

NATIONAL  
**RESTAURANT**  
ASSOCIATION



Statement  
On behalf of the  
National Restaurant Association

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HEARING: HEALTH CARE CHALLENGES FACING NORTH CAROLINA'S WORKERS  
AND JOB CREATORS

BEFORE: SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS  
COMMITTEE ON EDUCATION & THE WORKFORCE  
U.S. HOUSE OF REPRESENTATIVES

BY: MARSHALL "KEN" CONRAD  
CHAIRMAN  
LIBBY HILL SEAFOOD RESTAURANTS, INC.

DATE: APRIL 30, 2013

**Statement for the hearing**

**“Health Care Challenges Facing North  
Carolina’s Workers and Job Creators”**

**Before the**

**Subcommittee on Health, Employment, Labor and Pensions  
Of the  
Committee on Education and the Workforce,  
U.S. House of Representatives**

**By  
Marshall “Ken” Conrad  
Libby Hill Seafood Restaurants, Inc.  
Greensboro, North Carolina**

**On behalf of the  
National Restaurant Association**

**April 30, 2013**

Chairman Roe, Ranking Member Andrews, and members of the Subcommittee on Health, Employment, Labor and Pensions, of the House Committee on Education and the Workforce, 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, and the restaurant industry as a whole, particularly on our ability to create and grow jobs.

My name is Ken Conrad, and I am Chairman of the Board of Libby Hill Seafood Restaurants, Inc., a seafood restaurant first opened by my father Luke Conrad back in 1953. I am very involved in the seafood and restaurant industry here in the state and am the former Chairman of the North Carolina Restaurant Association. I currently serve as Vice Chairman of the National Restaurant Association.

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.<sup>1</sup>

### **THE LIBBY HILL SEAFOOD RESTAURANTS STORY**

My family continues to own and operate Libby Hill Restaurants and I’m proud to say that my son Justin is the third generation of Conrad’s in the business. Our first restaurant is still located within the city limits of Greensboro, North Carolina with locations scattered across North Carolina and Virginia. Four of the restaurants are part of Libby Hill Restaurants, Inc., with the remaining 5 separately owned and operated by others. My company also includes a seafood distribution company. We cook some of the best seafood in the area, and you know that every Libby Hill Restaurant is a family-friendly kind of place.

Libby Hill Restaurants, Inc. employs 32 full time employees and 109 part-time employees based on the new definition of full-time employment within the health care law. We have always used a 40 hour work week to define who is full-time and part-time within our company, and so we will have to make changes based on this law’s new definition of full-time at 30 hours a week on average in any given month.

Today, we offer a full medical benefits plan and pay 80 percent of the premium, but only 10 employees take the plan. As a result we have a carve-out plan for our corporate office staff, our warehouse employees and our truck drivers. We have tried to offer coverage to our restaurant employees in the past, but not enough employees opted in for the company to even be able to purchase a plan. To offer coverage, we needed a minimum participation of 75 percent of the eligible employees to take our offer of coverage, but that was not the case when all of our staff was included. As a result, we had to limit the eligibility pool to a smaller group of employees to be able to offer coverage to anyone. Level of participation in restaurateurs’ plans has been a long-standing challenge in our industry. I am concerned that even with the new law’s requirements for individuals, employees who are eligible for our offer of coverage will not accept it and choose to pay individual mandate tax penalty instead.

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 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 increased costs for employers when offering coverage.

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<sup>1</sup> 2013 Restaurant Industry Forecast.

## **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, me and my staff have educated 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 organization. Understanding our compliance requirements has been time consuming and burdensome. Currently we do not have human resources personnel on staff responsible for administering the health benefits program as part of their duties. Instead, we are relying on our lawyers and outside vendors to help us determine our options and implement the law within our business. This is typical of restaurants of similar size to our operations. Our Chief Financial Officer has primary responsibility for developing our strategy and plan to comply with the law. Both he and I have spent a significant amount of time trying to understand the impact so that educated business decisions can be made.

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 doing everything we can so that operators know that now is the time to take action to comply. While many rules and guidance have been proposed, questions still remain regarding exact implementation of many 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.<sup>2</sup> 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.<sup>3</sup>

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 a large amount of time trying to

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<sup>2</sup> Bureau of Labor Statistics, U.S. Department of Labor.

<sup>3</sup> 2013 *Restaurant Industry Forecast*.

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 Clause<sup>4</sup> 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. This is not an easy calculation. My business is on the bubble of being an applicable large employer defined as employing 50 full-time equivalent employees on business days in a calendar year. We must consider the number of full-time employees now based on 30 hours a week, as well as the hours worked by all our other employees. 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. I may be one of them.

As you might imagine, operators like myself who are 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

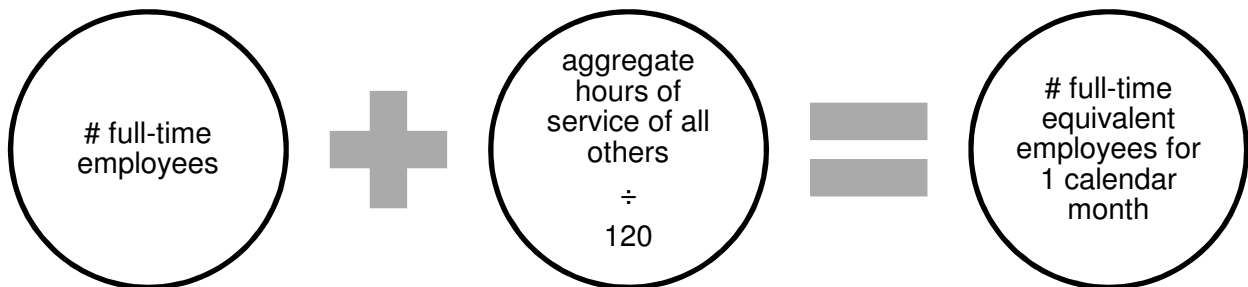
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<sup>4</sup> Internal Revenue Code, §414 (b),(c),(m),(o).

January through December must be considered for status beginning the following January 1<sup>st</sup>. 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. 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 solutions are 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.

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. Many employees’ hours can be unpredictable week to week. During periods of high customer traffic during the year, employees are scheduled to work more hours to maintain the customer’s expected level of service, but then hours are reduced as business slows. Some weeks an employee might pick up extra shifts to earn a little extra in their paycheck that month, and others they 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.

The Lookback Measurement Method’s implementing rules are complex but 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. The Lookback Measurement Method 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.

#### **AUTOMATIC ENROLLMENT REQUIREMENT**

Applicable large employers who employ 200 or more full-time employees are also subject to the Automatic Enrollment provision of the law. This duplicative mandate requires the employer 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 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. Since 43 percent of restaurant employees are under age 26 and more likely to be moving from job to job or eligible for enrollment in parents’ plans, many are likely to inadvertently miss opt-out deadlines and will be automatically enrolled in their employer’s health plan causing significant, unexpected financial hardship.

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. Since the health care law’s employer mandate already subjects large employers to potential penalties if they fail to offer affordable health care coverage to full-time employees and their dependents, the auto-enrollment mandate is redundant. It adds a layer of bureaucracy and burdens businesses without increasing employees’ access to coverage.

Some compare automatically enrolling employees in health benefit plans to automatically enrolling them in a 401(k) plan, but this isn’t a good parallel. The financial contribution associated with health benefits can be much larger, for example: 9.5 percent of household income toward the cost of the premium for employees of large employers versus an average 3 percent automatic 401(k) contribution. The financial burden on employees of automatic enrollment in health benefit plans would be much greater than that of 401(k) plans. Additionally, 401(k) rules allow employees to access their contributions when they opt-out of automatic enrollment; however health benefit premium contributions cannot be retrieved.

Restaurateurs will educate their 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.

I want to acknowledge and thank Congressman Richard Hudson for his leadership in introducing H.R. 1254, the Auto Enroll Repeal Act recently, together with Congressman Robert Pittenger. Enactment of this measure would eliminate this requirement that could hurt both employees and employers. The National Restaurant Association supports of passage of H.R. 1254 and looks forward to working with Congressmen Hudson and Pittenger and this Subcommittee to move the bill forward in Congress.

#### **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. 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 difficult to know premium costs so far in advance. For our January 1<sup>st</sup> plan year start date, we do not anticipate being able to obtain premium pricing for several more months. With a potential increase in cost, this gives us a short timeframe within which to make business decisions in advance of the new plan year. Any plan design or other changes to help control our costs will be part of our budgeting process going forward.

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 looked at this particular issue within the law, but we do not believe we will have to worry about the affordability of our plan for our employees, at least in the first year. As I previously mentioned, our company pays 80 percent of the total premium cost for the plan we offer. The remaining 20 percent of the premium, that we currently ask our employees to contribute, is less than 9.5 percent of our employees’ wages. Hence, if premiums do not increase we believe that our current practice will satisfy the affordability test and changes to employee contributions are not necessary for our next plan year.

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 new 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. This was the situation I encountered when we tried to offer coverage to more employees several years ago.

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 not received 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 Tax 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. Operators are aware of this

requirement and ask often when guidance and a template for this notice will be available from the Labor Department.

Of particular concern to the industry, 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 Tax 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 31<sup>st</sup> 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 on all of these interrelated issues, 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 with 8 months until the first of the year. 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 the application of 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 is too complicated, and 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.