

NATIONAL
RESTAURANT
ASSOCIATION



Statement
On behalf of the
National Restaurant Association

HEARING: OBAMACARE'S IMPACT ON JOBS

BEFORE: SUBCOMMITTEE ON HEALTH
ENERGY & COMMERCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

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**Statement for the hearing
"Obamacare's Impact on Jobs"**

Before the

**Subcommittee on Health, Energy & Commerce Committee,
U.S. House of Representatives**

By

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**On behalf of the
National Restaurant Association**

March 13, 2013

Chairman Pitts, Ranking Member Pallone, and members of the Subcommittee on Health of the House Energy & Commerce Committee, thank you for this opportunity to testify before you today on behalf of the National Restaurant Association. It is an honor to be able to share with you the impact the 2010 health care law is having on businesses like mine, particularly on our ability to create and grow jobs.

My name is Tom Boucher. I am an independent restaurateur and the CEO-Owner of Great New Hampshire Restaurants, Inc. My business partners and I operate eight restaurants doing business as T-Bones Great American Eatery, Cactus Jack's Great West Grill, and The Copper Door Restaurant with locations in Bedford, Derry, Hudson, Laconia, Manchester, and Salem, New Hampshire. I have the distinct honor to serve as a member of National Restaurant Association's Board of Directors, and have done so since 2004. I am very involved in my own communities serving on several other boards and with the New Hampshire Lodging & Restaurant Association, where I served as Chairman of the Board in 2004.

The National Restaurant Association is the leading trade association for the restaurant and foodservice industry. Its mission is to help its members, such as myself, establish customer loyalty, build rewarding careers, and achieve financial success. The industry is comprised of 980,000 restaurant and foodservice outlets employing 13.1 million people who serve 130 million guests daily. Restaurants are job creators. Despite being an industry of predominately small businesses, the restaurant industry is the nation's second-largest private-sector employer,

employing about ten percent of the U.S. workforce.¹ I like to say, “We teach America how to work.”

THE GREAT NEW HAMPSHIRE RESTAURANTS, INC. STORY

Our company’s story begins when T-Bones first opened its doors more than twenty-eight years ago. I joined the company, as many get their start in our industry, as a server. I had just graduated from college and came to find work before starting graduate school. I left T-Bones to begin my graduate work, but after a semester I returned to work at the restaurant during a holiday break, and never looked back! I worked my way up in the company as Dining Room Manager, Head Kitchen Manager, and General Manager. In 1995, I became a partner and we opened the first Cactus Jack’s in Manchester. In 2004, I became CEO and continue in that role today providing strong leadership, entrepreneurial vision, and maintaining our fiscal health and the growth that has contributed to our success. The Copper Door Restaurant is our latest concept, opening its doors in late 2011 in Bedford, NH.

My vision for our company is to become the premier restaurant company in New Hampshire. To accomplish this vision we need the help of our 503 staff members whose excellent service and great smiles create a warm and inviting atmosphere for our guests. Our core values are to serve quality, fresh, appealing products by a staff that feels more like a family than employee, and wrapping our arms around the neighborhoods and customers our restaurants take pride in serving.

Our core philosophical approach to our business practice is to make decisions which equally benefit our guests, our employees and our company. We call it our three-legged stool approach to success. One priority is to ensure that we take care of our employees to the best of our ability. As a mature company, we have many veteran and long-term employees who perpetuate our culture and core values. Over the years, it is our great employee benefits – including health care benefits – that have helped us recruit and retain the best people who have contributed to our success.

As a result of the changes required by the law, we now offer our hourly full-time employees who average 30 hours per week over 52 weeks enrollment in one of our medical benefit plans after one year of service. We also offer the plans to our salaried full-time employees. Only 45 percent of our 242 hourly full-time employees eligible to enroll in our plans today accept our offer of coverage. Of the remaining 55 percent of hourly full-time employees eligible to enroll today, how many of them will accept our offer of coverage given the individual requirement that begins January 1, 2014 as well?

Business owners crave certainty and one of the most difficult things to predict about the impact of this law is the choice employees will make. Will they accept our offer of minimum essential coverage? Will exchange coverage be less expensive than what we can afford to offer

¹ 2013 Restaurant Industry Forecast.

under the law? Will our young workforce choose to pay the individual mandate tax penalty instead of accepting our offer of coverage in 2014, 2015 and beyond? Future take-up rate of coverage is very hard to predict given many new factors, but could mean a significant increase in the costs employers must take on when offering coverage.

Based on our own experience and research, our team’s best estimate is that 75 percent of the hourly full-time employees eligible today, but not taking our offer of coverage, will likely accept it in 2014. Assuming plan costs were to remain the same – which they likely will not – such an increase in the employee take up rate of our plan would mean an increase in our company’s health insurance costs from \$500,000 to \$700,000. This represents a 40 percent increase over today. With such a large potential increase, you can understand why knowing the impact to the business and our employees is so important.

COMPLYING WITH THE HEALTH CARE LAW IS CHALLENGING FOR RESTAURANT AND FOODSERVICE OPERATORS GIVEN THE UNIQUE CHARACTERISTICS OF THE INDUSTRY

Since the law was enacted in 2010, we have been taking steps to educate ourselves about the requirements of the law, the details of the Federal agencies’ guidance and regulations, and to understand how to implement the necessary changes within our relatively small organization. Understanding our compliance requirements has been time consuming and burdensome for both our Executive team. Fortunately, we are large enough that the restaurant does employ a human resources professional. Both she and I have spent a significant amount of time trying to understand the impact so that educated business decisions can be made. We have spent so much time focused on this that sometimes I think we may need to hire an additional human resources professional just to handle health care benefits going forward. Other restaurateurs in our state and around the country are not as fortunate to have such internal resources, and many in the industry are running their day-to-day operations of their business while trying to understand what they must do to comply.

Until the January 2, 2013 *Federal Register* publication of the Treasury Department’s Proposed Rule regarding the Shared Responsibility for Employers provision, employers did not have any firm rules on which they could plan and make business decisions. Up until this time, proposals and guidance had been issued with numerous opportunities for public comment, but nothing had the weight of regulation. This proposed rule, while not finalized, does provide employers assurances that the rules proposed can be relied upon until further rules are issued. Our Association has been educating the industry since enactment and is spreading the word that now is the time to take action to comply. While many rules and guidance have been proposed, which we must implement, questions still remain regarding exact implementation of most of the employer requirements.

The unique characteristic of our workforce creates compliance challenges for restaurant and foodservice operators. As a result, many of the determinations employers must make to figure out how the law impacts them – for example the applicable large employer calculation – are much more complicated for restaurants than for other businesses who have more stable workforces with less turnover.

Restaurants are employers of choice for many looking for flexible work hours and so we employ a high proportion of part-time and seasonal employees. We are also an industry of small businesses with more than seven out of ten eating and drinking establishments being single-unit operators. Much of our workforce could be considered “young invincibles,” as 43 percent of employees are under age 26 in the industry.² In addition, the business model of the restaurant industry produces relatively low profit margins of only four to six percent before taxes, with labor costs being one of the most significant line items for a restaurant.³

All of these factors combine to complicate what a restaurant and foodservice operator must consider when implementing the necessary changes in their business to comply with the law. My company is a great example as we have spent an enormous amount of time trying to understand the law and what we must do to comply, but still do not know the answers to many questions.

APPLICABLE LARGE EMPLOYER DETERMINATION

The statute lays out a very specific calculation that must be used by employers to determine if they are an applicable large employer and hence subject to the Shared Responsibility for Employers and Employer Reporting provisions. Because of the structure of many restaurant companies, determining who the employer is may not be as easy as it would seem.

Aggregation rules in the law require employers to apply the long standing Common Control Clause⁴ in the Tax Code to determine if they are considered one or multiple employers for the purposes of the health care law. While these rules have been part of the Code for many years, this is the first time many restaurateurs, especially smaller operators, have had to understand how these complicated regulations apply to their businesses. The Treasury Department has not issued, nor to our knowledge, plans to issue, guidance to help smaller operators understand how these rules apply to them. Restaurant and food service operators must hire a tax advisor to determine how the complicated rules and regulations associated with this section of the Code apply to their particular situation. It is common that business partners of one restaurant company own multiple restaurant companies with other partners. These restaurateurs consider themselves to be separate businesses, but because there is common ownership, under the rules many are discovering that all the businesses can be considered as one employer for purposes of the health care law.

Once a restaurant or foodservice operator determines what entities are considered one employer, they must determine their applicable large employer status annually. For a restaurant company such as mine, it is clear that we have more than 50 full-time equivalent employees

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

³ *2013 Restaurant Industry Forecast*.

⁴ Internal Revenue Code, §414 (b),(c),(m),(o).

employed on business days in a calendar year, as we employ many more than 50 people in just full-time positions alone. However, given we are an industry of small businesses and that restaurants are labor intensive and require many employees to operate successfully, many small businesses will have to complete this calculation annually to determine their responsibilities under the law.

As you might imagine, operators on the bubble of 50 full-time equivalent employees are trying to understand what they must do to complete this complicated calculation each year. Generally, an employer must consider the hours of service of each of their employees in all 12 calendar months each year. However, the Treasury Department has allowed for transition relief in 2013 for businesses to use as short as 6 months to do this calculation. The Treasury Department recognized the fact that small businesses, who may not currently offer health coverage, will need time to determine their status and then negotiate a plan with an insurance carrier. However, there remain questions about the process in later years when January through December must be considered for status beginning the following January 1st. Will small employers just reaching the applicable large employer threshold find that they determine they are large on December 31, 2014, for example, and must offer coverage a day later on January 1, 2015? Rules are needed to clarify when such employers must offer coverage in future years.

The applicable large employer determination is complicated. Unlike the eligibility determination I use today to determine if my hourly full-time employees are eligible for health benefits (based on 1560 hours of service), for compliance beginning in 2014, employers must determine all employees' hours of service each calendar month, calculate the number of FTEs per month, and finally average each month over a full calendar year to determine the employer's status for the following year. The calculation is as follows:

1. An employer must first look at the number of *full-time employees* employed each calendar month, defined as 30 hours a week on average or 130 hours of service per calendar month.
2. The employer must then consider the hours of service *for all other employees*, including part-time and seasonal, counting no more than 120 hours of service per person. The hours of service for all others are aggregated for that calendar month and divided by 120.
3. This second step is added to the number of full-time employees *for a total full-time equivalent employee* calculation for one calendar month.



4. An employer must complete the same calculation for the remaining 11 calendar months and average the number over 12 calendar months to determine their status for the following calendar year.

This annual determination is administratively burdensome and costly, especially for those just above or below the 50 FTE threshold who must most closely monitor their status – most likely small businesses. Many restaurant operators rely on third-party vendors to develop technology or solutions to help them comply with these types of requirements but vendors are backlogged and a solution is not widely available today.

OFFERING COVERAGE TO FULL-TIME EMPLOYEES

The 2010 health care law requires employers subject to the Shared Responsibility for Employers provision to offer a certain level of coverage to their full-time employees and their dependents, or face potential penalties. The statute arbitrarily defines full-time as an average of 30 hours a week in any given month. This 30-hour threshold is not based on existing laws or traditional business practices. In fact, the Fair Labor Standards Act does not even define full-time employment. It simply requires employers to pay overtime when nonexempt employees work more than a 40-hour workweek. As a result, 40 hours a week is generally considered full-time in many U.S. industries. Certainly in the restaurant and foodservice industry, operators have traditionally used a 40-hour definition of full-time. Adopting such a definition in this law would also provide employers the flexibility to comply with the law in a way that best fits their workforce and business models.

Before this law, our company defined full-time employment differently for those employees working in positions in the Front of the House and the Back of the House. As a result of the definition in the law, we have changed our threshold and now use 30 hours per week. Such a definition is not typical in the restaurant industry. While it might seem that our definition aligns with the law, further adjustments to our current practice are needed due to the interplay of several provisions of the law. Beginning in 2014, group health plans cannot apply a waiting period (or eligibility period) of longer than 90 days. This maximum waiting period applies whether you are an applicable large employer or a small employer offering coverage. As of 2014, if we hire a new employee into a full-time position where they are expected to work at least 30 hours per week, we have only 90 days to offer them coverage and enroll them in the plan, if they accept our offer. Up until this point, we have used 52 weeks to determine if an employee is eligible for an offer of coverage but that must be changed under the law.

This is complicated by the fact that sometimes it is difficult to know who the full-time employees will be in a restaurant. For restaurant and foodservice operators who are applicable large employers, it is not easy to predict which hourly staff might work 30 hours a week on average and which will not. I think back to my first days working in our restaurant as a server as an example of how an employee’s hours could be unpredictable week to week. During the summer and holidays I was scheduled for more hours as customer traffic was at its peak, but then

my hours were reduced as business slowed. Some weeks I might pick up extra shifts to earn a little extra in my paycheck that month, and others I’d prefer a few less hours because of commitments outside the restaurant. This is one of the attractive benefits of our industry - the flexibility to change your hours to suit your own personal needs. However, for the first time under this law, the federal government has drawn a bright line as to who is full-time and who is part-time. As a result, employers with variable workforces and flexible scheduling must be deliberate about scheduling hours because there is now potential liability for employer penalties if employees who work full-time hours are not offered coverage.

The industry appreciates that the Treasury Department has recognized that it may be difficult for applicable large employers to determine employee’s status as full-time or part-time on a monthly basis, causing churn between employer coverage and the exchange or other programs. Such coverage instability is not in the employee’s best interest and so the restaurant and foodservice industry is pleased that the Lookback Measurement Method is an option that applicable large employers may use. Our restaurant is still in the process of considering whether this is an option we will use.

The Lookback Measurement Method’s implementing rules are complex but I believe that it could be helpful for both employers and employees. Employers will be better able to predict costs and offer coverage to employees they are required to offer to, and employees whose hours fluctuate have the peace of mind of knowing that if their hours do drop, coverage will not be cut short before the end of their stability period. Should we choose to utilize the Lookback Measurement Method, it can only be applied to variable hour or seasonal employees. Employers cannot consider the length of time of service of these employees, only that their hours are unpredictable and that they fluctuate.

Our restaurant’s health plan begins on October 1 each year – a change we made several years ago when it became clear how difficult for the employees it was to conduct open enrollment during our busy holiday season. If we were to choose a 12-month measurement period and hence a 12-month stability period, the measurement period would begin Tuesday, July 2, 2013 and end Wednesday, July 2, 2014. The hours of service for our current variable hour and seasonal employees would be measured during this time period on a calendar month basis and averaged over the length of the measurement period. We could then utilize up to a 90-day period for administrative activity, including eligibility determinations and conducting our open enrollment process with employees. This could be as long as Thursday, July 3, 2014 – September 30, 2014. For those variable hour and seasonal employees determined to be full-time during the measurement period, they will be offered coverage during the October 1, 2014 – September 30, 2015 stability period, which coincides with our 2014 plan year. Regardless of whether their hours are maintained at full-time status or not, they will maintain enrollment in our coverage for the full 12-month stability. If a variable hour or seasonal employee is determined to be part-time during the measurement period, they will not be offered coverage and considered a part-time employee for the duration of the stability period. The dates for these periods of time will change each year depending on the calendar. There is a similar but slightly different process for new hires variable hour and seasonal employees, and also a process for transitioning new hires into the normal open enrollment process each year. Also, there are other rules guiding how these processes must be administered.

Applicable large employers who employ 200 or more full-time employees, as Great New Hampshire Restaurants does, are also subject to the Automatic Enrollment provision of the law. This duplicative mandate requires us to enroll our new and current full-time employees in our lowest cost plan if they have not opted-out of the coverage. This provision also interacts with the prohibition on waiting periods longer than 90 days and effectively means that on 91 day, we must enroll a new full-time hire in our lowest cost plan if they do not tell us that they do not want to be enrolled. Employee premium contributions will begin to be collected and the industry is concerned that it could cause financial hardship and greater confusion about the law, especially amongst our young employees. Automatically enrolling an employee and then shortly thereafter removing them from the plan when the employee opts-out only increases costs unnecessarily without increasing our employee’s access to coverage as the law intended. Under the law employers can ask employees to contribute up to 9.5 percent of their household income towards the cost of the premium. We will educate our employees about how this provision impacts them, but if an employee misses the 90-day opt-out deadline, a premium contribution is a significant amount of money, which can be a financial burden. Since the same full-time employees must be offered coverage by the same employers subject to the Automatic Enrollment provision and the Shared Responsibility for Employer provisions, we believe the automatic provision is unnecessary and should be eliminated.

CHALLENGES FOR APPLICABLE LARGE EMPLOYERS OFFERING COVERAGE TO THEIR FULL-TIME EMPLOYEES AND THEIR DEPENDENTS

Once an applicable large employer has determined to whom coverage must be offered, he must make sure that the coverage is of 60 percent minimum value and considered affordable to the employee, or he may face potential employer penalties.

Minimum value is generally understood to be a 60 percent actuarial test; a measure of the richness of the plan’s offered benefits. This is a critical test for employers especially as it relates to what an employer’s group health plan covers and hence what the premium cost will be in 2014. I’ve mentioned that business owners like certainty and that means the ability to plan for their future costs. Employers are eager to know what their premium costs will be under the new law. Minimum value is key to determining that information.

On February 25, 2013 the Health and Human Services Department did include the Minimum Value Calculator, one of the acceptable methods to determine a plan’s value, in its Final Rule, Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation. Minimum value can now be determined using this calculator but still it is always difficult to know premium costs so far in advance. For our October 1 plan year start date, we generally are able to get data from our broker in August but it is always a fight to get the information from the insurance carriers. From there, budget decisions can then be made for the coming year. We do not anticipate that we will have premium information for the 2014 plan year until August of that same year. With a potential large increase in costs, this gives us a short timeframe within which to make business decisions in advance of the new plan year.

Employers must also ensure at least one of their plans is affordable to their full-time employees or face potential penalties. A full-time employee’s contribution toward the cost of the premium for single-only coverage cannot be more than 9.5 percent of their household income, or else the coverage is considered unaffordable. Employers do not know household income, nor do they want to know this information for privacy reasons. However, employers needed a way to be able to estimate before a plan is offered if it will be affordable to employees. What employers do know are the wages they pay their employees. Almost always, employees’ wages will be a stricter test than household income. Employers are willing to accept a stricter test in the form of wages so that they know they are complying with the law and are provided protection from penalty under a safe harbor. The Treasury Department will allow employers to use one of three Affordability Safe Harbors based on Form W-2 wages, Rate of Pay or Federal Poverty Line. We believe that the option of utilizing these methods will be helpful to employers as they determine at what level to set contribution rates and their ability to continue to offer coverage to their employees. Our company has begun to look at this test but is still in the process of determining how we will best implement this section of the law.

The law speaks to affordability for employees but is silent regarding whether the coverage required to comply with the Shared Responsibility for Employers section of the law is affordable to employers. We anticipate added costs as a result of this law, either through required changes impacting plan design or additional fees – such as the PCORI Funding Fee, the Exchange Reinsurance Program Fee, the Health Insurance Provider Fee – that will continue to drive up premiums for employers and employees as others pass along these increased costs. In addition, new taxes such as the “Cadillac” tax on certain employer-sponsored coverage, will also squeeze restaurateurs when it begins in 2018.

As restaurant and foodservice operators implement this law, considering all of the interlocking provisions that impact employers, some will be faced with difficult business decisions between offering coverage which they cannot afford and paying a penalty for not offering coverage that they equally cannot afford nor want to do. We encourage all policymakers to address the cost of coverage so that the employer-sponsored system of health care coverage will be maintained.

NEW NONDISCRIMINATION RULES APPLIED TO FULLY-INSURED PLANS

The health care law applies the nondiscrimination rule that self-funded plans cannot offer benefits in favor of their highly-compensated individuals now to fully-insured plans. This rule is not in effect as the Treasury Department has put implementation on hold until further guidance has been issued in this complex area. Under the law, these rules apply to all insured plans, regardless of where they are offered by an applicable large employer or a small business. The restaurant and foodservice industry is watching this rule closely as it may impact what plans may continue to be offered to employees.

Current group health plan participation often forces operators to carve out the group of employees who will participate in the plan. In our members’ experience, these are almost always a group that would be considered in the top 25 percent based on compensation.

However, management carve-outs are not just for upper level executives who may receive richer benefit plans than the rest of the employees. In the restaurant and foodservice industry, management-only plans are sometimes the only option that operators have to provide health care coverage to those employees who want to buy it and pass participation requirements at the same time. As a result, these plans are quite common in the industry.

The rules the Treasury Department writes to apply non-discrimination testing to fully-insured plans will have an impact on our industry. Regardless of how they are written, restaurant and foodservice operators will need sufficient transition time to apply these rules as it could create upheaval for plans and employers alike.

APPLICABLE LARGE EMPLOYER REPORTING REQUIREMENTS

A key area of implementation that employers have received little or no guidance on are the employer notice and reporting requirements: the Fair Labor Standards Act Notice to Employees from the Department of Labor, the notices and appeals processes with Exchanges from the Department of Health and Human Services, and the required information reporting under Code §6055 and §6056 from the Treasury Department. These employer notice and reporting requirements are a key link in the chain of the law’s implementation. They represent a significant employer administrative burden as well as rules that will help employers ensure that their employees are well informed about their options under the law.

Of particular concern is the flow of information and the timing of reporting employers must make to multiple levels and layers of government. Streamlining employer reporting will help ease employer administrative burden and simplify the process. The information provided by employers under Code §6055 and §6056 is critical in this process and can be used by the Treasury Department to verify if an individual had an offer of affordable minimum essential coverage of minimum value from an applicable large employer. The information provided by employers must be compared by the Internal Revenue Service to verify eligibility determinations made by the Exchanges for premium tax credits or cost-sharing reductions. The information can also be used to determine employer penalty liability. The restaurant and foodservice industry, along with other employer groups, have advocated for a single, annual reporting process by employers to the Treasury Department each January 31st that would provide prospective general plan information and wage information for the affordability safe harbors, as well as retrospective reporting as required by §6056 on individual full-time employees and their dependents.

We are anxious for guidance to be issued, especially by the Treasury Department on implementing §6056, as employers cannot just flip a switch and produce the detailed information reports required by the law. It will take time for employers to set up systems, or contract with vendors, to track and maintain the data needed to comply with the law. When I think of our own company and the detailed information we will have to track and report on all full-time employees and dependents, it is a large amount of data. The reporting will include not only the employees who remain with the restaurant for the entire year, but even our seasonal staff and others who

may only stay for a couple of months. Health plan benefit information as well as individualized payroll-sourced information must be merged to produce the report needed under the law.

TRANSITION RELIEF

Within the Proposed Rule for Shared Responsibility for Employers, the Treasury Department provided targeted transition relief. While appreciated, we believe that further transition relief is critical. The timeframe for compliance is short and getting shorter and safe harbor protections for good-faith compliance by employers in the law's early phases is necessary. Employers are still missing essential pieces of guidance and regulation necessary to construct their systems, make plan design changes and communicate with their employees. Under the threat of heavy penalties for not getting this exactly right the first time, some employers may opt-out of offering coverage to their employees and choose to pay the penalties instead. This is not what the restaurant and foodservice industry wants, but it may be a likely result of employers having to make difficult decisions under extremely uncertain conditions. The process should not discourage employers and employees from participating in the new system and so a good-faith compliance standard is appropriate. As with implementation of any law this size, it will take some time for the hiccups in the processes to be worked out and employers should be allowed adequate time to come into compliance.

CONCLUSION

Since enactment of the law, the National Restaurant Association has worked to constructively shape the implementing regulations of the health care law. Nevertheless, there are limits to what can be achieved through the regulatory process alone. Ultimately, the law cannot stand as it is today given the challenges employers such as restaurant and foodservice operators face in implementing it.

Broader transition relief is needed for employers attempting to comply with the law in good-faith as time is short to make the significant changes required by the law. The duplicative automatic enrollment provision should be eliminated as it could unnecessarily confuse and financially harm employees. Key definitions in the law must be changed: The law should more accurately reflect the general business practice of 40 hours a week as full-time employment. The applicable large employer determination over-reaches to include more small businesses than it should.

The National Restaurant Association looks forward to working with this Committee and all of Congress on these and other important issues to improve health care for our employees without sacrificing their jobs in the process. We also continue to actively participate in the regulatory process to ensure the implementing rules consider our industry's perspective.

Thank you again for this opportunity to testify today regarding the impact of the health care on the restaurant and foodservice industry, and the challenging environment it will cause for job creation and growth.