regarding their plan eligibility and enrollment practices. We believe that a look-back rule is essential for determining full-time employee status under Code § 4980H and offer below specific suggestions as to how such an approach should work in practice to address the unique operational concerns of staffing firms.

The look-back/stability period safe harbor described in the Notice would allow an employer to elect a "measurement period" (the look-back period) of between three and 12 months, in which employees working full-time (130 hours per month) during the period would be treated as full-time during a subsequent "stability period" of at least six months. Employees would be deemed to be full-time during the stability period "regardless of the number of hours of service during the stability period as long as he or she remained an employee" (p. 15).

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[8] As discussed in detail beginning on p. 6, the generally short-term and highly transient nature of temporary work presents logistical and operational challenges that have made it practically impossible for most staffing firms to offer traditional health coverage to their temporary employees.

The example provided in the Notice as to how the safe harbor would work assumes that the employer "did not hire any new employees in calendar year 2014" and that issues would arise in the case of "new employees" who were not employed during the entire measurement period or "employees who move into full-time status during the year." Because temporary employees come and go with high frequency throughout the year, it would make sense, as the Notice suggests on p. 17, to start the first measurement period based on each individual's start date. This would avoid issues relating to employees who come and go in a calendar year.

To minimize audit issues, we agree that employers should be required to use a uniform measuring period for all temporary employees. Of course, employers could elect not to apply a look-back period to employees—e.g., a staffing firm's internal staff—classified as full-time at the outset of their employment.

Comments

(1) Employers should have the option of using the date on which an individual first performs an "hour of service" within the meaning of Labor Reg. § 2530.200b-2(a) as the commencement of the measurement period used to establish full-time status (for Code § 4980H purposes) under the "look-back/stability period" rules described in Section V of the Notice.

In determining whether and when an individual is employed for the purposes of the measurement/stability period rules, employers should have the option of using an "hours of service" test.

Some staffing firms consider temporary workers to be "hired" when the firm completes the Employment Eligibility Verification Form I-9—after the individual completes the initial application process and is deemed qualified for assignments. But most applicants are not assigned to a client right away and, therefore, should not be viewed as employed until they actually begin performing services for compensation. In such cases, "hours of service" is the appropriate test for determining when the measurement period begins.

We would propose an hours of service definition as described on p. 6 of the Notice—i.e., periods when an employee is "paid or entitled to payment" for the performance of duties for the employer or for time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military, or leave of absence." This definition tracks the definition of "Hours of Service" under Labor Reg. § 2530.200b-2(a).

(2) Employees who are deemed full-time by virtue of their service during the look-back period should be required to meet a minimum threshold number of hours worked in the stability period to retain their full-time status.

The Notice proposes that employees determined to be full-time during the look-back period should be considered full-time during the stability period (as long as they remain

an employee) "regardless of the hours worked" during the stability period. This could result in a staffing firm paying a full-month's assessable payment on an employee who worked just one hour in a month.

Because the employment relationship between a staffing firm and the individuals assigned to clients is contingent on client demand, and because individuals are completely free to accept or reject assignments, the fact that a person works full-time during a particular measurement period is not necessarily predictive of the person's future work patterns. Therefore, the regulations should prescribe a minimum level of work during the stability period as a condition of full-time status.

The San Francisco Health Care Security Ordinance provides an example of such a "maintenance of effort" requirement. Under that law, employees must work at least 8 hours per week for the employer for purposes of the employer's fee calculation.[9] A similar rule could be applied during the stability period for determining whether an individual is full-time for purposes of the assessable payment provisions of § 4980H. The example below shows how such a rule might work for a particular employee who commenced work after those provisions become effective on Jan. 1, 2014.

> **Example:** Employee X is first employed by Employer M on March 1, 2014. Employer M elects a 12-month measurement period with a corresponding 12-month stability period. At the end of the measurement period on Feb. 28, 2015, Employee X is determined to have worked full-time (at least 130 hours per month) during the period. During the ensuing 12-month stability period, the employee works 130 hours each month, except that, in the monthly period June 1 through June 30, the employee performs only 30 hours of service. Because the employee worked less than 35 hours (8 x 4.33) in the month of June, the employee would not be considered full-time and Employer M would have no assessable payment obligation with respect to the employee for that month.[10]

(3) <u>Applicable large employers should be permitted to exclude temporary employees with respect to whom there is no offer of coverage when calculating assessable payments under Code § 4980H(a)</u>.

Section 4980H(a) provides that an "applicable large employer" may be liable for a monthly assessable payment if it fails to offer "minimum essential coverage" to its full-time employees and their dependents, provided that at least one full-time employee is allowed or paid a tax subsidy. In such case, the tax would be payable on all of the employer's full-time employees (less 30).

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[9] Office of Labor Standards Enforcement Regulations Implementing the Employer Spending Requirement of the San Francisco Health Care Security Ordinance, § 3.1 (last revised 7/12 2007).

[10] Because months vary in length, employers should be permitted to use a flat monthly hours test rather than having to make different average weekly hours calculations for each month. Most employer payroll systems are not set up to make such calculations.

The Notice states (p. 18) that the regulations will likely clarify that "an employer offering coverage to all, or substantially all, of its employees would not be subject to the § 4980H(a) assessable payment provisions." It further asks whether the challenges in offering health coverage to temporary workers warrant an exception from those provisions, and how the 90-day waiting period would interact with such an exception.

For the reasons set forth below, we recommend an exception to the assessable payment provisions of Code § 4980H(a) that would allow employers to not offer health coverage to temporary employees.

Providing traditional health insurance to temporary workers has been a major challenge for most staffing firms due to high employee turnover and the limited health insurance products available for those workers. Moreover, there may be few, if any, practical health insurance options available to employers in 2014 that will enable them to offer coverage to temporary workers. Since there is no evidence that Congress intended to penalize employers that have no practical way to offer health coverage to certain segments of their work force, an exception allowing employers to not offer health coverage to temporary employees would be consistent with the statute.

Temporary work is most often used as a form of supplemental employment. As a consequence, the majority of temporary employees get health coverage from sources other than their employer. According to the U.S. Bureau of Labor Statistics, 56% of those employees are covered under the health policies of parents or spouses, or are covered by Medicare or other government programs.[11] The BLS data show that even for staffing firms that find it logistically feasible to offer health insurance benefits to their temporary and contract employees, only 25% of those employees opt to take the coverage. Participation is lowest (8%) among short-term temporary employees and highest (49%) among contract employees, who tend to work in higher-paid, longer-term professional, health care, and IT jobs.

An employee survey conducted by ASA in 2006 showed that most employees (77%) view temporary work as a good way to find a permanent job. Employees using temporary work as a bridge to a permanent job generally refuse coverage because they do not expect to work for long periods of time and want to maximize their cash income during their short tenure. This accounts for the extremely low rate of participation among short-term temporary employees.

The transient and unpredictable nature of temporary work and the low rates of employee participation present serious underwriting challenges for health insurance carriers. As a result, the only health coverage most staffing firms have been practically able to offer are so-called "mini-med" plans that provide limited coverage. If those plans are abolished in 2014, it will be virtually impossible for staffing firms to offer temporary employees minimum essential coverage unless alternative insurance plans can be

[11] U.S. Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (2005).

designed—in a manner consistent with applicable non-discrimination rules—to meet the needs of those employees.[12]

An exception allowing employers to not offer health coverage to temporary employees for the purposes of Code § 4980H(a) would mean that a staffing firm could satisfy the requirements of Code § 4980H(b) by offering minimum essential coverage only to those employees whom the firm classifies as its regular, full-time employees—for example its headquarters and branch office staff. In such case, a staffing firm would be potentially liable for assessable payments under Code § 4980H(b) only with respect to full-time employees (including temporary employees determined to be full-time under a look-back rule) who are allowed or paid a subsidy.[13]

It bears repeating that, for such an exception to be meaningful, it would be critical to ensure that such a benefits structure is permissible under applicable nondiscrimination rules. This is particularly important in the case of the new insured plan nondiscrimination rules, since the penalties for violating those rules could exceed the penalties under Code § 4980H.

(4) For purposes of applying the 90-day waiting period under PHS Act § 2708, employers should be granted discretion to treat employees hired in temporary or variable-hour categories of employment, as ineligible for enrollment in the employer's group health plan, despite otherwise satisfying the plan's eligibility requirements for the employer's regular employees, unless the employee's status changes to a benefits-eligible classification.

The Notice (p. 21) asks whether it would be appropriate to allow employers to consider "employees hired as seasonal workers or into certain other temporary or variable-hour categories of employment" as ineligible for enrollment in the employer's group health plan even if they satisfy the plan's eligibility requirements for the employer's regular employees. The Notice points to existing Treasury, DOL, and HHS regulations that leave such eligibility determinations to employers.

In our view, the regulations cited allow employers to treat temporary workers as ineligible for coverage and therefore an employer could determine, as the Notice suggests, that the maximum 90-day waiting period allowed under the PPACA would not

[12] One approach that might obviate the need for an exception might be to allow staffing firms to offer their temporary employees coverage through the state exchanges, provided, of course, that such an offer would be considered an offer of minimum essential coverage under § 4980H(b). However, since the law expressly limits access to the exchanges to employers with fewer than 100 employees, the majority of staffing firms would not qualify unless the law is changed.

[13] Without an exception under § 4980H(a) for temporary employees, a staffing firm could be assessed a penalty on all of its full-time headquarters and branch staff employees irrespective of whether those employees are getting subsidies and even if they are enrolled in the firm's group health plan. Such "double payments" would create a significant disincentive to offering coverage to any employees.

come into play unless the employee's status "changes to one that is eligible to enroll in the plan." This is consistent with the exception, previously discussed, that would allow employers not to offer coverage to temporary workers for purposes of the assessable payment provisions of Code §4980H(a).

(5) Employers should be allowed an administrative grace period following the close of the look-back period to allow sufficient time to enroll their full-time employees in coverage.

Despite the challenges in covering temporary workers, some staffing firms, depending on the demographics of their individual work forces, may find it logistically feasible to offer coverage to their temporary workers who are determined to be full-time during the look-back period. In such cases, the employer should have the option, described on p. 16 of the Notice, of taking an "administrative interval" (at least one month) to perform the look-back calculation, notify employees of their eligibility, and enroll them in coverage.

Finally, we agree with the suggestion that firms using a measurement period of less than one year be allowed to use different stability periods to account for employees who may become full-time at different points in the employer's plan year.

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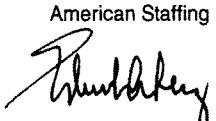
We appreciate the opportunity to comment on the topics raised by the Notice, and we look forward to working with you on these important issues.

Respectfully submitted,

American Staffing Association



By Edward A. Lenz
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Mr. GOWDY. Thank you, Mr. Lenz.
Mr. Uprichard.

STATEMENT OF JOHN UPRICHARD

Mr. UPRICHARD. Mr. Chairman, and members of the committee, thank you for the opportunity to be here today to discuss the impact of health care reform on the staffing industry and my company specifically.

My name is John Uprichard and I am the president and CEO of Find Great People. We are a temporary staffing and executive search firm headquartered in Greenville, SC with offices throughout the Carolinas. We have actually been in business or 30 years and have provided job opportunities and stability to thousands of people throughout the Carolinas as well as nationwide. We work very hard to take good care of our employees and as a result, we have been recognized as Best Place to Work in South Carolina for 3 years in a row.

In order to help clarify the ramifications of health care reform on my organization, I would like to give you some background on my company. We currently have 50 internal employees with an average salary of $64,000 a year and an average tenure of 5 years. Our internal payroll for 2010 was $2.9 million. Our temporary payroll was $7.4 million.

We provide 100 percent of our internal employees health insurance and long term disability insurance premiums. We also give them access to our 401(k) retirement savings plan and in addition, they have generous time off as well. We believe our internal employees are vital to the success of our organization and we are very committed to their individual financial success and stability.

Moving to the folks who work with us on a temporary basis, we also recognize the need to provide fair, competitive wages and benefits to them. We currently have 400 people working for us on a temporary basis at one time. The average wage is $14.28, well above the national minimum wage.

We provide these temporary employees with access to mini-med coverage that is not dependent on their temporary work schedule because we know their hours will fluctuate and we want them to have consistent access to medical care. In addition, they have access to our 401(k) program.

The average assignment length for one of our temporary employees is 5 months. In most cases, the temporary assignments serve as a bridge to a full-time job opportunity either with one of our clients or a different employer of their choice. Those full-time job opportunities are usually dependent upon their performance with the opportunity given by one of our customers.

As we began to study the impact of health care reform on our business, we quickly recognized there were some very significant and unintended consequences. First is cost. Based upon historical volumes, our monthly health care costs would increase by $62,000 to $76,000 per month. That is a mathematical problem for us.

In addition, the administrative cost to comply with the regulatory and compliance aspects would be over $40,000 annually. Offering coverage to temporary employees will be difficult because their hours fluctuate and they are moving in and out of coverage

constantly. Also, it is essential to note that we do not control the hours. Those are controlled by the clients to whom we provide the service.

Ultimately, health care reform legislation imposes large employer costs in infrastructure on staffing firms like FGP because we cannot qualify as a small business. We technically have 400 employees but only 50 are regular, full-time staff.

You might ask why can't we pass on this cost to our customers? This is a question we have studied the feasibility of. We do not believe it is a viable solution based upon our recent experience with increased cost from our State unemployment taxes. In 2011 in the State of South Carolina, we had a 300 percent increase in our State unemployment taxes. We had to have this conversation with our customers and we received significant pushback. Our volume started to drop as a result of these conversations.

Once we take into account the increased cost from health care reform and unemployment taxes, we really hit a ceiling on price where the client actually looks at the cost benefit analysis and says it doesn't make sense and it is an affordability issue. As a result, jobs are going to be impacted. Unfortunately, those jobs will be impacted within our own organization for the full-time and temporary folks that work with us. This could result in hundreds of jobs per year. That is what keeps me up at night, that is difficult.

The people who have helped us build this company, especially the 50 employees that are with us internally who have been with us several years, if we are unable to move forward, we have to make a business decision. We will not close as a company but we will more than likely get out of the temporary staffing business which means we will have to down size those employees who have worked with us for many years.

I appreciate the opportunity to come before the committee today. I would ask that the committee strongly support the look-back rule the Treasury Department is now considering.

[The prepared statement of Mr. Uprichard follows:]

Mr. Chairman and members of the committee, thank you for the opportunity to be here today and discuss the impact of healthcare reform on the staffing industry and my organization specifically. My name is John Uprichard and I am the president & CEO of Find Great People, Intl. (FGP), a temporary staffing and executive search firm headquartered in Greenville, South Carolina with offices throughout the Carolinas. We have been in business for nearly 30 years and have provided job opportunities and stability to thousands of people throughout the Carolinas and nation-wide. We work hard to take good care of our employees and as a result, we are fortunate to have been recognized as a Best Place to Work in South Carolina three years in a row.

In order to help clarify the ramifications of healthcare reform on FGP, let me give you some specifics on our organization. We currently have 50 internal employees with an average salary of $64,000 and an average tenure of five years. Our internal payroll for 2010 was $2.9 million and our temporary payroll was $7.4 million.

FGP provides for 100% of internal employees' health and LTD insurance premiums. A 401K retirement savings plan is available to all employees. In addition, all employees begin their career with FGP with a generous time off policy of 3 weeks of paid time off and 7 paid company holidays. We believe that our internal employees are vital to our success as an organization and in turn, we are committed to their individual financial success and stability.

Moving to those employees who are with us on a temporary basis, we recognize the need to provide fair and competitive wages and benefits to them. We currently have 375-400 people working for us on a temporary basis at any one time. The average wage is $14.28/hour. We provide these temporary employees with access to a mini-med coverage that is **not** dependent on their temporary work schedule because we realize that their schedule may fluctuate on a weekly basis and we want them to have consistent access to medical care. In addition, temporary employees have access to FGP's 401K program. The average assignment length for one of FGP's temporary employees is 5 months. In most cases, the temporary assignments serve as a bridge to a full-time career, either with one of FGP's clients or at a different employer of their choice.

As we began to study the impact of healthcare reform on our business, we quickly recognized that there were some very significant and probably unintended consequences. First and foremost, the legislation will result in **insurmountable increased cost to FGP** due to the temporary staffing model. **Based upon our historical volumes, our monthly healthcare costs would increase by $62,000 to $76,000 per month**. In addition, the administrative

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costs to comply with the regulatory and compliance aspect of the legislation would be over $40,000 annually. **Offering coverage to temporary employees will be virtually impossible because their hours fluctuate and they would be moving in and out of coverage constantly.** It is essential to note that FGP does not control these hours. It is based on what the client and temporary employee decide outside of FGP. Since the legislation only requires that full-time employees receive coverage, a look-back rule is essential to ensure that we only have to offer coverage to truly full-time employees.

Ultimately, the healthcare reform legislation imposes large employer costs and infrastructure on staffing firms because few can qualify as a small business. FGP technically has 400 employees—but only 50 are regular-full time staff. Implementing this legislation is ultimately penalizing the service we offer our clients.

One might ask why temporary staffing agencies cannot pass the cost on to the customer. This is a question that we have asked and analyzed ourselves as well, but we do not believe it is a viable solution based upon our recent experience with increased cost from state unemployment taxes. In 2011, we recently experienced a more than 300% increase in our state unemployment taxes with subsequent increases pending. These increases are once again due to the nature of the temporary staffing model, despite the fact that our internal tenure is very stable.

Once FGP takes into account the increased costs from healthcare reform and unemployment taxes, we approach **a ceiling on price increases—a tipping point.** Our clients will do a cost-benefit analysis and make the determination that despite the benefits of temporary staffing, it is no longer a cost-effective method to hire people or utilize temporary workers on a project basis. As a result, **jobs will be impacted within our organization, both for our full-time and temporary staff. This could result in hundreds of jobs per year going away in the South Carolina economy.** While we will not close our doors, 78% of our revenue is from our temporary staffing business. Healthcare reform will force us to change the strategic direction of our company and eliminate that part of our business because the risk does not justify the return. People that have helped us build a great company and who currently earn above-market salaries will be forced to look for new jobs in a different industry.

In closing, we would strongly encourage that as the Treasury Department writes the regulations on healthcare reform, they support the following recommendations:

- **Do not mandate that staffing agencies provide health insurance for temporary employees.**
- A twelve-month "look back" rule supported by the American Staffing Association is essential.
- Revise definition of "large" employer from 50 to 500.
- Increase full time definition for temporary staffing from 30 to 37.5 hours per week.
- Regulations need to allow differentiation between temporary & internal employees.
- Nondiscrimination rules applicable to insured plans should be consistent with existing self-insured regulations, and allow two-tier plans as traditionally offered in temporary staffing.
- Provide a permanent exception allowing "mini-med" plans as acceptable second tier health insurance plans qualified as providing "minimum value" for temporary staffing firms and other similar industries.
- To allow predictability of penalties, replace "household income" test with an employee wage based "safe harbor" to determine "affordable" coverage (we understand that Treasury is considering such a rule and we support that).

If Treasury determines that it does not have authority to do all of the above in regulations, Congress should amend the law.

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Mr. GOWDY. Thank you, Mr. Uprichard.
Mr. Gauss.

STATEMENT OF TAV GAUSS

Mr. GAUSS. Mr. Chairman, distinguished members of the committee, thank you for having me here today.

I am Tav Gauss. I am from eastern North Carolina. I started my business 30 years ago after going to the University of North Carolina, the real Carolina, and then Wake Forest University and then being a commercial banker.

So as not to repeat what you have already heard, it is in my testimony but let me get down to some brass tacks. I have 16 permanent people in my company whose payroll is over $1 million a year. We are in eastern North Carolina. I think two of my folks have a college degree; the rest are high school degreed or associates. The average tenure with the company during the 30 years is 18 years.

These people are benefited with health insurance for which they pay a premium, a significantly large premium. We have a huge deductible. We have a 401(k) plan that is open to our permanent staff as well as our field staff. The field staff, to my knowledge, there have been fewer than 50 people who have wanted to contribute to that in the 30 years we have been in business. We match the 5 percent match or whatever and we do that for field staff as well. We have a lot of vacation time for our permanent staff and we have paid vacation for our temporary staff who have been with us over 1,500 hours and it continues on as long as they live with us at certain levels.

We have 1,700 field staff this year. Mini-med plans have been offered to them since 1992. I cannot tell you the numbers that have come across our desk and the ones that would work and wouldn't work, and so forth. To my knowledge, we have never had a temporary staffer take their portion of the mini-med plan. I can say that with 99 percent positivity. They would rather have the money.

My temporary staff makes an average of $9.25 an hour which is significantly above the prevailing minimum wage in North Carolina and the Federal Government. We live in, I wouldn't say a rural part of the State, but we are not in the metropolitan part of the State. If you take $9.25 an hour, that annualizes at a little less than $20,000 a year. They would much rather have that extra $30 or $40 a week, or whatever, than to pay for medical care. Some are young and think they are bullet proof and think they don't need it, and some would rather have the money.

If the health care plan goes in as it is written now, my premiums for health insurance will go from $80,000 a year to $711,000 a year. I would close my doors. All of my people would be out of work, temporary and permanent staff. If I was able to pass some of that cost onto my temporary staff, say 20 percent, I am still out of business because it goes from $80,000 to $500,000.

In an effort to skip ahead if I may say this, I know this bill was passed with good intentions by everybody who signed off on it. There is no doubt in my mind we need reform in health care. When I look at my personal situation with the $5,000 and $10,000 deductible, that is pretty high, but when you take the health care plan and put it on top of the increases in Federal unemployment

taxes, State unemployment taxes, regulatory more and more rules and laws and fees being charged and fines being raised and charged, this is a piling on.

I ask that you please put it off for a while until we get the loose ends tied up. We cannot figure out how to stay in business the way this plan is written now. By the way, the Treasury's idea on look back is not a bad idea, but it needs to be 12 months. Three months is way too short a period of time for a lot of obvious reasons that I won't go into here.

Thank you for your time and thank you for listening. I appreciate it.

[The prepared statement of Mr. Gauss follows:]

October 6, 2011

Mr. Chairman, distinguished members of the committee, thank you for giving us the opportunity to come before you today to discuss the effects that the new health care law will have on my company and our industry.

My name is Tav Gauss. I am from Wilson North Carolina. After graduating from the University of North Carolina in 1977 and The Babcock Graduate School of Management at Wake Forest University in 1979, I became a commercial banker with a national bank. After three years in that line of work I decided to start my own business. I started, what is now The Action Group, Human Resources Solutions on January 2, 1982.

I have been studying the potential effects the new health care law will have on my business and my employees, both permanent and the field staff. If the law takes effect on January 1, 2014 as it appears to be written, I will have to close my doors. My permanent staff of 16 people makes about $1,000,000.00 collectively and I am not included in that figure. They are fully benefitted with a 401 k plan; a generous paid time off policy (they tell me it is so generous they cannot use all of the days) and we have a health insurance plan. (HSA). My share of their premium is about $80,000.00 per year. My premium under the new health care plan would be $711,000 based on my year to date 2011 numbers. My permanent staff would become unemployed.

Our field staff also has the benefits of our 401k plan plus longevity bonuses. We make matching contributions to what they pay in, just like our permanent staff. In almost 30 years less than 50 of the field staff have chosen to participate. They do not want to make a contribution for a myriad of reasons.

Our field staff, which should number about 1700 people by year end, has had the benefit of mini med health care plans since about 1992. To my knowledge, no one has participated in these plans. They would rather have the money. They need the money. My average pay rate exceeds $9.25 per hour. That is a great wage for high school graduates in Eastern North Carolina who are unskilled or semi-skilled. We assemble windshield wiper motors for a Japanese company; commercial grade transformers for a Swedish company; oven doors for a German company; ball bearings for American automobile companies plus hundreds of different other jobs in Eastern North Carolina. My turnover ratio is pretty good compared to industry standards. Our field staff turns over every 9 weeks or after about 360 hours.

Maybe I could pass on 20% to these folks for $33.00 per month. That means my share of the premium would be $569,000 instead of $711,000. 5 times what I pay now. I still close my doors. My field staff becomes unemployed.

Companies in the United States use temporary staffing to supplement their current work force; for seasonal peaks, short term projects, or uncertainty in the economy. Their ability to use staff only during peak times protects the jobs of their permanent employees. The system has two major benefits to temporary staff. First, it gives the temporary employee a foot in the door for a permanent job. It is like a working interview. Second, Our clients can use the temporary employees when they need them then we can place them somewhere else that is in need of people for their projects or long term employment. The temporary employees are statutorily our employees. We have to keep them working or find permanent jobs for them or we have to pay for their unemployment benefits, like we have had to do since October 2008.

If our client companies have to pay more for the health insurance for the temporary employees it really threatens their global competitiveness and flexibility to adapt to changing market conditions. No matter what I could pass on to them, if anything, it will simply raise the price of doing business with manufacturers in the United States. The last thing we need is another impediment to the recovery of our economy.

The health care bill also is, to use the old football term, piling on. Every business in the United States and the world has been effected by the great recession. Now businesses in the United States face increases in their employment taxes. FUTA or federal unemployment tax has been calculated at .008 percent of the first $7,000.00 in wages for everyone they employee. That has been the rate for as long as I can remember. Now many states have the rate calculated at .011 percent of the first $7,000.00 and there are approximately 8 states that will have rates of .014 in 2012. SUTA or state unemployment taxes have severely increased in almost every state. All states and all companies are different but my SUTA rates increased from 2% of the first $19,700.00 in wages to 3.24% in2011 and will be somewhere north of that for 2012.

There have been so many new regulations and new regulators since January 2009. Fines, penalties, and fees have all increased. Businesses do not know what is going to come next with those types of issues, much less mandatory health care. We are in the longest growth cycle we have ever had after a recession. Businesses are fearful of making permanent decisions about increasing staff.

There is no doubt that our health care system needs some major work. (see my premiums above). I am sure the new plan was thought up with good intentions. However, it cannot work mathematically and practically as it has been presented to those who bear the burden of paying for it.

Thank you for having us here today.

Gustav Edward Gauss III

Mr. GOWDY. Thank you, Mr. Gauss.
Mr. Spiro.

STATEMENT OF CHRISTOPHER SPIRO

Mr. SPIRO. Mr. Chairman, Ranking Member Davis, thank you for the opportunity to testify today.

Starting in 2014, all Americans will have access to affordable health insurance. Carl Camden, president and CEO of Kelly Services, one of the largest employers of temporary workers, explains why this is so important: "The United States remains the only advanced nation in which individuals lack access to affordable group health coverage outside the employment setting. As a result, health insurance related job lock afflicts millions which is bad for entrepreneurship, worse for economic dynamism and frustrating for an industry that relies on a free agent work force. Simply put, nontraditional workers are treated badly by the current model. Any policy choice that enhances the availability and mobility of talent is a good thing for the staffing industry and the economy as a whole."

As Mr. Camden observes, access to affordable health insurance will benefit not only workers, but also their employers. Preventive care will reduce absenteeism and increase and the productivity of workers. Health care costs for the uninsured will no longer be shifted onto employers through higher premiums and for staffing firms, millions of newly insured Americans will create demand for health care workers of all types.

In addition to these economic benefits, many temporary workers who work long, hard hours but may be struggling to pay the bills and cannot afford health insurance through no fault of their own, will not lay awake at night out of fear that a family member will become sick, sending the family over the edge into bankruptcy.

If you agree with Mr. Camden that access to affordable health insurance is a good thing, as I do, then employer responsibility is an essential piece of the puzzle. It provides an incentive for employers that currently offer coverage to maintain that coverage. Otherwise, many employers might drop coverage and allow taxpayers to pick up the tab, which would increase the Federal deficit by billions of dollars. In fact, the non-partisan Congressional Budget Office concluded that the absence of employer responsibility would significantly erode employer-based coverage.

Simple financial comparisons of potential penalty liabilities to the cost of coverage may not drive employer decisions. Many employers offer coverage because their employees expect them to do so and they want to remain competitive in the labor market. Since individuals will have a responsibility to maintain coverage, there will be much more demand for their employers to offer it.

Finally, the cost of coverage will still be excluded from income and payroll taxes. In fact, in Massachusetts, enrollment in employer-based coverage actually increased even during the recession. Therefore, it is not surprising CBO concluded that the Affordable Care Act would have very little effect on employer-based coverage.

Congress carefully targeted employer responsibility under the Affordable Care Act and the Treasury Department is carefully examining how to implement the law so that it is practical and flexible

for employers. I want to highlight several aspects of the statute and its implementation that demonstrate this careful approach.

First, and most importantly, employer responsibility only applies to large employers with at least 50 full-time employees. As a result, the vast majority of employers will be exempt from employer responsibility altogether. Second, small employers do not become large employers just because they hire seasonal workers. Third, since penalties apply with respect to full-time employees, the definition of full-time employee is important. Treasury has proposed a safe harbor in which an employer can generally look back up to 12 months to determine whether employees averaged at least 30 hours per week.

Employers for Flexibility in Health Care, a coalition of employers that rely on large numbers of temporary workers, strongly supports Treasury's proposal, commenting that it "has the potential to provide flexibility employers need to preserve flexible work arrangements, provide a stable source of coverage and allow for the practical administration of benefits."

In addition to proposing the safe harbor, Treasury has requested comments on alternative methods. Of course any method must not undermine the purpose of employer responsibility that I discussed earlier to prevent erosion of employer-based coverage which would be disruptive and increase cost to taxpayers.

In closing, employers of temporary workers need not fear employer responsibility. It is an essential part of health reform which will expand access to affordable health insurance to millions of Americans. Mr. Camden of Kelly Services writes, "Someone suggested that higher penalties imposed on staffing firms will narrow the cost advantage of using temporary employees and thus, weaken demand for our services. I think that concern is misplaced." Rather, Mr. Camden sees significant opportunity that the Affordable Care Act will "accelerate the growth of non-traditional workers and remove longstanding barriers to employment options."

Mr. Chairman, this concludes my testimony and I am happy to answer any questions you may have.

[The prepared statement of Spiro follows:]

Mr. Chairman, Ranking Member Davis, and members of the Committee—thank you for the opportunity to testify today about employer responsibility under the Affordable Care Act and the Act's impact on temporary workers and their employers. My name is Topher Spiro, and I am the Managing Director of Health Policy at the Center for American Progress Action Fund, which promotes effective implementation of the Affordable Care Act.

Today's hearing focuses on an important issue, as temporary staffing firms employ about 10 million workers each year. My testimony is organized into three parts. First, I will describe the broad benefits to temporary workers and their employers under the Affordable Care Act. Then, I will explain the purpose and design of employer responsibility under the Affordable Care Act. My testimony will close with observations of how employer responsibility is practical and flexible for temporary workers and their employers.

Benefits to Temporary Workers and Their Employers

Starting in 2014, all Americans will have access to affordable health insurance. As Carl T. Camden, President and CEO of Kelly Services, Inc. – one of the largest employers of temporary workers – has observed, the Affordable Care Act "will create long-overdue opportunity for non-traditional workers to access affordable health care." Mr. Camden explains how the Affordable Care Act benefits temporary workers and their employers better than I could, so I will quote him at length:

> The United States remains the only advanced nation in which individuals lack access to affordable group health coverage outside the employment setting. As a result, health insurance-related 'job lock' afflicts millions, which is bad for entrepreneurship, worse for economic dynamism, and frustrating for an industry

> that relies on a free-agent workforce. Simply put, non-traditional workers are treated badly by the current model...Any policy choice that enhances the availability and mobility of talent is a good thing for the staffing industry and the economy as a whole.

As Mr. Camden observes, access to affordable health insurance will benefit not only workers, but also their employers. Preventive care will reduce absenteeism and increase the productivity of workers. Health care costs for the uninsured will no longer be shifted onto employers that do offer coverage through higher premiums. And for staffing firms, millions of newly insured Americans seeking health care will create demand for health care workers.

In addition to these economic benefits, on a more human level, many temporary workers – who work long, hard hours but may be struggling to pay the bills and cannot afford health insurance, through no fault of their own – will not lay awake at night out of fear that a family member will suddenly become sick, sending the family over the edge into bankruptcy.

Why Employer Responsibility?

If you agree with Mr. Camden that access to affordable health insurance is long overdue, as I do, then employer responsibility is an essential piece of the puzzle. It provides an incentive for employers that currently offer coverage to maintain that coverage, the primary source of coverage for millions of Americans. Otherwise, many employers might drop coverage and allow taxpayers to pick up the tab, which would increase the federal deficit by billions of dollars. This is not conjecture on my part; the nonpartisan Congressional Budget Office concluded that the absence of employer responsibility would significantly erode employer-based coverage.

Based on this logic, employer responsibility under the Affordable Care Act imposes "free-rider" penalties on large employers to help cover the cost if taxpayers subsidize their employees. Large employers that do not offer coverage to their full-time employees must generally pay a penalty of $2,000 per full-time employee (excluding the first 30 employees). Large employers that *do* offer coverage must pay a penalty of $3,000 for each full-time employee who receives a premium tax credit through the Exchange. That would be the case if the coverage is unaffordable to the employee or does not provide minimum value.

Simple financial comparisons of potential penalty liabilities to the costs of coverage may not drive employer decisions about whether to offer coverage. In addition to employer responsibility, there are several other important reasons why employers will continue to offer coverage. Some may offer coverage because their employees and potential employees expect them to do so, and they want to remain competitive in the labor market. Others may view offering coverage as one of their responsibilities to their employees. Since individuals will have a responsibility to maintain coverage, there will be much more demand for their employers to offer it. Small business tax credits will reduce the cost of offering coverage, particularly for very small firms. And finally, the cost of coverage will still be excluded from income and payroll taxes – which for the vast majority of workers will provide a larger subsidy than they can receive through the Exchange.

In fact, research on the experience in Massachusetts found that enrollment in employer-based coverage actually *increased* – even during the recession. Therefore, it is

not surprising that CBO concluded that the Affordable Care Act would have very little effect on employer-based coverage.

A Practical and Flexible Design of Employer Responsibility

Congress carefully targeted employer responsibility under the Affordable Care Act. And the Treasury Department is carefully examining how to implement the law so that it is practical and flexible for employers. I want to highlight several aspects of the statute and its implementation that demonstrate this careful approach.

First, and most importantly, employer responsibility only applies to large employers with at least 50 full-time employees. As a result, 96 percent of all employers will be exempt from employer responsibility altogether. And since the vast majority of employers that are not exempt already offer coverage, less than 0.2 percent of all employers might be subject to penalties. It is worth noting that in Massachusetts, employer responsibility is much broader in scope, applying to employers with more than 10 full-time employees.

Second, small employers do not become large employers just because they hire seasonal workers. In general, a "seasonal worker" is an employee who is employed for less than four months of the year.

Third, penalties do not apply with respect to part-time employees; they only apply with respect to full-time employees.

Fourth, since penalties apply with respect to full-time employees, the definition of "full-time employee" is important. In general, a "full-time employee" is an employee who works an average of at least 30 hours per week. If full-time employee status is

determined on a monthly basis, an employee who works more than 30 hours per week for only one month would be considered a "full-time employee" who triggers employer responsibility for that month.

Alternatively, Treasury has proposed a safe harbor in which an employer can generally look back up to twelve months to determine whether employees averaged at least 30 hours per week. For example, suppose that a temporary worker works 40 hours per week, but is employed for only three months of the year. If the employer looks back six months, that worker will have averaged only 20 hours per week over the six-month period. Therefore, that worker would not be considered a "full-time employee", and would not trigger employer responsibility.

Treasury's rationale for this safe harbor is to ensure that there is a sufficient attachment between the employer and the employee to trigger the employer's responsibility to the employee. Otherwise, temporary workers might bounce around between employer coverage and coverage through the Exchange, which could disrupt continuity of care and place an administrative burden on both employers and the Exchange.

Employers for Flexibility in Health Care – a coalition of employers that relies on large numbers of part-time, temporary, and seasonal workers – strongly supports Treasury's proposal, commenting that it "has the potential to provide the flexibility employers need to preserve flexible work arrangements, provide a stable source of coverage, and allow for the practical administration of benefits."

In addition to proposing the safe harbor, Treasury has requested comments on alternative possible methods of determining full-time employee status. Of course, any

method must not undermine the purpose of employer responsibility that I discussed earlier – to prevent erosion of employer-based coverage, which would be disruptive and increase costs to taxpayers. In addition, the method must not create an incentive to convert permanent full-time employees into temporary workers, and must be consistent with the Affordable Care Act's 90-day limitation on waiting periods.

And finally, Treasury has proposed a practical method for determining whether coverage is unaffordable to an employee, which could trigger a penalty if the employee receives a premium tax credit through the Exchange. In general, coverage is unaffordable if the cost to the employee exceeds 9.5 percent of the employee's income. Because total income is not something that is known to the employer, employers might not be able to figure out whether the coverage they are offering is affordable, and whether they will be subject to penalties. To address this concern, Treasury proposed a safe harbor in which coverage is unaffordable if the cost to the employee exceeds 9.5 percent of the employee's *W-2 wages* – which is information that is known to the employer. This proposal would adopt wholesale the recommendation of Employers for Flexibility in Health Care, the broad coalition of employers that relies on temporary workers.

In short, Treasury is clearly examining ways to implement employer responsibility in a manner that is practical and flexible, and that takes into account employees with highly variable work schedules and limited employment periods.

Conclusion

In closing, employers of temporary workers need not fear employer responsibility. It is an essential part of health reform, which will expand access to affordable health

Mr. GOWDY. Thank you, Mr. Spiro.

Pursuant to committee rules, all witnesses are to be sworn before they testify, so I would ask you to please rise and raise your right hands.

[Witnesses sworn.]

Mr. GOWDY. Let the record reflect that the witnesses answered in the affirmative.

All of us are subject to being called for votes at any minute, so in that case, we will go as quickly as we can to vote and then come back as quickly as we can so that we can all be good stewards of your time. We do not control the floor and the timing of votes.

Mr. Spiro, are you familiar with the phrase pyrrhic victory?

Mr. SPIRO. Yes, I am.

Mr. GOWDY. What is a pyrrhic victory?

Mr. SPIRO. It is a victory that at first is small but turns out to be not a victory.

Mr. GOWDY. Right. It when you win the battle but all your soldiers die.

Mr. SPIRO. Correct.

Mr. GOWDY. The gentlemen to the right of you just testified that they are going to lay off workers if this is not changed and yet you, and I would assume you would agree with me, they have better access to information with respect to their businesses than you do? Do you agree with that?

Mr. SPIRO. I agree he probably has more access to information about his workers than I do.

Mr. GOWDY. That is not a trick question. They have better access to the numbers within their own business than you would have and they both testified that they are going to lay off workers if this isn't changed. I guess my question, and it may be a rhetorical question, are you better to have access to full health care and no job or are you better to have a job and a mini-med plan?

Mr. SPIRO. Mr. Chairman, they are still implementing the law. Treasury is still carefully implementing the law, so they do not have full information about how the law will be implemented.

Mr. GOWDY. Which raises another point. Did you testify before any committee or subcommittee when they were debating or considering the Affordable Care Act?

Mr. SPIRO. No, I did not.

Mr. GOWDY. Do you know anyone who did?

Mr. SPIRO. Yes.

Mr. GOWDY. You do? How many committee hearings did they have?

Mr. SPIRO. There were several committee hearings over a span of many years leading up to the passage of the Affordable Care Act.

Mr. GOWDY. And amendments were able to be offered?

Mr. SPIRO. I can't speak to that.

Mr. GOWDY. Do you know if any representatives from the businesses to your right were able to give their perspective on it?

Mr. SPIRO. I am happy to go back and search through the hearing record.

Mr. GOWDY. What do you think the Speaker meant when she said "We will have to pass it to see what is in it?"

Mr. SPIRO. I think she meant perhaps that the benefits of the Affordable Care Act only will be realized in 2014. It will take some time for the general public to become comfortable with this law, but I think I agree with the Speaker that once people have experience under the law, as they have had in Massachusetts, the public overwhelmingly supports that law.

Mr. GOWDY. Mr. Uprichard, you have such a good reputation in the State of South Carolina personally and your business does as well. The thing I was struck by when you and I met and talked is there wasn't a partisan comment that came out of your mouth. There wasn't an ideological comment that came out of your mouth. There wasn't a political comment that came out of your mouth. To this day, I do not know your politics. Frankly, it is none of my business.

The entire extent of our conversation was your concern for whether or not you were going to have to lay off your workers because of this. I would like you to tell me—take a minute or minute and a half—tell me this has nothing to do with politics from your perspective. This is all about saving your business and allowing you to provide jobs to people that you care deeply about and you are genuinely fearful that if this is not changed, you are not going to be able to keep them.

Mr. UPRICHARD. You are correct, that is really what keeps me up at night. When we look at our staffing business, the margins are not significant, they are thin. When we have significant increased costs we can't pass on to our customers, it becomes a mathematical problem.

We also take on significant risk with our staffing business, personal guarantees that I personally guarantee millions of dollars in working capital for this staffing business to run. As a business owner, one of the things I have to do is a cost benefit and risk analysis. As the margins erode, the risk is too great and it doesn't make sense to move forward.

The challenge with that is we have built a great company and I have 50 employees who have been with us for several years, people that I am friends with. I coach their kids in soccer, I see them all the time out in the community and they earn high wages. The challenge will be that we will no longer be able to move forward with temporary staffing as part of the services that we offer which means I will reduce my infrastructure resulting in probably at least half our employees losing their jobs.

With the impact on our industry, they really aren't able to go get jobs with other staffing companies because they will also be impacted as well. That is what keeps me up at night and that is what is important because that is what I am responsible for, is making sure we provide a paycheck to those 50 employees as well as the temporary employees we have out on billing on a weekly basis.

Mr. GOWDY. Thank you, Mr. Uprichard.

I would now recognize the gentleman from Illinois, the ranking member of the subcommittee, Mr. Davis.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Again, I want to thank the witnesses for being here.

Mr. Lenz, let me ask, what would you say are the basic reasons for temporary employment?

Mr. LENZ. That is a broad question and there are many answers. Some of them are from the worker standpoint and others from the business standpoint. Employees use temporary help most often as a stop gap when they are out of work, looking for new work or simply looking for a different kind of opportunity. Students, retired people make up a huge portion of the work force. In the current environment, lots of people are unemployed and the only work they can find is temporary work.

The reason why temporary jobs constitute such a huge portion of the new jobs that have been created since the recession technically ended in June 2009 is precisely because of business uncertainty or concern about making a commitment to permanent hire, but they still need to get the job done, so the temporary employees are a way for them to get the job done and a way to keep a substantial portion of the population employed. That is a unique situation in the current environment.

From the business standpoint, more generally, I think the key word is flexibility. Most labor economists recognize that flexible labor markets is one reason why we have had in the past and hopefully will again soon in the future, such a dynamic economy because employers can make employment decisions based on the needs of their businesses and the conditions in the economy and use labor as needed.

I think it is also important to point out that temporary jobs represent a relatively small percentage of non-farm jobs on a daily basis, really less than 2 percent, but we play a disproportionate role in the economy because we provide that flexibility to both employees and to employers.

Mr. DAVIS. Let me ask, would a diminution of temporary work foster an increase in full-time work?

Mr. UPRICHARD. I don't think so, perhaps at the margin, some, but there is such reluctance on the part of businesses to over hire and to burden themselves with workers they cannot sustain and cannot support because the business is not there that I do not think that shortfall would be made up in permanent jobs by any means.

Mr. DAVIS. Mr. Gauss, do you think seasonal work becomes a big factor in this as well?

Mr. GAUSS. Yes. Seasonal work, where I come from, usually has to do with agriculture and you do not find temporary employees, by definition, in the agricultural seasonal work but I have friends in Miami and New York and the seasons for the hotel workers, the restaurant workers, and once the season is over, then they go someplace else and put them wherever else they are needed. Could I expand a little on your question?

Mr. DAVIS. Yes.

Mr. GAUSS. When I first started this years and years ago, basically when someone would call us it was because someone was going to be out on vacation. As time has gone by, most of my business is manufacturing. Light industrial is what we call it in our industry. Industries, especially with the global economy, have to be more flexible.

To answer your question, if our industries were only doing business in the United States of America, there may be more perma-

nent hiring—they are scared to death—but it is not and we are competing against a lot of low wage countries. For our manufacturers to stay flexible, it protects the jobs of their permanent employees. If they have too many permanent employees onboard, they have to lay off a ton of people. If they layoff temporary staff here, we can put this temporary staff someplace else.

Mr. DAVIS. Finally, quickly, do you think that under the Affordable Care Act more small businesses will be able to provide some form of health care for their workers than without it?

Mr. GAUSS. Small business is defined as what?

Mr. DAVIS. Individual companies with 25 or less employees?

Mr. GAUSS. It doesn't apply to me. Actually, I am two businesses. I am considered a large business by statute, yet we have less than 50 permanent employees.

As I said, my portion right now is $80,000 a year; my staff pays about $40,000 a year. We have 16 people and there is a $5,000 deductible and a $10,000 family deductible. To answer your question, I have no earthly idea. I would love to think mine would come down.

Mr. DAVIS. Thank you very much, Mr. Chairman.

Mr. LENZ. Mr. Chairman, may I respond to Mr. Davis briefly on the small business aspect of this? I think it is an important question and a good question.

The problem is the definition of small business rarely does a staffing firm very much good and the reason for that is most staffing firms have very small permanent staffs and large numbers of temporary employees that come and go. If you were to measure the size of the company by revenue, they might be small under Small Business administration standards, but by head count standards, they almost always exceed 25 and even 50 and with respect to the State health insurance exchanges, they have more than 100, and you have to be awfully small to meet those head count thresholds. The vast majority of staffing firms cannot meet them.

Mr. DAVIS. Thank you, Mr. Chairman.

Mr. GOWDY. I thank the gentleman from Illinois.

The Chair would now recognize the distinguished gentleman from Arizona, Dr. Gosar.

Dr. GOSAR. Mr. Chairman, I would like to submit for the record, testimony from a ski area in Flagstaff, AZ which I would like to highlight that talks about temporary workers.

Mr. GOWDY. Without objection.

[The information referred to follows:]

October 5, 2011

RE: Subcommittee on Health Care, District of Columbia, Census and the National Archives
Hearing to be held on Thursday, October 6, 2011 at 9:30 am

Healthcare reform is a thorny issue for all concerned because those who currently are not covered by medical plans either use the emergency room, at the expense of the hospital who passes costs on to those who have insurance, or they enroll in government plans such as ACCHS which is funded by the tax payer thus resulting in higher taxes for individuals or corporations; we are already paying increased costs for health care.

In regards to our particular company we currently have less than fifty (50) full time year employees. The fulltime employees we do have are offered health insurance of which some participate and others do not for a variety of reasons. We hope to exceed that number in the near future as some may work both the winter and summer seasons and if this pattern continues we may add twenty (20) positions over the fifty (50) on some years requiring insurance coverage. Current costs are approximately $400/month of which the company pays fifty percent which would be $96,000/year. However, the greatest impact and conundrum would be the seasonal employees. We feel seasonal employees should not be treated as full time employees.

The law states employees who work more than 120 days would be subject to the employer mandate. If we are operational for an average of 120 days none of the seasonal employees work all 120 days but have several days a week off. If the law is translated as employed 120 days and maybe only working one day a week (which happens), we would see an impact of major proportions. The conundrum exists for the exception; the employee who may work 125 days, be eligible for insurance, the season ends and they are laid off. What is effect on their coverage? Do they go on COBRA and pay the entire premium or is there another program for them. As there are thousands if not millions of seasonal employees in this country we view this as the most important area to be addressed as this would impose an undue burden on employers.

Sincerely,

J. R. Murray

General Manager

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Dr. GOSAR. This letter basically highlights what we do in the west when we have temporary solutions as far as utilizing a ski area that may operate as little as 6 weeks out of a year, and as many as 4 months out of a year. That gives us a great idea.

Mr. Spiro, have you ever run a business?

Mr. SPIRO. No.

Dr. GOSAR. So you have never signed the back end of a paycheck?

Mr. SPIRO. That is correct.

Dr. GOSAR. Mr. Gauss, you have been in business for 30 years; I was in business for about 27 years in health care, by the way. How much has your overhead gone up in the administrative aspect in regard to rules and regulations?

Mr. GAUSS. I would say a good 75 percent over the last eight or 9 years.

Dr. GOSAR. Interesting.

Mr. Spiro, do you think the government has a right to turn out the lights on a business?

Mr. SPIRO. No, but I do not think they are turning out the light on business.

Dr. GOSAR. How would you answer these two gentlemen if these rules go into effect, and they are fairly nebulous rules, how would they stay in business?

Mr. SPIRO. Congressman, I have not seen all the numbers and assumptions they have used. All I can tell you is that the CBO studied this issue comprehensively. They looked at all the studies out there and concluded that the effects of the Affordable Care Act on the labor markets would be purely marginal.

Dr. GOSAR. It actually shows—lets us go back and recalibrate that. It actually shows that we lose a significant amount of jobs and costs incredibly more than what was originally orchestrated. Is that true?

Mr. SPIRO. I disagree with your conclusion.

Dr. GOSAR. That isn't what the CBO said?

Mr. SPIRO. They said there would be marginal effects.

Dr. GOSAR. Let me ask you a question. You are familiar with the Massachusetts model?

Mr. SPIRO. I am somewhat familiar but I am not from Massachusetts.

Dr. GOSAR. But you cited it, did you not?

Mr. SPIRO. That is correct, I did cite it in my testimony.

Dr. GOSAR. Have premiums gone up?

Mr. SPIRO. They have gone up as they have gone up everywhere around the country.

Dr. GOSAR. So it is not a solution?

Mr. SPIRO. It was never intended to lower cost. They are now engaging in a second round of payment reforms intended to lower costs.

Dr. GOSAR. What you are saying to me—you actually highlighted it for me—it was a solution process but it is not a solution process because we have seen these premiums going up all over the place.

Mr. SPIRO. It was a solution to the problem of the uninsured and on that score, Massachusetts has been found to be wildly successful and popular, reducing the uninsured rate to a couple of percent.

Dr. GOSAR. Let me ask you the question, where was that money dumped? Was it on the backs of the businesses or on the taxpayer? Let me answer it for you—on the taxpayer.

Mr. SPIRO. It was from taking the cost of uncompensated care and redistributing it so that it was not being shifted onto higher premiums for employers.

Dr. GOSAR. So let me ask the next question. Premiums went up then or went down? From what you just said, it should have gone down. They went up, sir. When you run a business you understand how those dynamics work and obviously you need to spend some time in the private sector before you start pulling out rules.

How do you feel about that, Mr. Gauss? Does the government have the right to turn your lights off by these rules and regulations?

Mr. GAUSS. No, sir, they do not.

Dr. GOSAR. It seems to me there was a lot of nebulism in this. We talked about mini-med plans. We asked the Secretary to define the number to use in mini-med plans and holy cow we went off on tens of millions of dollars and gave waivers to 1,500 industries, picking and choosing. Do you think that was fair?

Mr. GAUSS. No, I do not.

Dr. GOSAR. How do you feel about that, Mr. Uprichard?

Mr. UPRICHARD. I would agree with Mr. Gauss, I do not think it is fair. We are trying to run a for profit business, we are trying to make a difference in peoples' lives. As we have seen over the last few years, even with our current economy, it is not easy. More regulations, more increased costs that we cannot pass on to our customers will force us out of business.

Dr. GOSAR. A business is run on a somewhat fairly certain environment. You have to have some variance in making sure you are able to, God forbid, make a profit because that is the only way you can open your doors, keep your doors open to do that. Do you see the environment that was created by this law making it more certain or less certain?

Mr. UPRICHARD. I see it becoming less certain because the forecasting will be much more difficult. We look at hours right now but we will have to look at hours in a very different way because of the fluctuation in hours of the temporary workers, it will be incredibly difficult to forecast and people moving in and out of coverage will also be very difficult to forecast. The administrative and compliance piece will really be problematic for our business.

Dr. GOSAR. Thank you.

Mr. GOWDY. I thank the gentleman from Arizona.

The Chair would now recognize the distinguished gentleman from Maryland, the ranking member of the full committee, Mr. Cummings.

Mr. CUMMINGS. Thank you, Mr. Chairman.

I have been listening to all of this and I was just wondering, Mr. Uprichard, you are from South Carolina?

Mr. UPRICHARD. Yes, sir.

Mr. CUMMINGS. You realize in 2009, 16 percent of the people in South Carolina had no insurance? Did you know that?

Mr. UPRICHARD. No, sir, I did not know that.

Mr. CUMMINGS. It is a fact. I ran a small law firm for years and we had to do some sacrificing to provide our people with insurance but we also wanted healthy people. I know you are a responsible business person and I respect what you are doing. I know business is hard. If you were to testify before folks in a hearing like this, I know you would want people to be insured, would you not? You would want people generally to be insured?

Mr. UPRICHARD. Yes, sir.

Mr. CUMMINGS. Because if they are not insured, in many instances, as in my district, they die. I want you to understand that, dead, gone. I am just wondering what solution would you have, if any, you don't have to answer this, to help people get insurance? I am not saying this is the answer. Do you have an answer on that or does it matter? Do we just let them die?

Mr. UPRICHARD. No, sir, we do not let them die, but we create a model that is practical and provides flexibility and has, for example, a 12-month look-back rule.

Mr. CUMMINGS. Mr. Spiro, they asked you about the Massachusetts model. I find it so interesting that obviously when Governor Romney was the Governor, he must have felt there was a need for some kind of care act and opponents of the Affordable Care Act ignored the reality that the health reform law could have positive impacts on the economy in addition to reducing the deficit over the next two decades, the ACA could result in significantly improving health outcomes in this country.

The number of people without health insurance rose in 2010 and is estimated to be 49.9 million Americans, an increase of 900,000 from 2009. Expanding health coverage definitely improves health outcomes by helping people obtain preventive care. A large part of the Affordable Care Act of course is trying to help people stay well so they can have employees, am I right, because if you are sick, you can't work?

Mr. SPIRO. That is correct, Congressman. Of course it benefits employees and improves their health but we can't forget how that also benefits employers. As I said in my testimony, it reduces absenteeism and increases productivity. That will ripple through the economy. It also deals with the problem of job block where people feel like they can't move to another job where they might be more productive. All those benefits are for workers but also their employers.

Mr. CUMMINGS. The ACA also includes a provision in which certain employers, those with at least 50 full-time employees, would pay a penalty for not offering health care coverage or if the insurance they offer does not meet certain criteria and at least one of their workers receives a subsidy from individuals.

My colleagues on the other side have argued that this penalty would dramatically lead to sharp reductions in employment. In contrast, the CBO has concluded that such penalties on firms with 50 or more employees that do not offer health insurance would have little effect on hiring.

Mr. Spiro, do you believe that such penalties will force employers to dramatically change their hiring practices? I have heard the testimony of these gentlemen. This is the other part. Mr. Spiro, the State of Massachusetts also had an employer responsibility provi-

sion in their health plan which served as the model. I think we need to make sure it is clear. Mr. Romney, who is now running for President, who now acts like he doesn't like his own plan, some have called it Romneycare but my understanding is that the employer responsibility provisions of Romneycare are much stricter than those in the ACA with penalties applying to employers with 10 or more full-time employees. Has Massachusetts seen a decline or increase in enrollment in employer-based coverage?

Mr. SPIRO. You are right to point out that the Massachusetts employer penalty is much broader in scope. Even so, the vast majority of employers are exempt. That is the key to remember that the employer responsibility under the Affordable Care Act will exempt the vast majority of employers.

As you said, the CBO has studied this issue. It will have very marginal effect on the labor market and employment.

Mr. CUMMINGS. Thank you. I see my time is up.

Thank you, Mr. Chairman.

Mr. GOWDY. I thank the gentleman from Maryland.

The Chair would now recognize the distinguished gentleman from Indiana, Mr. Burton.

Mr. BURTON. Who was the chairman of this committee for 6 years. That is my ugly face up there on the wall. I have been around here for a long, long time, 29 years. How old are you, young man?

Mr. SPIRO. How old am I?

Mr. BURTON. Yes.

Mr. SPIRO. Thirty-six.

Mr. BURTON. You were 7 years old when I came to Congress.

Let me start off by saying to my colleague, my good buddy down there, that in Indiana we don't let people die. If people don't have insurance, they still get to go to the emergency room and they do get coverage. I think it is probably that way in every part of the country.

There is no question about it, Mr. Spiro, we need to make some changes in health care. You are absolutely right. We have come up with a bill that we think solves that problem in a little more effective way than the Affordable Care, we like to call it the Obamacare Act.

We believe that small businesses ought to be able to band together to buy insurance like major corporations do so they can get the better rate. We believe you ought to be able to buy insurance across State lines so that companies out West or in the Midwest can compete with companies in the East.

We believe there ought to be medical savings accounts with tax deductible options in there so that people and the employers put money into an account; if the people don't use that money, say $3,000 a year, it is carried over to the next year and the next year. Then there is a major medical policy above that which takes it to $100,000 or more. There are a whole host of things in our bill that does not cause the Federal Government to start sticking its nose into the private sector, but you are absolutely right, we do need to make changes.

I am now the chairman of Europe and Eurasia on the Foreign Affairs Committee. I just got back from Greece. Greece has had a

government that has from cradle to grave taken care of people. They stuck their nose into everything. Do you know what they are doing to salaries today? They are cutting them by 40 percent. Do you know what they are doing to retirement benefits? They are cutting them by 40 percent. They are raising taxes on property and doing it through the utilities over there. I talked to a policeman who was very supportive of the government until they started doing this and realized that government control over the private sector only leads to chaos.

The same thing is happening in Italy, in Spain, and in Portugal. In Ireland, they had a little different situation but they are in bad trouble as well. All those things do have an impact on the United States of America.

I guess the thing I would like to get across is the private sector is the engine that drives this country, that makes this country great, not government, not government regulation or the government sticking its nose into the private sector. We need to get government out of the way so the private sector can flourish and create jobs.

The only way our government can create jobs is to take taxpayers' money. You mentioned the term redistribution of wealth. The only way the government can do that is to take money away from the guy that is an entrepreneur that's creating jobs and give it to somebody else from the government. It just creates a big mess.

Right now I do not know how many regulations we have added to the mix in the last couple of years but I think it is about 500 to 600 or more. That is another albatross around the neck of the private sector. It is just really sad.

When I hear a businessman like Mr. Gauss and Mr. Uprichard, I did not hear you, Mr. Lenz, I apologize because I was late getting here, when I hear them telling us that they are going to lay off people because of government intrusion into their business, whether healthcare or anything else, it really bothers me. I had my own business, and I started it by myself, and I know what it means to have government sticking their nose into your business.

You are absolutely right. We need to do everything we can to make it more affordable for people. The way to do that is, as I said, to get government out of the way, to create incentives for business and industry to provide insurance, to give tax incentives for people to do that, not to have the government come in and say you have to do this, because it only leads to a really big problem.

I hope that you and other young people like you who are interested in doing good for the country will take a little look at history and look at what is going on in other countries around the world where the government has been very intrusive because it does not work. It didn't work in Russia, it does not work in Greece, it will not work in Spain, it has not worked in Italy and it is not going to work here.

What will happen is government will cause the free enterprise system to collapse. We need to be a help to the private sector by creating incentives for them to do the things that need to be done. That is why the approach we think needs to be taken is to create incentives for the private sector to do the right thing without government intrusion.

I will not ask any questions. I just thought I would get that off my chest, Mr. Chairman. Thank you.

Mr. GOWDY. Thank the gentleman.

Mr. SPIRO. Mr. Chairman, may I respond?

Mr. GOWDY. Let me do this because they have a call for votes and only because the gentleman from Missouri, Mr. Clay, is such an efficient questioner and is a pithy with both his questions and knows you will be with your answers, we will try to get the gentleman from Missouri in so we do not have to go vote and waste a hour of your time. With that, the distinguished gentleman from Missouri.

Mr. CLAY. Thank you so much, Mr. Chairman. I will be efficient and keep it brief.

Some have argued that employers face considerable confusion and uncertainty about the ACA including what it will cost employers in 2014, thus making planning for the future difficult. However, the Federal Government Web site www.healthcare.gov was launched after the ACA was enacted. Managed by the Department of Health and Human Services, this Web site provides comprehensive information about the provisions of the ACA, including a small business site with up-to-date guidance on small business tax credits, coverage options and reinsurance for retirees, among other things.

Mr. Spiro, do you believe there is a lack of information available for small businesses explaining the provisions of the ACA?

Mr. SPIRO. Congressman, there is a wealth of resources, as you mentioned, www.healthcare.gov, there are calculators so that small businesses can figure out if they are eligible for a tax credit. In addition, on this very issue with respect to temporary workers, you can see the Treasury Department is being very responsive and they sent out a Notice for Request for Comment before even issuing a proposed rule. They are gathering those comments and they are going to then issue a proposed rule, then get more comments before issuing a final rule. It has been a very transparent process and they have gone out of their way to solicit feedback from stakeholders such as the other witnesses at the table.

Mr. CLAY. Could the Federal Government do a better job of making sure the necessary information is available for employers as they seek to comply with the ACA's requirements?

Mr. SPIRO. I think there is lots of information out there and I think hearings like this are an important piece of that to make the public aware of issues surrounding implementation. Obviously, always more can be done but I am very pleased with the way the administration has been transparent and seeking comments and being responsive.

Mr. CLAY. On that point, for the entire panel, the IRS, HHS and Treasury have all conducted outreach to stakeholders to provide comment and guidance on a broad range of employment definitions. Did any of you provide comment to the agencies or departments promulgating these guidelines to express your concerns? Mr. Lenz.

Mr. LENZ. Yes, sir, we have. We have been working very closely with the administration and we do appreciate the efforts that are being made, but it is a complex subject and we are concerned they

may not get it right or may not have the legal authority to do what they need to do to fix the concerns that we have.

Mr. CLAY. Thank you. Mr. Uprichard.

Mr. UPRICHARD. Yes, sir, Mr. Clay, we have. As a matter of fact, I have been working closely with the Deputy of Health and Human Services for the Southeast, Anton Gunn. He is actually coming to Greenville to speak to some of our customer base on November 15th. When I was coming to D.C., he did try to make some introductions for me to the folks at the Treasury Department and Internal Revenue Service but they were unresponsive with the request for a meeting.

Mr. CLAY. Thank you. Mr. Gauss.

Mr. GAUSS. Yes, sir, I did, mostly through Mr. Lenz because I have been fighting on the State level because of unemployment taxes going through the ceiling.

If I could answer about the Web site information, it is thorough enough for me. That is where I got the $711,000 that is going to put me out of business. That is how I understood it and I am in the trenches. I am on the ground, boots on the ground.

Mr. CLAY. Thank you for that response. Mr. Spiro, would you care to respond to Mr. Burton's comment?

Mr. SPIRO. Do we have time, Mr. Chairman?

Mr. GOWDY. You have to solve all the world's problems in 37 seconds.

Mr. SPIRO. I would just respond that the Affordable Care Act is fundamentally a market-based solution. It is not single pair healthcare as you would find in Europe. I think that is why Mitt Romney supported it in Massachusetts. I would say when you raise the issue of Greece and debt problems in Europe, that is exactly why the Affordable Care Act was necessary. The CBO found that it reduced the deficit $143 billion over the first 10 years and continues to reduce the deficit in subsequent decades. I think repealing the Affordable Care Act would have the opposite effect and would worsen our debt problems.

Mr. GOWDY. On behalf of all of us, we want to thank our witnesses for your expertise, for your collegiality toward one another, and for your helpfulness to this committee on what is a very important issue. Thank all four of you.

I am not singling out anyone, but Mr. Uprichard, safe passage back to Heavens Gateway in the up State of South Carolina.

With that, the committee is adjourned. Thank you.

[Whereupon, at 10:39 a.m., the subcommittee was adjourned.]