

## End the Employer Mandate

Dr. Robert F. Graboyes / [rfgaboyes@gmail.com](mailto:rfgaboyes@gmail.com) / [www.robertgraboyes.com](http://www.robertgraboyes.com)

*NFIB Healthcare Bulletin (2/21/13)*

---

Obamacare's employer mandate must go. Now. Clean and neat. Straight repeal. Just do it.

If you're an Obamacare supporter, this is the biggest favor you can do for the health care law. If you're an Obamacare opponent, this is the biggest favor you can do for the country.

The American economy didn't grow slowly last quarter. It shrank. If that happens again this quarter, its official – we are back in recession, and the country's leadership can once again wear a scarlet "R" on their clothing. If so, the employer mandate may well be what earns Washington that shame.

Tellingly, the employer mandate warnings are coming from [Obamacare friends](#) and foes alike. With the U.S. economy one quarterly datum away from recession, employers are not seeking ways to maintain what they have, much less to innovate or expand or hire. Instead, we see frenzied efforts to restructure organizations in ways that make no sense whatsoever – other than to avoid the mandate. Employers exploring these options are small and large, for-profit and not-for-profit, private and public.

Just to recap, the mandate applies to employers with 50 or more full-time employees or full-time equivalents. It requires them to offer affordable coverage to substantially all full-time employees, with "affordable" determined by a complex formula. They must pay a large penalty if they fail the test with even a single full-timer. To avoid that possibility, they're exploring a number of possibilities:

**CUT SOME HOURS:** In a previous column, I mentioned that [the Community College of Allegheny County](#) (PA) slashed its adjunct professors' hours to avoid what would have been a budget-busting employer mandate penalty. In that story, an adjunct lamented that his pay was shrinking at the very moment he is being commanded by Obamacare to purchase expensive insurance. A number of restaurants had been considering the same move.

**CUT SOME MORE:** Now, Ohio's [Stark State College](#) has written its adjuncts: "in order to avoid penalties under the Affordable Care Act ... employees with part-time or adjunct status will not be assigned more than an average of 29 hours per week." A hard-working, low-paid adjunct told the press, "In education, we're working for the public good, we are public employees at a public institution; we should be the first ones to uphold the law, to set the example." Unfortunately for this fellow, his college IS upholding the law – in this case, they're upholding the parts he doesn't like so much. The college is setting an example that will be replicated across the country. The employer mandate pits employer against employee. In this battle, the college won a Pyrrhic victory – no doubt in the name of the "public good" – and the adjunct and his family lost. In a larger sense, both lost, as did the students and the community and the country; all will pay a price. Following suit, the [state of Virginia](#) will now restrict over 37,000 state employees – those paid by the hour – to no more than 29 hours per week. For some Virginia adjunct professors, this could mean a one-third cut in pay.

**CUT DEPARTMENTS:** Entrepreneur [Paul Christiansen](#) suggests that businesses go "protean." The employer mandate only penalizes employers with 50 or more employees, so Christiansen suggests that businesses cut themselves up into tiny entities, each below the 50-employee threshold. Take your human resources department, spin it off, incorporate it, and deal with it as an independent vendor

rather than as a set of employees. Do the same with accounting, sales, whatever. Will this strategy pass legal muster? No doubt, an army of attorneys will work furiously to answer the question.

**TEMPS GALORE:** Then there's this strategy: lay off an employee, tell her to go to a temp agency, and then tell the temp agency, "I'd like her back, but as your employee, not mine." The IRS [has warned employers](#) not to try such strategies – that it will issue an "anti-abuse" regulation. The law says employers are only responsible for their own employees' health insurance, but the IRS comment suggests that they will simply declare non-employees to be employees. Time will tell whether an already over-stretched IRS can put muscle behind its order. No doubt, this will be a big job-creator for litigators.

**KICK YOUR WORKFORCE:** None of this should be a surprise. Economist [Casey Mulligan](#) wrote in his *New York Times* blog that when the government hands each employer its own personal fiscal cliff, the employer will go to extraordinary lengths to avoid that cliff. He shows, as does [Business Week](#), that France has 2.4 times as many businesses with 49 employees as it has with 50 employees, thanks to mandate-like obligations that kick in at 50. You don't even have to leave the U.S. to witness this phenomenon. [Hawai'i](#) has had a health insurance employer mandate since 1974. For a given employee, that mandate kicks in at 20 hours, and in 2009, a Federal Reserve Bank of San Francisco [study](#) showed that the result is an unusually high number of employees working 19 or fewer hours per week. Businesses are already cutting employees or dropping expansion plans.

**KICK YOURSELF:** Labor unions were among the biggest backers of Obamacare, but now, some have realized that the employer mandate will bite them back. The [Wall Street Journal](#) reports that buyer's remorse is setting in. Obamacare will make union health insurance policies more expensive and will make it more difficult for union members to compete with employees working for businesses with fewer than 50 employees. The article reports that some unions are lobbying for subsidies to which they are not currently entitled.

**KICK THE CHILDREN:** One of the more surprising rules to emerge from the federal agencies may hang employees' families out to dry. The law says employers with 50 or more employees will pay penalties if: (1) they fail to offer health insurance to all full-time employees and their families and (2) the insurance is not "affordable" (according to calculations described [here](#)). A recent rule clarified, however, that while the employer must offer health insurance to employees' dependents, the affordability standard applies only to the *employee's* insurance – not to the *dependent* coverage. Thus, employers are now free to offer bargain-basement insurance to employees, but charge their families a king's ransom for their coverage. Just last month, a clarification of the clarification clarified that the families will be eligible for subsidies in the exchanges, but the clarification of the clarification makes it harder for the families to get those subsidies. Is that clear? Timothy [Jost](#), a law professor and prominent Obamacare backer described the bottom line: "Employers can offer unaffordable family coverage and avoid a penalty. The federal government will pay less for premium tax credits as fewer people will be eligible. And hundreds of thousands, probably millions, of children (and spouses) will remain uninsured."

**BREAK THE SHELF:** The fastest-running assembly line in America these days is the one rolling out Obamacare regulations. Shelves are bowing under the weight of a 1,000-page law and over 10,000 pages of regulations. The employer mandate occupies 3½ pages or so of the law, and it has now been "clarified" by a 144-page proposed regulation, including 44 definitions – many of them unprecedented. The regulations make a distinction, for example, between a "seasonal worker" and a "seasonal employee." A seasonal worker and a seasonal employee will affect the employer mandate penalty in very different ways. The difference? A seasonal worker, you see, is one who works up to 120 days or

four months per year. A seasonal employee, on the other hand, is ... well, they'll be getting back to us on that one.

**MANDATE CRASHING:** This might be an opportune moment to go back a few years and remember what economist [Martin Feldstein](#) wrote in the *Washington Post* in November 2009 – four months before the law passed: “Obamacare could have the unintended consequence of raising health insurance premiums and causing a decline in the number of people with insurance.” The official forecast was that Obamacare would add 30,000,000 people to the health insurance rolls. It also forecast that 4,000,000 small businesses would get the health insurance tax credit (only 170,000 did); they forecast that 375,000 people with pre-existing conditions would get insurance through the new temporary high-risk pools (only 45,000 did). This month, the Congressional Budget Office (CBO) [predicted](#) that 7,000,000 people would lose their employer-sponsored coverage (up from 4,000,000 six months ago). CBO also predicted that individual subsidies will cost the federal government close to 30 percent more than they had previously forecast – in part because of employers dropping coverage.

**TIME FOR TRASHING:** Timing is everything. The employer mandate, individual mandate, and individual subsidies are all supposed to kick in at the same moment – January 1, 2014. These three mechanisms cannot function unless the health insurance exchanges are ready to go on October 1, 2013 and fully functioning by January 1, 2014. It grows clearer by the day that the exchanges will not be ready this year, so now is the perfect time to end the employer mandate. For an example of exchange-related doom-saying, economist [John Goodman](#) predicts that only three to five states will have functional exchanges by New Year's Day. Employers were supposed to explain to employees on March 1, 2013, how they could sign up with exchanges to purchase health insurance. Since no one yet has a clue how that is to happen, the Administration gently laid that deadline to rest, at least until late summer or early fall.

With the exchanges flailing and the employer mandate scaring the wits out of employers, this is a perfect moment for bipartisanship. The employer mandate serves the interests of no Americans and of neither party. This word is spreading on both sides of the aisle and across the country.

The message is clear: end the employer mandate today.

–Originally published by the Altarum Institute ([www.altarum.org](http://www.altarum.org)), 2/20/13.