

# **Obamacare and Small Business: “Glitches” May Only be the Beginning if Employer Plans Relinquish Grandfathered Status**

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# **Obamacare and Small Business: “Glitches” May Only be the Beginning if Employer Plans Relinquish Grandfathered Status**

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## **ABSTRACT**

The Patient Protection and Affordable Care Act, known popularly as Obamacare, introduced sweeping changes to the healthcare system in the United States. The now infamous observation from Nancy Pelosi<sup>1</sup>, Speaker of the United States House of Representatives, “we have to pass the [health care] bill so that you can find out, what is in it,” is beginning to come to fruition. The problem plagued launch of the insurance exchange marketplace, via the HealthCare.gov website, has sparked frustrations and criticisms from the consuming public. The technical difficulties with the website were initially characterized by officials as “glitches,” but it was subsequently obvious that problems were more severe and would require significant repairs while also leading to delays. Insurance issuers have sent millions of cancellation notices and more are expected to come. Both individuals and small businesses are threatened by penalties if they fail to obtain insurance on time, yet the exchanges are still not fully functioning.

Keywords: Obamacare, ACA, Affordable Care Act, ACA, Health Care, Small Business, Entrepreneurship, Economic Stresses

## **INTRODUCTION**

The Patient Protection and Affordable Care Act, (abbreviated PPACA, or shorter still, ACA), (Public Law 111-148) ("Patient Protection and Affordable Care Act," 2010), as well as amendments in the Health Care And Education Reconciliation Act of 2010 (Public Law 111 - 152) ("Health Care And Education Reconciliation Act," 2010), more popularly known as Obamacare, is “legislation that created the greatest single expansion of health care access and coverage in American history” (Neiburger, 2011). The law was intended, as is suggested by its name, to make health care more affordable. The website known as HealthCare.gov, which opened on October 1, 2013, is the primary destination to which individuals and businesses have been directed to participate in these exchanges (otherwise known as the Marketplace).

From the very beginning, HealthCare.gov subjected users to freezing, crashing, and other site problems. At first these were characterized as mere “glitches” (Chumley, 2013; Weigel, 2013), but subsequent investigations have evidenced more severe problems including major security concerns and other issues that go far beyond such an upbeat description (minimizing design flaws) as that which was suggested in the first few days following the website’s launch. Commitments to address the website issues were given (Pearson, 2013; Wallace, 2013; Young, 2013), targeting a November 1, 2013 date. As of the time of this writing, the date has not been changed but the level of functioning of the website has been ratcheted down from fully functioning to eighty percent. Insurance companies have sent millions of cancellation notices,

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<sup>1</sup> “Nancy Pelosi Pass the Bill to find out what is in it,” 2010

and the Obama administration has responded by announcing that policies that have been cancelled can be restored through 2014 (Barrineau & Dastagir, 2013), but at best, a reinstatement of these cancelled policies will be up to insurance companies and insurance commissioners in the various states where individual policies have been cancelled. It has been predicted that small and larger employer plan cancellations will follow (as the media seems to have recently discovered analysis that was published in the *Federal Register* as of June 2010, discussed below). Then, there are issues of skyrocketing prices for some policies, especially those of individuals and families who are ineligible for tax credits or subsidies, as the nature of the risk pool as a whole in the United States is changed under the law.

Small businesses create the majority of jobs in the U.S. economy. Yet, they have “continued to face an uphill battle” (“The small business economy,” 2012). As this present paper is being written, coverage from media outlets is nearly overwhelming. Yet, a paucity of research exists to address the impact of Obamacare on small businesses in the scholarly literature to date.

## **DISCUSSION**

The following discussion is organized to address predominate themes which are associated with the impact of Obamacare and small businesses. There have been several reports and analyses presented in the media which essentially suggest that the majority of citizens, because they already obtain their health care coverage through employers and are likely to continue to do so, are not affected by Obamacare. However, the conceptual framework presented demonstrates an opposing view: it suggests that virtually all citizens are affected in some ways, as the law manifests both positive and negative consequences.

### **Not Calling Employer Shared Responsibility Payments (ESRPs) What They Are: Penalties**

The U.S. Small Business Administration (SBA) applies standards such as number of employees and receipts to establish the size of businesses, and these standards may vary by industry (“Small business size standards,” 2013). Historically, as a broader generalization the SBA has used the threshold of fewer than 500 employees to define what may be identified as small businesses by virtue of size. Under this definition over 99 percent of all businesses are categorized as small businesses (“Frequently Asked Questions about small business,” 2012). Notwithstanding the SBA’s “500 or fewer” threshold, Obamacare has added a layer of complexity and requires small businesses with the equivalent of 50 full-time employees (known as FTEs or Full Time Equivalents) to pay an Employer Shared Responsibility Payment (ESRP) if they do not provide health insurance for employees, and that coverage must meet “certain standards” (“Do I have to offer health coverage to my employees?,” 2013).

As per the business section of the HealthCare.gov website, “No employer has to offer coverage. Some large businesses that don't offer coverage meeting certain standards may have to make a shared responsibility payment in 2015” (*Ibid.*). It should also be clarified that challenging calculations may be entailed for small businesses to derive their FTE’s, as the hours of both full- and part-time employees as well as those of seasonal employees are to be counted in order to derive their FTEs, which are a first step in a process for calculating “responsibility” (Amato & Schreiber, 2013; Brighenti, 2011; “Small business health care tax credit questions and answers: Determining FTEs and average annual wages,” 2013).

According to Neiburger (2011): “The ACA imposes a so called ‘shared responsibility payment’ (a euphemism for ‘penalty’)” (p. 69) in connection with the individual mandate (to buy health insurance, or not). This euphemism arose because the Supreme Court reasoned in *National Federation of Independent Business v. Sebelius*: “Those subject to the individual mandate may lawfully forgo health insurance and pay higher taxes, or buy health insurance and pay lower taxes” (Roberts, 2012, pp. 12, footnote). This distinction over the use of the wording “penalty” versus “tax,” was made an issue because “plaintiffs contend[ed] that Congress’s choice of language—stating that individuals “shall” obtain insurance or pay a “penalty”—requires reading §5000A as punishing unlawful conduct, even if that interpretation would render the law unconstitutional” (*Ibid.*, p. 38).

### **Small Business Health Options Program (SHOP) Marketplace Pricing**

Under the ACA, small business owners with fewer than 50 full-time equivalent (FTE) employees are directed via the HealthCare.gov to use the Small Business Health Options Program (SHOP) if they wish to provide insurance for their employees (“What is the SHOP Marketplace?,” 2013). Each state is to offer its own version of the SHOP Marketplace (including rates). In order to be eligible to use SHOP, small businesses must meet other criteria, such as, offering coverage to all of full-time employees, “generally those working 30 or more hours per week on average” (*Ibid.*). Beyond offering SHOP coverage, in some states employees must accept the coverage in sufficient numbers percentage-wise to meet minimum participation thresholds. Small business owners who have no employees are not eligible to use the SHOP Marketplace and are directed to use the individual marketplace. According to the SBA, which in-turn cites U.S. Census data, non-employer firms comprise approximately 78.5 percent of all businesses (“Frequently Asked Questions about small business,” 2012; “The small business economy,” 2012; “U.S. Census Bureau nonemployer statistics,” 2013).

By the same token, firms with over 50 FTE employees are not eligible to use the SHOP Marketplace, although plans are in place to change the threshold to 100 FTE employees beginning in 2016 (“What is the SHOP Marketplace?,” 2013). Users may access an Excel file which contains SHOP pricing data for states in federally operated and state-federal partnership health care exchanges on the HealthCare.gov website (“SHOP health plan information for small businesses,” 2013).

Next, it should also be mentioned that SHOP pricing is calculated based upon “four levels of health plans – Bronze, Silver, Gold and Platinum – [which are] are differentiated based on their actuarial value: the average percentage of health care expenses that will be paid by the plan” (Folger, 2013). “The actuarial value of a plan tells you what percentage of health care costs that health insurance plan is expected to pay for its beneficiaries” (Davis, 2013). The actuarial value of a gold plan, generally, is about 80 percent (Davis, 2013; Folger, 2013). Thus, an individual or family would also face deductibles, co-pays, and maximum out-of-pocket limits, in addition to those monthly premiums. Out-of-pocket limits under ACA are \$6,350 for individuals and \$12,700 for families for the year 2014 (Folger, 2013).

### **Forthcoming Small and Large Employer Cancellations**

A table in the June 17, 2010 issue of the *Federal Register* (“Rules and Regulations,” 2010, p. 34553) depicted estimates of the percentage of employer insurance plans that were

predicted to relinquish their grandfathered status. These estimates were presented in three ranges, low-end, mid-range, and high-end, and expressed in cumulative percentages across the three year period from 2011 to 2013. The grandfathered status refers to plans that the ACA would allow to continue without having to comply with a new core set of benefits. In other words, “certain provisions of the Affordable Care Act do not apply to a group health plan or health insurance coverage in which an individual was enrolled on March 23, 2010 (a grandfathered health plan)” (Ibid., p. 34545).

At a more granular level, according to HealthCare.gov, health insurance plans offered in the exchanges must cover a core set of benefits. These minimum provisions include: Ambulatory patient services; emergency services; hospitalization (such as surgery); maternity and newborn care; mental health and substance use disorder services, including behavioral health treatment; prescription drugs; rehabilitative and habilitative services and devices; laboratory services; preventive and wellness services and chronic disease management; pediatric services (“What does Marketplace health insurance cover?,” 2013). In news reports widely disseminated in the media, and in reference to this more granular level, many individuals have complained about changed policies which have added coverages that do not apply to their particular circumstances. Examples include maternity and pediatric services from the list of minimum provisions above, where no such coverage is applicable (e.g., maternity and newborn benefits for a single male). Paying into the revenue pool of insurers when no claim (at this granular level) is going to occur, in effect subsidizes the costs of other insureds who would likely make claims under one of these specific coverage areas.

However, what this discussion of grandfathered plans (or their inverse, those that are not grandfathered) actually refers to is in connection with recent revelations before the public at large that individual and group plans, numbering in the millions, might be (are being) cancelled. An article in *Forbes* estimated that 93 million Americans would see their plans cancelled (Roy, 2013). Returning to the aforementioned estimates in the *Federal Register* table, small employers were defined as those with 3 to 99 full-time employees. By 2013, the cumulative percentages of small employers that would no longer have grandfathered plans were estimated as follows: on the low-end, 49%; mid-range, 66%; and high-end, 80%. For the sake of comparison, estimates for large employers, defined in the table as those with 100 or more employees, were expected to no longer have grandfathered plans by 2013 in percentages as follows: low-end, 34%; mid-range, 45%; and high-end, 64%.

### **The “Other Costs” Obamacare on Small Business**

Notwithstanding the number one action (66 percent of respondents to the NFIB research) to defray the costs of increased health insurance premiums, as depicted in Figure 1, to “take a lower profit or suffer a loss” the latter, if this should come to pass, is obviously unsustainable. Further, *a priori*, these respondents cannot know as yet what all of the other costs will be. While much of the debate covered by media centers around the more obvious features of Obamacare, such as health insurance policy pricing, terms and conditions, and the functioning (or not) of the HealthCare.gov website (Chumley, 2013; Howell, 2013; Radnofsky, Weaver, & Needleman, 2013; Young, 2013), some observers have noted other costs, such as the loss of time, energy and dollars that small business owners must invest in order to comply (Lahm, 2013). For instance, as observed by Neiburger (2011):

Because the ACA creates a new regimen for reporting to the federal government, it will create new work for tax attorneys and CPAs. Computing penalties as well as deductions and credits under the ACA will not be easy. The law is likely to increase taxes on many taxpayers by reducing both medical deductions and the amounts that individuals can place in tax deferred accounts for medical expenses. Reporting provisions will, of course, increase operating costs for most businesses. (p. 62)

It is clear that numerous other costs have not been acknowledged as widely as health insurance policy costs. Thus, the calculus that is often applied in analyses that have been performed in many instances is missing some crucial variables with respect to whatever may be the true cost and impact of Obamacare in total. Economists would identify such implementation burdens as an opportunity cost.

## CONCLUSION

The 2007 recession hit businesses hard (Kobe, 2012), and even though recent years have shown some improvement, the U.S. economy has yet to fully recover. The U.S. Small business Administration's (SBA) Office of Advocacy publication entitled, *The Small Business Economy 2012*, is part of an ongoing series of reports (released over the past three decades) which document trends on financing, ownership, employment and other characteristics. In a cover letter introducing this latest report, it was observed that "the effects of the most recent downturn are still being felt. The number of business births and their associated employment remain below pre-downturn levels and employment gains have been muted compared with previous downturns" ("The small business economy," 2012). "The Patient Protection and Affordable Care Act has three provisions of particular significance to small businesses. Those provisions are the small business health care credit, the shared responsibility penalty for large employers, and the health care exchanges" (Amato & Schreiber, 2013).

Numerous suggestions for further research are implied, and some of these will be more actionable as the ACA continues to be implemented. A few are presented here for the benefit of future researchers as follows: With more precision, how many billable hours will law firms, CPA firms, consultants and the like generate in responding to small business owners and their questions? How many small businesses will actually receive cancellation notices? What if enrollments remain at levels far below original expectations to make the system financially feasible? ("Health insurance marketplace: November enrollment report," 2013). Who are Obamacare's real winners and losers? This present research effort represents an initial foray into an immense topic of importance to the U.S. and consequently, the global economy.

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