

**Statement of Gregory L. Needles
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before the

**Education and the Workforce Committee
United States House of Representatives**

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Impact of the Patient Protection and ACA on Educational Institutions

Chairman Kline, Ranking Member Miller and Members of the Committee, thank you for the opportunity to participate in today's hearing. I am honored to appear before you today.

By way of introduction, I am a partner with the law firm of Morgan, Lewis & Bockius in the Washington D.C. office where I lead the office's Employee Benefits and Executive Compensation Practice Group. Over sixty percent (60%) of my practice involves advising tax-exempt and governmental employers regarding their benefit plans. In representing these plans, I have been actively involved in all aspects of their operation and administration. Recently my practice has focused on advising employers, including many colleges and universities, on the impact of the Patient Protection and Affordable Care Act (the "ACA") on their health plans. I want to relay to you today the challenges colleges and universities face as a result of the ACA.¹ In addition, I briefly will discuss the issues facing K-12.

I. Introduction

Central to the ACA are the shared responsibility provisions that impose obligations on individuals and employers. The "individual mandate" generally provides that individuals who do not have minimum essential health coverage will have to make a payment through their tax returns. On the other side of the coin, large employers who fail to offer group healthcare coverage to their full-time employees and their dependents will be subject to tax penalties (referred to as the "employer shared responsibility mandate" or "penalty") under section 4980H of the Internal Revenue Code. To avoid the tax penalty entirely, an employer's group health plan must meet certain coverage mandates, be affordable to each employee, and provide a minimum level of benefits to the employee.

The majority of working age people will meet their individual mandate requirement through participation in employer-sponsored group health plans. No employers that I advise will be

¹ I am not speaking on behalf of Morgan, Lewis & Bockius, and my testimony should not be attributed to that organization. My testimony reflects my own personal views.

terminating their health plans next year, or in 2015 for that matter. They feel compelled by the market to continue to offer their own plans in order to attract and retain talent. This would be particularly true of colleges and universities and K-12.

Both colleges and universities and K-12 have large variable workforces that are unique to them. For colleges and universities, they are primarily adjunct professors and student employees. For K-12, they are substitute teachers and after-school workers such as coaches. As I will describe further, the ACA's requirements result in unintended consequences when applying its rules to those unique populations.

II. Challenges Facing Colleges and Universities

Adjuncts and student employees serve a unique role in the college and university space. In the case of adjuncts, they generally supplement the institution's full-time faculty. For students, college employment through work-study is a way to finance their education. Typically neither adjuncts nor students are provided benefits. Instead, they are provided an opportunity to gain valuable experience, and the college or university is able to meet a need that might otherwise go unmet. It is a compact that has served students, adjuncts, and academia well for decades.

Adjunct Faculty

The Challenge of Measuring Hours.

Generally, in order for a college or university to avoid having to provide an adjunct health benefits under the ACA, the adjunct's average hours of service need to remain below 30 hours a week. Employees are considered full-time employees who must be offered group health coverage if they are employed, on average, for 30 or more hours each week (or 130 hours per month). Under the IRS proposed rules, for hourly employees, employers must calculate actual hours of service. For non-hourly employees, employers are instructed to use actual hours of service, or equivalency standards based on days-worked (which credits the employee with 8 hours for every day he/she works at least one hour of service) or weeks-worked (which credits the employee with 40 hours of service for each week that he/she works at least one hour of service).

Adjuncts are generally paid by the course, a unique arrangement that is neither strictly full-time nor part-time. The preamble to the IRS's proposed rules acknowledges that they present difficulties in terms of categorization as full-time versus part-time employees for purposes of the shared responsibility penalty tax and requests further comment on how they should be treated. In the interim, the preamble provides that a college or university may use a reasonable method for crediting hours. It goes on to say that a method would not be considered reasonable if it only took into account the time spent in class. The preamble notes that some have suggested an equivalency that credits an adjunct with three hours of service for every class hour or instead, determining what a full class load would be for a full-time professor and then determine the

maximum hours an adjunct might work and remain part-time under the ACA based on a percentage of what constitutes a full-time load.

What is lacking now is certainty for colleges and universities. They do not know where to draw the line when determining an equivalency method to use for adjuncts. And given the penalty taxes involved, many are afraid to take anything more than a conservative approach, which is typically crediting three hours of service for every one in class, one of the equivalency standards described above in the preamble to the regulations. Using this equivalency as the standard, in order to keep an adjunct in part-time status and avoid the cost of having to provide him or her health benefits, colleges and universities are restricting adjuncts course loads to nine hours or less. As a result, adjuncts' course loads are being reduced with a corresponding reduction in compensation.

The Unintended Effect of the Control Group Rules.

It is sometimes the case that an adjunct faculty member will teach courses at several different colleges, all on a part-time basis, and in effect, cobble together a full-time teaching position. Because of the professor's part-time status at each of the colleges at which he or she teaches, each college will not have to offer the professor health coverage under the ACA. This is fine if the colleges are not under common control, which is generally the case for private institutions. However, where colleges may be under common control, they will be treated as a single employer for purposes of the ACA despite being separate institutions that are operationally distinct from one another.

The issue normally arises in the community college system where "career adjuncts" are more prevalent. If the state has established its system where each college is treated as its own independent entity, governed by its own board, there will be no problem, because the colleges are unrelated. However, if each college in the system is governed by a single board at a state-wide level, then arguably, each college that makes up the system is part of the same controlled group and treated as one employer for purposes of applying ACA's employer mandate. The problem is that as a practical matter, there is usually no central office that tracks employees on a system-wide basis. In other words, no one knows when a part-time employee, including an adjunct, is working part-time at two or more colleges within the system; thus inadvertently becoming a full-time employee under the ACA. The issue is further compounded by the fact that community colleges may participate in their state's health plan rather than sponsoring their own, thus potentially jeopardizing the state plan's ACA status. And while payroll might be centralized at the state level, it is processed for each college using the college's own EIN. Meaning no one is tracking part-time employees on a statewide basis. The cost to establish the systems to track what might be a handful of "career adjuncts" and other part-timers may be prohibitive.

Students Who Work On Campus

As you know, many students must work to afford the college or university they attend. They take on hourly work-study jobs at their college and university such as clerical positions, security guard, furniture mover, etc. to finance their way through college. In addition, they could take on a non-hourly, non-work-study position such as a resident assistant. Under the ACA, though, they are employees of the college or university and as such, must be taken into consideration when applying the employer mandate.

Most of the students will be scheduled to work less than twenty hours a week as part of their work-study program and fall within ACA's part-time employee exception. However, there are instances in which a work-study student might hold a second job with the college or university that is not work-study related and the hours are not tracked, e.g., a resident assistant. The college or university is then forced into trying to determine appropriate equivalencies: what weekly equivalency should apply to an R.A.? And even if the combination of the two jobs results in the student working 30 hours or more a week, the student should not have to be counted in applying the employer mandate.

Unlike other employees, students have other avenues of access to health care beyond their employer. One of the ACA's most popular market reforms was to require employers to allow dependent children to stay on their parents' health plans until they turn 26. In addition, the Department of Health and Human Services (HHS) issued proposed rules that consider students who are covered under a self-funded student health plan to satisfy their individual mandate under the ACA. Thus, there is no need to extend the protections afforded to other employees under the ACA to student employees.

III. Challenges Facing K-12 School Districts

The IRS proposed rule addresses the academic year schedules of teachers and other traditionally full-time employees of educational organizations in terms of measuring their hours of service. For example, the proposed rule takes into account breaks in service for summer and winter breaks, an academic year versus a calendar year, and calculating average weekly hours for school employees (both hourly and non-hourly) when they typically will not work a full twelve-month period. While helping to ensure that teachers and staff who work over the course of the entire academic year are treated as full-time employees, the proposed rule does not adequately address other types of employees who do not work for school districts on a day-to-day basis. The unique status of these individuals may have a profound effect on very small public school districts who may inadvertently find themselves "large employers" for purposes of the ACA.

Under its proposed rule, the IRS states that a "large employer" for shared responsibility purposes is determined by totaling the number of "full-time employees" (defined by the statute as those working an average of at least 30 hours per week), along with the number of full-time *equivalent* employees (based on a calculation using a formula adding all the service hours for the month of

the employer's part-time employees and dividing them by 120). The application of this straightforward rule may be problematic for small school districts which employ substitutes and after-school employees.

The proposed rule specifically states that employers must take into account all part-time employees when conducting the FTE calculation. Certain types of substitute teachers, though, act more in a capacity as an independent contractor than an employee. For example, a substitute who is on-call and only works when there is a need of limited duration is not a typical part-time employee. He or she is more like an independent contractor who drops in and out when the need arises. In fact, for these types of substitutes it is not atypical for them to be on call to more than one school district given the sporadic nature of their work assignments. In reality, they are employees in name only, which is why they are characterized as variable-hour employees under the proposed IRS guidance. Yet, for purposes of determining whether an employer is a large employer under the ACA, these nomadic substitutes must be taken into account when determining full-time equivalents. For a small school district that has under 50 full-time employees, the inclusion of these types of substitutes can mean the difference between being subject to the ACA shared responsibility mandate or not. And clearly since the IRS did not intend to have the substitutes covered under the employer's health plan, it is incongruent to have them taken into account in determining whether the district is a large employer.

The same is true for those employees hired solely to assist with extracurricular or after-school activities. In the context of very small school systems that would otherwise not be large enough to have to be subject to the ACA's requirements, these individuals could tip the balance because they must be taken into consideration when determining full-time equivalents and whether a district has 50 or more full-time employees.

IV. Conclusion

The issues described above have created uncertainty among colleges and universities and K-12 employers. They have created challenges for the long-standing business models under which these entities operate. What is clear from discussions with our clients, though, is that they do not intend to change the model. They can't afford to. If the equivalency for adjuncts is three hours of service for every credit hour taught, then adjuncts' hours will be cut, because the college cannot afford the cost of providing health insurance or incurring the applicable penalty tax. If students who work 30 hours or more are required to be counted as full-time employees, then their hours will be cut to make sure that does not happen. As a client said, "The ACA is forcing us, typically well-meaning employers, to make tough decisions that have negative consequences for our faculty and our students, and that can't be what was intended."

Mr. Chairman, thank you for giving me the opportunity to testify this morning. I will be happy to answer any questions from the Committee members.