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Mandate's Definition of Full-Time Employee on Jobs and Opportunities**

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This testimony before the Committee on Ways and Means before the United States House of Representatives examines the effect of the Affordable Care Act's 30-Hour Rule on employer-based health insurance coverage in the workforce.

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**Hearing on the Impact of the Affordable Care Act (ACA) Employer
Mandate's Definition of Full-Time Employee on Jobs and
Opportunities**

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¹ The views presented in this testimony are my own, and do not represent the positions of the Hoover Institution or Stanford University. I am grateful to Daniel Heil and Thomas Church, my colleagues at the Hoover Institution, for their assistance in the preparation of this testimony.

Chairman Camp, Ranking Member Levin, and Members of the Committee:

Thank you for the invitation to appear before you today to discuss the Affordable Care Act (ACA) and the impact of its employer mandate's definition of "full-time employee" on jobs and opportunities.

My name is Lanhee Chen, and I am a Research Fellow at the Hoover Institution, as well as a Lecturer in Public Policy and a Lecturer in Law at Stanford University. In those capacities, I conduct research, teach, and write about a number of contemporary health policy issues.

I believe that the ACA as a whole creates significant disincentives for businesses to grow and hire new workers. But no element of the law is more directly impactful to American employers than its requirement that some of them furnish health insurance to their employees.² And within the employer mandate, no provision is more controversial—or more harmful to those workers who can least afford it—than the law's definition of who qualifies as a "full-time employee" for purposes of determining compliance with the law.

Background: The ACA's Employer Mandate and Its 30-Hour Rule

Nearly 160 million Americans receive health insurance coverage through their employers. Prior to passage of the Affordable Care Act, federal policy generally encouraged employers to offer health coverage by making it voluntary—with only occasional legislative or regulatory intervention.³ Employers have therefore been free to innovate and tailor benefit designs to meet the needs of a changing workforce. Today, these employer-sponsored plans are leading the way toward better quality and greater efficiencies in our health care system.

The Affordable Care Act, however, takes forty years of federal policy and turns it on its head; it is a highly prescriptive and complex law that imposes a myriad of new rules and regulations on employers.

Most importantly, employer-sponsored health insurance is no longer voluntary for some businesses because of the ACA. The law requires that employers with at least 50 full-

² The employer mandate was added by Section 1513 of the Patient Protection and Affordable Care Act and is codified in 26 U.S.C. § 4980H.

³ The precedent for this was set by passage of the Employee Retirement Income Security Act of 1974 (ERISA), which does not require that an employer furnish health insurance benefits to its employees. See 29 U.S.C. § 18 et seq. ERISA also set uniform federal standards for self-insured health benefits plans, and broadly preempted the regulation of these plans at the state level. In fact, ERISA was subsequently used to bar the imposition of employer mandates at the state level. Major modifications to ERISA since its passage included the enactment of a continuing coverage requirement; protections against discrimination or the denial of coverage due to a preexisting health condition; a mental health parity requirement; and benefit mandates relating to coverage for mothers and their newborn children as well as certain cancer patients.

time employees (FTEs) offer health benefits to their employees. Those employers that do not are subject to one of two new tax penalties.

First, employers that do not offer health coverage *and* have at least one FTE receiving a tax credit or cost-sharing reduction for insurance through the ACA's health insurance exchanges are subject to a tax penalty.⁴ Second, employers that offer health insurance, *but* have at least one FTE receiving a tax credit or cost-sharing reduction to purchase health insurance through the ACA's exchanges, are also subject to a penalty.⁵

As if the employer mandate weren't onerous enough, the ACA defines a "full-time employee" as someone who is employed an average of at least 30 hours per week.⁶ This provision, in particular, creates significant administrative complexities for employers and provides them with strong economic incentives to shift workers from full-time work, defined by the ACA as at least 30 hours per week, to part-time work.

Thus, the 30-hour rule creates a "double whammy" for employers that are trying to determine whether they are subject to the mandate. First, and most obviously, any employee who is employed an average of 30 hours per week or more is a "full-time employee" and must be included in the calculation. Second, an employer must consider not only the number of full-time employees it has but also the number of "full-time equivalents" it employs. And the formula the law uses to calculate these full-time equivalents assumes that full-time employment equals an average of 30 hours per week. If the total number of full-time employees plus full-time equivalents exceeds fifty, the employer is subject to the ACA's employer mandates and its accompanying penalties.

The Damage Created By the 30-Hour Rule

The 30-hour rule is particularly damaging because it impacts the economic incentives that employers have to hire and/or retain labor. Since full-time work is defined in the ACA as work for an average at least 30 hours per week, employers might have an incentive to reduce the hours of some workers who are close to the 30-hour threshold.

More specifically, I believe the 30-hour rule must be replaced for three reasons: First, it disproportionately affects low-wage workers—those who can least afford it. Second, it creates administrative complexities and additional costs for businesses, making it less likely that they will expand and create new jobs. Finally, it adversely impacts school districts, institutions of higher learning, and educational opportunities. I address each of these arguments in turn.

⁴ The penalty is \$2,000 for each full-time employee in excess of the first 30. See 26 U.S.C. § 4980H(c)(1).

⁵ The penalty is the lesser of \$3,000 per full-time employee who receives subsidized coverage or the penalty the employer would have to pay if it did not offer health insurance, as calculated in 26 U.S.C. § 4980H(c)(1). See 26 U.S.C. § 4980H(b)(1).

⁶ The employer mandate provision defines a "full-time employee" as someone who is "employed on average at least 30 hours of service per week." 26 U.S.C. § 4980H(c)(4)(A). It also requires employers to add to the number of employees the number of full-time equivalents, which are calculated by "dividing the aggregate number of hours of service of employees who are not full-time employees for the month by 120." 26 U.S.C. § 4980H(c)(2)(E).

The 30-Hour Rule Hurts The Workers Who Can Least Afford It

Americans who are currently in relatively low-wage, low-skilled jobs will be most acutely impacted by the ACA's 30-hour rule. Most broadly, there are currently 7.8 million Americans who working part-time but want full-time work.⁷ The 30-hour rule only makes it more unlikely that these Americans can find the jobs they want and need.

A more precise estimate of the number of Americans who are vulnerable to having their work hours reduced as a consequence of the ACA's 30-hour rule was performed by the Labor Center at the University of California, Berkeley in February 2013.⁸ The Berkeley study defined the "vulnerable population" as those Americans working at firms with more than 100 employees; who were employed between 30 and 36 hours per week; who had family incomes below 400% of the Federal Poverty Level (FPL); and who did not receive health insurance through their employers. Those researchers concluded that 2.3 million workers, or approximately 2% of the United States workforce, were at greatest risk for a reduction of hours because of the 30-hour rule.

My colleagues and I at the Hoover Institution recently updated and refined the analysis done by the UC Berkeley researchers.⁹ We utilize the same definition of the "vulnerable population" and conclude that a total of 2.6 million workers, or 3.1% of the United States workforce, are a part of this group. Table 1 in the Appendix provides a breakdown, by industry, of the number of employees, as well as the percentage of overall workers in the United States workforce, who fall into the "vulnerable population."

I provide here a few descriptive statistics regarding the Americans who are most at risk because of the 30-hour rule. First, the 30-hour rule disproportionately affects women; in fact, 63% of those most at risk of lost hours are female. Furthermore, the vast majority (89%) of those potentially affected do not have a college degree, with over half of the group having a high school diploma or less. Almost 60% of the group is between the ages of 19 and 34, making the 30-hour rule particularly damaging for younger American workers. Finally, the median income of workers in the "vulnerable population" is

⁷ This figure comes from the monthly household employment survey conducted by the Bureau of Labor Statistics and is reported in Table A-8 as the number of Americans employed part-time for economic reasons ("those who want and are available for work but have had to settle for a part-time schedule.") The most recent data are from the December 2013 survey, available at: <http://www.bls.gov/news.release/empsit.t08.htm>.

⁸ Graham-Squire, David and Jacobs, Ken, "Data Brief: Which Workers are most at risk of reduced work hours under the Affordable Care Act?," *UC Berkeley Labor Center*, Feb. 2013. Available at: http://laborcenter.berkeley.edu/healthcare/reduced_work_hours13.pdf

⁹ Our analysis relies on the 2011, 2012, and 2013 Current Population Survey (CPS) March Supplement data. It uses the detailed Census industry codes to provide breakdowns by specific industries. Perhaps most importantly, our analysis relies on a recent improvement in the CPS data (specifically the firm size variable), which allows researchers to separately identify firms with 50 or more employees. There are three differences of note from the Berkeley analysis: (1) we use more current (2011-13) data; (2) our analysis is able to specifically identify workers in firms with greater than 50 employees, where the Berkeley analysis was limited to workers in firms with greater than 100 employees; and (3) the industry-specific data is broken down on the basis of Census industry codes, whereas the Berkeley analysis relied on proprietary industry categories that were not perfectly replicable using publicly available CPS variables.

\$14,333 per year for individuals and \$29,126 for families. Tables 2 through 4 in the Appendix provide additional descriptive statistics of interest.

Americans that work in the retail trade or at restaurants are most at risk of having their hours cut, according to our analysis. Over 600,000 workers in the retail trade, or 6.3% of workers in that industry, and 589,000 workers in restaurants, or about 15.4% of workers in that industry, are at risk because of the 30-hour rule. A notable percentage of employees in the accommodation, building services, and nursing home industries are also at risk.

These data are consistent with actual reports regarding employer behavior that have been made publicly available over the last year. It is certainly the case that not every firm or every type of worker will be impacted by the 30-hour rule. It is unlikely, for example, that law firms will cut associate hours or investment banks will cut the hours of bond traders in order to avoid the impact of the ACA's employer mandate. But, as the analysis above reveals, those most affected by the rule are American workers who can least afford it.

Although some have argued that the ACA is not the definitive reason for this behavior, the law creates strong incentives to engage in precisely the behavior that has been observed. Andrew Puzder, the CEO of CKE Restaurants, Inc., the parent company of Carl's Jr. and Hardees Restaurants, put it best: "The evidence that ObamaCare is having a negative impact on hiring is unequivocal, abundant, and consistent with common sense."¹⁰

The actual reports of reductions in hours coming from employers around the country are impossible to ignore. One media outlet compiled in December 2013 a list of 388 employers that had restricted work hours to below thirty hours per week.¹¹ Notable examples of employers on the list included SeaWorld Entertainment, David's Bridal, several Subway Restaurants franchisees, and Land's End. Another media account noted that clothing retailer Forever 21 planned to cut hours and reclassify some full-time employees as part-time workers.¹² Regal Entertainment Group, which operates more than 500 movie theatres across 38 states, cut hours for non-salaried workers to stay below the 30-hour per week threshold, citing the Affordable Care Act as the reason why.¹³ Finally, a 2012 survey of employers by Mercer consulting found that almost 70% of employers in retail and wholesale firms that do not offer health coverage today "are

¹⁰ Andrew Puzder, "Obamacare and the Part-Time Economy," *The Wall Street Journal*, Oct. 10, 2013.

¹¹ Jed Graham, "ObamaCare Employer Mandate: A List of Cuts to Work Hours, Jobs," *Investors Business Daily*, Dec. 19, 2013. Available at: <http://news.investors.com/politics-obamacare/121913-669013-obamacare-employer-mandate-a-list-of-cuts-to-work-hours-jobs.htm>.

¹² Karen McVeigh, "US employers slashing worker hours to avoid Obamacare insurance mandate," *The Guardian*, Sep. 30, 2013. Available at: <http://www.theguardian.com/world/2013/sep/30/us-employers-slash-hours-avoid-obamacare>. Forever 21 denied in the article that the changes in employment practices had anything to do with the ACA.

¹³ Jessica Chasmar, "Regal Cinemas cuts workweek for thousands, blames 'Obamacare'," *Washington Times*, Apr. 16, 2013. Available at: <http://www.washingtontimes.com/news/2013/apr/16/regal-cinemas-cuts-workweek-thousands-blames-obama/>.

more inclined to change their workforce strategy so that fewer employees meet that [30 hour a week] threshold.”¹⁴

Workers in the public sector are also seeing their hours cut because of the ACA’s 30-hour rule. Reports from municipalities and states across the country—from Long Beach, CA to Auburn Hills, MI—are that workers’ hours are being cut to fewer than 30 hours per week. And, as will be discussed more substantially below, the 30-hour rule is particularly harmful to part-time workers in school districts, community colleges, and other educational institutions across the country.

Finally, workers who have seen their hours cut must also deal with the fact that the ACA is leading some employers to cut health benefits for part-time workers. Recent media reports have indicated that major employers like Target, Inc., Home Depot, and Trader Joe’s have stopped offering health benefits to part-time employees—at least in part due to the ACA.¹⁵

The 30-Hour Rule Creates Added Administrative Complexities and Costs for Employers

The ACA’s creation of a separate rule governing the definition of a “full-time” employee creates added administrative complexities and costs for employers. These added costs and complexities may act as disincentives for additional hiring and growth.

First, it is a widely held understanding that an employee who works a 40-hour workweek is employed full-time. This understanding is also codified in the Fair Labor Standards Act, which does not define “full-time” employment but does mandate the payment of overtime for nonexempt employees who work more than 40 hours per week.¹⁶

Moreover, the 30-hour rule creates additional health benefits costs for employers. Those employers who currently offer health insurance to all of their full-time employees and will continue doing so—even with the 30-hour rule—are now required to extend coverage to additional employees. Given the individual mandate and the anticipated expense of plans in federal and state-level health insurance exchanges, employers may see many of their employees who are working between 30 and 40 hours per week electing coverage. For employers, these costs are added to expected increases in health costs caused by other components of the ACA, and health inflation more generally. A recently released letter from Delta Airlines to the Obama Administration disclosed the magnitude of these cost increases for one large employer. Delta

¹⁴ “Obamacare and the ‘29ers,” *The Wall Street Journal*, Feb. 26, 2013.

¹⁵ Clare O’Connor, “Target Joins Home Depot, Walmart, Others In Cutting Health Care For Part-Timers, Citing Obamacare,” *Forbes.Com*, Jan. 22, 2014. Available at: <http://www.forbes.com/sites/clareoconnor/2014/01/22/target-joins-home-depot-walmart-others-in-dropping-health-care-for-part-timers-citing-obamacare/>.

¹⁶ See *generally* 29 U.S.C. § 207 (setting forty as the maximum hours that many employees may work before earning overtime benefits).

estimated that the ACA would be responsible, at least in part, for an increase of nearly \$100 million in the company's health care costs in 2014.¹⁷

Employers also face significant new recordkeeping and reporting requirements in complying with the 30-hour rule. Regulatory guidance issued by the Internal Revenue Service requires employers to determine whether each employee averaged at least 30 hours of service per week “by looking back at a defined period of not less than three but not more than 12 consecutive calendar months, as chosen by the employer.”¹⁸ If an employee is a full-time employee during this so-called “measurement period,” he/she is treated as a full-time employee during a subsequent “stability period,” regardless of his/her hours worked during the stability period. Furthermore, recordkeeping requirements vary based on whether employees are “new” or “ongoing” employees and, in the case of new employees, whether they are expected to work full-time or are “variable” or “seasonal” employees. Thus, many employers—particularly larger ones—will be faced with the administrative difficulties associated with tracking many different initial measurement and stability periods.

Even those employers that provide health coverage to all of their full-time employees will now be required to track and record hours of service under these proposed guidelines to comply with the reporting and payment obligations imposed by the employer mandate. This is because potential penalties under the mandate are based on the number of full-time employees and whether any full-time employees receive subsidized coverage through the ACA's health insurance exchanges.

The 30-Hour Rule Negatively Impacts Educational Opportunities

The final reason that I argue the 30-hour rule must be addressed is because of the negative impact it has on school districts, colleges, and universities.

The analysis of vulnerable workers referenced earlier found that about 225,000 workers in the education industry—about 2% of workers in that field—were at risk of seeing their hours cut because of the ACA's 30-hour rule. A recent analysis revealed that over 100 school districts across the country, including dozens in Indiana alone, have either cut worker hours or outsourced jobs to avoid the ACA's employer mandate.¹⁹ School districts have either cut the hours or outsourced the responsibilities of support staff like teachers' aides, bus drivers, and cafeteria workers to limit their financial liability under the 30-hour rule.

But the impact of the 30-hour rule is not limited to school districts; it also impacts institutions of higher learning. The 30-hour rule may actually limit a college or

¹⁷ Avik Roy, “Delta Air Lines: Next Year, Our Health Care Costs Will Increase By ‘Nearly \$100 Million,’” *Forbes.Com*, Aug. 22, 2013. Available at: <http://www.forbes.com/sites/theapothecary/2013/08/22/delta-air-lines-next-year-our-health-care-costs-will-increase-by-nearly-100-million/>.

¹⁸ “Determining Full-Time Employees for Purposes of Shared Responsibility for Employers Regarding Health Coverage (§ 4980H),” Internal Revenue Service, U.S. Department of the Treasury, Notice 2012-58. Available at: <http://www.irs.gov/pub/irs-drop/n-12-58.pdf>.

¹⁹ Jed Graham, “100 School Districts Cut Work Hours, Blame ObamaCare,” *Investor's Business Daily*, Oct. 18, 2013. Available at: <http://news.investors.com/politics-obamacare/101813-675710-100-school-districts-blame-obamacare-for-cuts-to-work-hours.htm>.

university's ability to offer certain courses or to ensure that students timely complete their degree requirements. Recent testimony from an employee benefits attorney to the House Education and the Workforce Committee revealed the particular difficulty that educational institutions (and particularly community colleges) face when hiring adjunct faculty members, who are generally hired to teach a specific course and are neither fully part-time nor full-time employees, making it difficult to track the number of hours they work per week.²⁰ Adjuncts are generally not offered health benefits—thus, to preserve this arrangement, colleges and universities are forced to take a conservative approach to the hiring of adjunct faculty, or to the number of courses which adjunct instructors are able to teach. This will, in turn, limit the courses that some colleges and universities are able to offer to their students.²¹

Conclusion

The 30-hour rule in the Affordable Care Act's employer mandate has impacts that reach far beyond the boundaries of our healthcare system. In fact, its negative effect on jobs and economic opportunities are of greatest concern.

I have argued here that the 30-hour rule most adversely affects the American workers who can least afford it; that it creates additional costs and administrative complexities for employers that will serve as disincentives to hire, grow, and invest; and that it negatively impacts educational opportunities. For all of these reasons, I believe the 30-hour rule is fundamentally flawed and must be replaced.

Mr. Chairman, thank you for the opportunity to appear before the Committee today. I look forward to taking your questions, and those of your colleagues on the Committee.

²⁰ Gregory L. Needles, Testimony before the House Committee on Education and the Workforce, "Impact of the Patient Protection and ACA on Educational Institutions," Nov. 14, 2013. Available at: http://edworkforce.house.gov/uploadedfiles/needles_testimony.pdf.

²¹ See, e.g., Tina Haynes, Chief Human Resource Officer, Rowan-Cabarrus Community College, Salisbury, NC, Testimony to the House Education and the Workforce Committee, Hearing on "Healthcare Challenges Facing North Carolina's Workers and Job Creators," Apr. 30, 2013 (arguing that community college students could face difficulties graduating because of the impact of ACA on hiring adjunct faculty).

Appendix

Table 1. Hours Worked by Industry in Firms with 50 or More Employees

	Number of Workers (thousands)					Percent of Workers				
	Hours Vary	Below 30 hrs	30 to 36 hrs	37+ hrs	Vulnerable Population	Hours Vary	Below 30 hrs	30 to 36 hrs	37+ hrs	Vulnerable Population
Agriculture, Forestry, Mining	88	22	26	912	17	8.4%	2.1%	2.5%	87.0%	1.6%
Construction	167	56	94	2,394	38	6.2%	2.1%	3.5%	88.3%	1.4%
Manufacturing	460	180	332	9,592	118	4.4%	1.7%	3.1%	90.8%	1.1%
Utilities, Transportation, Communication	382	326	252	4,889	77	6.5%	5.6%	4.3%	83.6%	1.3%
Wholesale	92	72	69	1,940	30	4.2%	3.3%	3.2%	89.3%	1.4%
Retail Trade	624	1,655	1,292	5,935	602	6.6%	17.4%	13.6%	62.4%	6.3%
Financial	203	240	248	5,502	58	3.3%	3.9%	4.0%	88.8%	0.9%
Education	482	1,569	1,043	7,701	225	4.5%	14.5%	9.7%	71.3%	2.1%
Accommodation	59	83	127	640	70	6.5%	9.1%	14.0%	70.4%	7.7%
Restaurants	340	946	873	1,676	589	8.9%	24.7%	22.8%	43.7%	15.4%
Bldg. Services	26	72	46	303	27	5.9%	16.1%	10.3%	67.6%	6.1%
Health Care	422	997	1,424	6,869	238	4.3%	10.3%	14.7%	70.7%	2.5%
Nursing Home	64	153	239	898	103	4.7%	11.3%	17.6%	66.3%	7.6%
Other Services	905	1,325	1,122	15,706	403	4.7%	7.0%	5.9%	82.4%	2.1%
Total	4,314	7,697	7,188	64,956	2,596	5.1%	9.1%	8.5%	77.2%	3.1%

Notes: Analysis based on Graham-Square and Jacobs (2013). Numbers may not add up due to rounding. Data from 2011, 2012, and 2013 Current Population Survey March Supplements was used and is limited to workers aged 19-64. Vulnerable population limited to those working between 30 to 36 hours, with family incomes below 400% of the federal poverty line, and who do not receive health insurance from their employers. Industry classifications based on Census detailed industry codes.

Table 2. Vulnerable Population by Gender

	Total	Percent of Vulnerable Population
Female	1,638,774	63.1%
Male	957,127	36.9%

Table 3. Vulnerable Population by Level of Educational Attainment

Level of Attainment	Total	Percent of Vulnerable Population
Less than High School Diploma	407,403	15.7%
High School Diploma	964,380	37.2%
Some College or Associates	925,169	35.6%
Bachelors or Higher	298,949	11.5%

Table 4. Vulnerable Population by Age

Age Group	Total	Percent of Vulnerable Population
19 to 25	822,178	31.7%
25 to 34	709,507	27.3%
35 to 44	497,586	19.2%
45 to 54	379,134	14.6%
55 to 64	187,496	7.2%