

PATRICK J. LEAHY, VERMONT, CHAIRMAN

DIANNE FEINSTEIN, CALIFORNIA
CHARLES E. SCHUMER, NEW YORK
RICHARD J. DURBIN, ILLINOIS
SHELDON WHITEHOUSE, RHODE ISLAND
AMY KLOBUCHAR, MINNESOTA
AL FRANKEN, MINNESOTA
CHRISTOPHER A. COONS, DELAWARE
MAZIE HIRONO, HAWAII

CHARLES E. GRASSLEY, IOWA
ORRIN G. HATCH, UTAH
JEFF SESSIONS, ALABAMA
LINDSEY O. GRAHAM, SOUTH CAROLINA
JOHN CORNYN, TEXAS
MICHAEL S. LEE, UTAH
TED CRUZ, TEXAS
JEFF FLAKE, ARIZONA

BRUCE A. COHEN, *Staff Director*
KRISTINE J. LUCIUS, *Chief Counsel and Deputy Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*
RITA LARI JOCHUM, *Republican Deputy Staff Director*

United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

February 20, 2014

VIA ELECTRONIC TRANSMISSION

The Honorable Jack Lew
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable John Koskinen
Commissioner
Internal Revenue Service
U.S. Department of the Treasury
1111 Constitution Avenue, NW
Washington, DC 20224

Dear Secretary Lew and Commissioner Koskinen:

Recently, the Obama Administration announced its decision to once again delay certain provisions of the Patient Protection and Affordable Care Act (PPACA) requiring employers to provide insurance to their workers or pay a penalty. The merits of this decision are debatable, but the Administration's new regulations create bizarre new requirements that may not be enforceable.

As written, the employer mandate in PPACA required employers with 50 or more full time employees to provide health coverage starting on January 1, 2014. Employers who did not offer coverage would be subject to penalties. In July 2013, the Obama Administration delayed the employer mandate by one full year, to January 2015.

On February 10, 2014, the Administration announced another delay to the employer mandate. Under the new decision, employers with 50 to 99 full time employees will be exempt from the employer mandate until January 2016, while employers with more than 100 employees will only have to provide coverage for 70 percent of their workers in 2015 and 95 percent in 2016 and beyond.

PPACA clearly laid out in statute the category of employers subject to the employer mandate, the penalties for not complying with the employer mandate, and the date on which the mandate goes into effect.¹ The Administration's decision to delay the employer mandate is contrary to the plain language of the statute and the clear intent of Congress. Further, the Administration has created an additional category based on employer size that does not exist in law, seemingly without any justification or rationale.

¹ P.L. 111-148, § 1513.

Even more questionable than the Administration's decision are the new regulations issued by the Internal Revenue Service (IRS) on how it plans to administer the delay for businesses with between 50 and 99 employees. In order to be eligible for the delay, an employer must certify that it has between 50 and 99 employees, and that it has not reduced its workforce to fall into that category.² The regulation goes on to add that employers who reduce their workforces for "bona fide business reasons" will still be eligible for the delay of the employer mandate.

Businesses applying for a delay in the employer mandate must provide a certification of eligibility to the IRS, in accordance with section 6056 of the Internal Revenue Code. Section 6056 requires employers to report information on health insurance coverage, such as what type of health coverage is offered to employees, any delays in enrollment, and the cost of the health plans.

The information that was required to be reported in Section 6056 by PPACA was easily verifiable. However, there does not appear to be any practical way the IRS could verify information reported under the new certification requirement. It is unclear how the IRS would be able to verify that employers are honestly certifying the reasoning behind their business decisions. Proving that any one certification was intentionally inaccurate would be extremely difficult, and would require a vast amount of resources that the IRS does not have.

Many members of Congress have raised concern with the employer mandate, myself included. The mandate, and its delay, creates great uncertainty among employers. The penalties for not complying with the mandate are severe and costly, and could easily motivate businesses to reduce their workforce to avoid them. However, the Obama Administration has repeatedly denied that PPACA will cause any reduction in employment. In fact, just a few days ago, Health and Human Services Secretary Kathleen Sebelius said "there is absolutely no evidence, and every economist will tell you this, that there is any job-loss related to the Affordable Care Act."³

If the Obama Administration is so certain that PPACA will not lead to a reduction in employment, it begs the question: What is the point of the certification process? The requested information is completely unnecessary, unless the Administration believes the employer mandate is so harmful to businesses that they would rather reduce their workforce than comply.

² 26 C.F.R. § 1, 54, and 301

³ Secretary Kathleen Sebelius, as quoted in *Politico*, "Kathleen Sebelius: No Job Loss Under Obamacare," February 18, 2014.

The regulation appears to be no more than political theatre, designed to provide the Administration with an unverifiable talking point that employers did not lay off workers in order to avoid complying with PPACA. If the Administration believes, as I do, that the employer mandate will cost jobs, the responsible thing to do would be to ask Congress to repeal this provision.

In order to learn more about this decision and how it will be carried out, please answers the following questions as soon as possible:

- 1) What is the legal justification for creating a new category for employers with 50 to 99 employees?
- 2) What is the legal justification for conditioning a delay of the employer mandate based on a certification of intent of an employer in reducing workforce?
- 3) What are the “bona fide” business reasons that the IRS would find acceptable to reduce workforce?
- 4) How does the IRS expect to verify the accuracy of employer certifications?
- 5) What is the amount of resources the IRS will need to process the certifications?
- 6) Does the Administration believe the employer mandate will create a reduction in the workforce? If not, why is it requiring the certification?

Please provide the requested information as soon as possible, but no later than March 7, 2014. If you have any questions regarding this letter, please contact Tegan Millspaw of my Judiciary Committee staff at (202) 224-5225. Thank you for your attention to this matter.

Sincerely,



Charles E. Grassley
Ranking Member
Committee on the Judiciary

cc: The Honorable Kathleen Sebelius, Secretary, Department of Health and Human Services

The Honorable Mark Mazur, Assistant Secretary for Tax Policy, Department of the Treasury