

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

Memorandum

To: Members, Subcommittee on Contracting and Workforce
From: Committee Staff
Date: March 3, 2014
Re: Hearing: "Obamacare and the Self-Employed: What About Us?"

Introduction

At 10:00 am on March 6, 2014, in Room 2360 of the Rayburn House Office Building, the Subcommittee on Contracting and Workforce will meet for the purpose of receiving testimony on the effects of the Affordable Care Act¹ (health care law or law) on the self-employed. Like businesses with employees, the self-employed also need health insurance. While most small companies with employees obtain coverage on the small group market, the self-employed typically purchase their health policies in the individual or non-group market. The Subcommittee will explore the experiences of the self-employed in finding and maintaining this coverage.

The Self-Employed Business Owner

While there is no legal or standard definition of what constitutes a self-employed individual, it is widely considered to be a situation in which an individual works for himself or herself instead of working for an employer that pays a salary or a wage. A self-employed individual earns their income through conducting profitable operations from a trade or business that they operate directly and are the primary person responsible for the enterprise's success or failure. The Internal Revenue Service defines a self-employed individual as one who carries on a trade or business as a sole proprietor or an independent contractor. Additionally, a self-employed individual may be part of a partnership that carries on a trade or business or one who is otherwise in business by themselves, including a part-time businesses.²

¹ Pub. L. No. 111-148, 124 STAT. 199 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 STAT. 1029 (2010) codified in scattered sections of titles 20, 25, 26, 29, and 42 of the United States Code.

² <http://www.irs.gov/Businesses/Small-Businesses-%26-Self-Employed/Self-Employed-Individuals-Tax-Center>.

Self-Employment in the United States

According to the Office of the Chief Counsel for Advocacy of the United States Small Business Administration (SBA), small businesses³ represent 99.7 percent of all businesses having employees in the United States.⁴ Small businesses employ 49 percent of the workers in the private sector⁵ and account for 42 percent of the private sector payroll in the United States.⁶ Between 1993 and 2011, small businesses generated 64 percent of net new jobs.⁷

Self-employment continues to be an important source of jobs in the United States. In 2009, 15.3 million individuals were self-employed.⁸ The self-employment rate, which is the proportion of total employment rate made up of the self-employed, was 10.9 percent.⁹ According to the National Association for the Self Employed (NASE), over 77 percent of small businesses in the United States are self-employed ones.¹⁰

Brief Overview of the Health Care Law Mandates

As enacted, the health care law requires “large” employers to offer full-time or full-time equivalent employees the opportunity to enroll in an employer-sponsored health care plan or pay a penalty.¹¹ The law also requires individuals to enroll in health insurance, either on their own or through plans offered by and employer, or pay a penalty.¹² These requirements are colloquially referred to as the “employer mandate” and the “individual mandate.”

On July 2, 2013, Mark Mazur, Assistant Secretary for Tax Policy at the United States Department of the Treasury (Treasury) announced via a blog post that Treasury would delay the employer mandate by one year, until 2015.¹³ On February 10, 2014, the administration announced that it would extend this deadline for one additional year for those employers with 50

³ For the purposes of this memo, we use the most widely accepted Small Business Administration definition of 500 employees or less.

⁴ OFFICE OF THE CHIEF COUNSEL FOR ADVOCACY, UNITED STATES SMALL BUSINESS ADMINISTRATION, FREQUENTLY ASKED QUESTIONS (Sept. 2012), available at http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ STEVEN F. HIPPLE, UNITED STATES BUREAU OF LABOR AND STATISTICS, SELF-EMPLOYMENT IN THE UNITED STATES, MONTHLY LABOR REVIEW 17 (Sept. 2010), available at <http://www.bls.gov/opub/mlr/2010/09/art2full.pdf>.

⁹ *Id.*

¹⁰ NATIONAL ASSOCIATION FOR THE SELF-EMPLOYED, SELF-EMPLOYED AND THE U.S. ECONOMY 2 (2007), available at https://www.nase.org/Files/Documents/Self-Employed_and_the_US_Economy_Charts_and_Stats.pdf.

¹¹ 26 U.S.C. § 4980H(a). The type of coverage that must be offered to employees is specified at 26 U.S.C. § 5000A(f)(2). Technically, the employer penalty only occurs if an employee enrolls in a plan for which the employee obtains a tax credit or when a cost-sharing reduction is allowed or paid, or if the employer’s coverage fails to meet the minimum federal standards. 26 U.S.C. § 4980H(a)(2).

¹² *Id.* at § 5000A.

¹³ <http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner.aspx>.

to 99 employees.¹⁴ Employers with more than 99 employees will see their obligations modified as well, with a requirement to offer coverage to 70 percent of their full-time employees in 2015 and 95 percent starting in 2016.¹⁵

In total, the administration has delayed various portions of the health care law 28 times.¹⁶ They have not, however, delayed the individual mandate, which became effective on January 1, 2014. Because the self-employed typically purchase health insurance on the individual or non-group market, they are currently required to maintain minimum essential coverage as proscribed by the law or pay a penalty.

Effects of the Health Care Law on Self-Employed Individuals

Undoubtedly, there have been self-employed individuals who were able to maintain their coverage from previous years. However, anecdotal evidence collected by the Committee through previous hearings and meetings with numerous trade associations that represent the self-employed and micro-businesses, it has been shown that the health care law is causing significant difficulties in the form of general confusion, higher prices, and shrinking provider networks for self-employed individuals.

On February 6, 2014, the National Small Business Association (NSBA) released a study which found the health care law is having a significant negative impact on all small businesses through onerous requirements and increased costs.¹⁷ Among the key findings were that 91 percent of respondents experienced increases in their health plan's premium at their most recent renewal; 66 percent said insurance increases have left them with less profit available for general business growth; and 33 percent said they are purposefully not growing as a result of the health law. Perhaps most significantly, the respondents reported that the average monthly per-employee cost of health insurance premiums for a small business is \$1,121; nearly double what it was just five years ago.

While the NSBA survey was for small business in general, a recent NASE survey queried 498 self-employed individuals and micro-businesses¹⁸ from November 7 through November 20, 2013.¹⁹ This survey found that nearly 60 percent of respondents believe there is a "low" or "very low" chance they will be able to secure both affordable and comprehensive coverage in 2014. Half of the survey's respondents had visited HealthCare.gov, and over 60 percent of them experienced technical issues and/or glitches with the website. Over 30 percent of those who

¹⁴ Juliet Eilperin and Amy Goldstein, *White House Delays Health Insurance Mandate for Medium-sized Employers until 2016*, WASHINGTON POST, Feb. 10, 2014, available at http://www.washingtonpost.com/national/health-science/white-house-delays-health-insurance-mandate-for-medium-sized-employers-until-2016/2014/02/10/ade6b344-9279-11e3-84e1-27626c5ef5fb_story.html.

¹⁵ *Id.*

¹⁶ <http://www.foxbusiness.com/economy-policy/2014/02/12/28-delays-and-counting-to-health-reform/>

¹⁷ The full survey can be found on the NSBA website here: <http://www.nsba.biz/wp-content/uploads/2014/02/Health-Care-Survey-2014.pdf>.

¹⁸ Advocate groups typically define microbusinesses as an organization with less than five employees, small enough to require little capital to get started.

¹⁹ The full survey can be found on the NASE website here: <http://www.nase.org/sf-docs/default-source/advocacy-documents/november-2013-aca-enrollment-survey-qs-only.pdf?sfvrsn=2>.

visited HealthCare.gov decided to explore options outside of the exchange. Only 9 percent of those able to visit the site reported they had successfully enrolled in a health insurance plan for 2014 and almost 17 percent of respondents indicated that they'd be forgoing health insurance in 2014 due to the plans' high costs.

On February 21, 2014, the Centers for Medicare and Medicaid Services (CMS) released a report predicting that the health care law could cause premiums to increase for nearly two-thirds of small to medium-sized businesses. The report stated that 11 million individuals will experience premiums estimated to be higher as a result of the ACA and about 6 million individuals are estimated to have lower premiums.²⁰

Another problem that self-employed individuals are encountering is the recent guidance document²¹ that appears to disallow Health Reimbursement Arrangements (HRAs) unless the participant is also enrolled in other *group* health coverage. As previously stated, the vast majority of self-employed individuals purchase their coverage in the individual market. This guidance document may effectively eliminate the use of HRAs for self-employed individuals, even though this option has been commonly used by such individuals in the past.

Difficulties with the SHOPS

The Small Business Health Options Program (SHOP) are exchanges required by the law to assist small businesses in identifying, comparing, and enrolling in health insurance coverage. Some states chose to establish and operate their own SHOP exchanges. For those states that did not opt to do so, the federal government is responsible for operating the SHOP exchanges, called a Federally-Facilitated SHOP (FF-SHOP).²² The SHOPS were supposed to be fully functional on October 1, 2013. While many of the state-based SHOPS are operational and accepting enrollment, the FF-SHOPS and some of the state-based SHOPS are still not fully functional. These delays continue to cause confusion and consternation for small businesses and self-employed individuals seeking information about rates and plans, as well as to sign up.

Alternatives to the Health Care Law

Because many people, including small business owners and self-employed individuals, have experienced difficulties with the health care law, some alternatives to the law have been suggested. Some of those ideas are discussed below.

Those with costly, chronic health problems can increase the cost of health insurance for others in the individual market. For some time, states have been operating high-risk pools to help ensure that these individuals are able to maintain affordable health coverage. One legislative proposal would encourage states to work with insurers to identify those with the highest chronic health care costs among a state's insured population and establish strong disincentives for excessive

²⁰ OFFICE OF THE ACTUARY, CENTERS FOR MEDICARE AND MEDICAID SERVICES, 6 (Feb. 2014), *available at* <http://www.cms.gov/Research-Statistics-Data-and-Systems/Research/ActuarialStudies/Downloads/ACA-Employer-Premium-Impact.pdf>.

²¹ <http://www.dol.gov/ebsa/newsroom/tr13-03.html>.

²² 42 U.S.C. § 18041.

referrals to the high-risk pool, such as penalizing insurers seeking subsidization for individuals who are found to be unqualified for the pool.²³

Another plan would encourage states to allow small businesses to join together through an association to increase their negotiating power with insurers.²⁴ Under some alternatives, states would be permitted to establish interstate compacts for insurance pooling, which would allow consumers to shop for insurance across state lines.²⁵ These alternatives could increase small business coverage options and reduce their cost.

Many self-employed individuals have utilized Health Savings Accounts (HSA) or Health Reimbursement Arrangements (HRA)²⁶ to save for future health care expenses. With an HSA, an individual may claim a tax deduction for contributions by the taxpayer or someone other than his or her employer, even if the taxpayer does not itemize deductions; contributions made by an employer may be excluded from gross income; contributions remain in the account until they are used; distributions may be tax free if used for qualified medical expenses; and the HSA is portable – it stays with the individual even if that person changes jobs or leaves the workforce.²⁷ HRAs are similar, in that contributions made by the employer are excludable from gross income and reimbursements may be tax free if used for qualifying medical expenses.²⁸ Although these savings plans are popular, they do carry restrictions, and some self-employed persons may not qualify for them. For example, to qualify for an HSA, an individual must be covered under a high deductible health plan, may not be covered by Medicare and may not be claimed as a dependent on another taxpayer's return.²⁹ The Internal Revenue Service considers HRAs to be employer-sponsored benefits, so self-employed persons are not eligible under Obamacare,³⁰ although some organizations support expanding HRA eligibility.³¹

Over the years, there has also been support for medical malpractice reform as a way to reduce the cost of health insurance and health care. Most states have enacted some kind of malpractice reform, and reform has also been discussed at the federal level, but support is not unanimous.³²

²³ Summary, The Patient Choice, Affordability, Responsibility and Empowerment Act 4 (Jan. 2014) [hereinafter "Patient CARE Act Summary"], available at <http://www.hatch.senate.gov/public/cache/files/bf0c9823-29c7-4078-b8af-aa9a12213eca/The%20Patient%20CARE%20Act%20-%20LEGISLATIVE%20PROPOSAL.pdf>. This legislative proposal has not yet been introduced.

²⁴ The American Health Care Reform Act, H.R. 3121, 113th Cong. § 801 (2013), available at <http://lis.gov/cgi-lis/bdquery/D?d113:1:/temp/~bdjNbf:@@E&summ2=m&:dbs=n:/billsumm/billsumm.php?id=2>.

²⁵ § 204, Patient CARE Act Summary. This bill was introduced by Representative Phil Roe (R-TN) and was cosponsored by 124 other House members.

²⁶ INTERNAL REVENUE SERVICE, PUBLICATION 969, HEALTH SAVINGS ACCOUNTS AND OTHER TAX-FAVORED HEALTH PLANS 1 (2013), available at http://www.irs.gov/publications/p969/ar02.html#en_US_2013_publink1000204194.

²⁷ *Id.*

²⁸ *Id.* at 15.

²⁹ *Id.*

³⁰ *Id.*

³¹ POSITION PAPER, ACCESS TO AFFORDABLE HEALTH COVERAGE, NATIONAL ASSOCIATION FOR THE SELF-EMPLOYED, available at http://www.nase.org/Nase_News/2009/03/29/Access_to_Affordable_Health_Coverage.

³² See Peter Orszag, *To Fix U.S. Budget, Reform Medical Malpractice Law*, BLOOMBERG, Feb. 27, 2013, available at <http://www.bloomberg.com/news/2013-02-27/to-fix-u-s-budget-reform-medical-malpractice-law.html> (supporting medical malpractice reform as a way to reduce the cost of the Medicare program) and Wayne Oliver, *States Debating Innovative Approaches to Malpractice Legislation*, ATLANTA JOURNAL-CONSTITUTION, Feb. 7, 2013,

Conclusion

Many self-employed individuals are experiencing difficulty obtaining health care coverage compliant with the health care law. In some cases, the law itself is causing individuals to forgo obtaining coverage due to cost concerns or dramatically increasing costs. Other alternatives may offer the promise of expanded choices and flexibility. The hearing represents an opportunity for Members to hear from the self-employed and benefits experts as to how the health care law is affecting these businesses, and what options could be available to improve their health care financing situation.

available at <http://blogs.ajc.com/health-flock/2013/02/07/states-debating-innovative-approaches-to-medical-malpractice-reform/> (describing various state efforts on malpractice reform). *But see* Maureen Martin, *Federal Malpractice Law Would Hinder Reform*, SEPT. 15, 2009, The Heartland Institute, available at <http://news.heartland.org/editorial/2009/09/15/federal-medical-malpractice-law-would-hinder-reform> (stating that federal tort reform wouldn't be effective, and tort reform is best enacted by the states).