



**Testimony by Mr. Daniel Murray**  
**Kansas State Director, National Federation of Independent Business**  
**Special Committee on Financial Institutions and Insurance**  
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**Introduction.** For more than 25 years, healthcare costs have been cited as the No. 1 problem facing small businesses. While costs are high for most people, they've risen more rapidly in the small business sector because these job-creating enterprises are trapped in a dysfunctional marketplace that suffers from a lack of competition, limited and expensive choices, and no flexibility in plan design. **In fact, small businesses pay 18 percent more than large companies for equivalent insurance coverage.**

High and rising costs force millions of businesses to choose between offering insurance coverage and creating jobs or hiring needed employees. Small business owners and their employees, faced with near monopolies that insurance companies hold in some states, have fewer choices among insurance plans. And, unfortunately, current policies do not address the unique needs of the small business community.

Unlike big businesses and unions, small businesses cannot pool risks or buy insurance across state lines. Further, the tax treatment for small business owners and employees who buy insurance in the individual market is uneven and unfair. And, finally, insurance is not portable, so employees cannot carry their insurance from one job to another.

**Small Business & the Cost of Health Insurance.** Health insurance products are as varied as those individuals and employers purchasing the insurance plan themselves. While seeking to expand coverage for small employers, it's critical to understand who offers health insurance, what small employers spend and the value of services that are purchased. Available data shows that:

**Health Insurance Offer Rates by Small Employers**

- Forty-three percent of small firms with less than 50 employees offer health insurance to their employees. Ninety-six percent of small firms with more than 50 employees offer health insurance.
- Eighty-six percent of small firms that offer health insurance offer one health insurance plan option to their employees. Fourteen percent of small firms offer two plans.

**Health Insurance Costs for Small Employers**

- The average health insurance premium cost in the small group market is \$4,260 for individual coverage and \$11,100 for family coverage.
- Small employers pay on average 86 percent of the total cost of single employee health insurance and 65 percent for family coverage.
- Forty percent of small employers pay 100 percent of the total cost of single employee health insurance coverage, while 10 percent of large firms pay 100 percent of the cost.

**It's not just the price tag of the plan, it's the value of the plan.** Although data is available to suggest what is being spent, the price tag isn't a direct reflection on what small employers are getting for those dollars.

- Small businesses, on average, pay about 18 percent more for health insurance than their larger counterparts for the same group of services. Such data suggests that small employers either pay more for the same services or receive less (in terms of services) for their health insurance.
- The figure cited above confirms that ***there is a difference between the price of a plan and the value of a plan.*** This is particularly true in small firms where it is found that such firms have "received slightly less generous health insurance benefits, according to calculations of actuarial value."

**Negative Impact of PPACA.** NFIB's small business and self-employed entrepreneurs have been clear about what they need and want from healthcare reform: lower costs, more choices, and greater competition in the private insurance market. These reforms are critical, but to be workable and sustainable, they must be balanced against the overall cost of doing business. **Unfortunately, with its new taxes, mandates, growth in government programs and excessive price tag, the Patient Protection and Affordable Care Act (PPACA) costs too much and delivers too little.** The worst provisions for small businesses include the Employer Mandate and the Health Insurance Tax.

**Employer mandate** The PPACA requires that employers with 50 or more full-time equivalent employees offer “affordable, minimum essential [healthcare] coverage” beginning in 2014. This provision negatively impacts both employers and employees. The employer bears the first blow in struggling to afford the new unfunded mandate. The second blow is borne by employees who suffer lower wages or lose their jobs when their employer is hit with penalties ranging from \$2,000 to \$3,000 per full-time equivalent employee. The employer mandate has left many small-business owners unable to expand operations as they brace for new costs and taxes coming out of Washington.

**Health insurance tax:** The new Health Insurance Tax, included in the PPACA, will raise the cost of small business health insurance premiums. This tax, levied on health insurance companies, will exceed \$87 billion in assessments between 2014 and 2019 alone. Because employers that self-insure are excluded, this tax will be almost entirely passed on to consumers in the fully insured marketplace, where 87 percent of small businesses and the self-employed purchase their coverage. This new tax on small business owners will raise insurance costs for already struggling small businesses and is contrary to the goals of health care reform. One study indicates the tax will heap an additional \$500 a year on each family plan purchased by small business!

These new burdens, plus the unprecedented mandate that forces all Americans to purchase a particular product, led NFIB to join with attorneys general from 26 states, including Kansas, and two individual plaintiffs in challenging the constitutionality of the new healthcare law.

**Lawsuit Challenging PPACA.** On May 14, 2010, NFIB joined the multi-state lawsuit challenging the constitutionality of PPACA. The suit was filed on behalf of NFIB by the NFIB Small Business Legal Center in U.S. District Court for the Northern District of Florida Pensacola Division. On January 31, 2011, the district court ruled that Congress exceeded its authority in enacting the individual mandate and ruled that since the mandate cannot be severed from the law, the entire law must be overturned.

On August 12, the 11th Circuit US Court of Appeals ruled that the individual mandate is unconstitutional because the mandate exceeds Congressional authority. This was the first court of appeals decision striking down the mandate and created a circuit split with the recent Sixth Circuit going the other way. The 207-page opinion was jointly written by Chief Judge Joel Dubina, an appointee of President George H.W. Bush, and Circuit Judge Frank Hull, an appointee of President Bill Clinton, and a major defeat for the Obama Administration.

The case brought by NFIB and the state co-plaintiffs is rooted in the Commerce Clause. A mandate that compels individuals to purchase health insurance is not a permissible regulation of commerce. The government is arguing that the individual mandate regulates the commercial activity of an individual obtaining healthcare without first obtaining health insurance. However, the reality is that the mandate simply forces all uninsured individuals to purchase insurance, regardless of whether an individual actually obtains healthcare, let alone obtains uncompensated care.

The healthcare law directly undermines NFIB's mission and we are determined to fight against it—both in the Courts and in Congress—for our members, small-business owners nationwide and for future generations of entrepreneurs. **In the meantime, we are committed to advocating for federal and state legislative solutions that will achieve real and meaningful reforms.** For more details on NFIB's lawsuit: Please see the attached “Backgrounder on NFIB's Lawsuit Challenging the Constitutionality of the Healthcare Law.”

**General Recommendations for Reform.** As the Court decides the fate of PPACA, NFIB will continue to offer solutions, pursue reforms and repeal measures that will help lower healthcare costs and provide affordable options for small businesses. Below are some general reform principles that Congress and the states should keep in mind when enacting reform measures.

- **Allow employers to provide employees with more choice to purchase insurance.** Our healthcare system should recognize that the employer-employee relationship in America has changed considerably since employer-sponsored insurance began in the 1940s. Aside from job lock, the current structure of the insurance market limits options for small employers. As a result, more than 80 percent of small employers have the choice of just one plan, forcing small business owners and employees to “take it or leave it.” Employers and employees should be provided with a new option that allows them to voluntarily give workers tax-advantaged resources so they can tailor healthcare choices and purchases to their own preferences and needs.

- **Expand tax deductibility to individuals and the self-employed.** Today, despite their continued contributions to our economy, the self-employed cannot deduct any healthcare costs from self-employment taxes. Fixing this inequity is a necessary step that must be taken so that small business owners have a more affordable pathway to healthcare by allowing them to deduct any health insurance costs from their self-employment taxes. Changing the law in this manner will bring much-needed parity to the tax code and to the health insurance marketplace.
- **Create multiple pooling opportunities.** The current environment for employers and individuals purchasing health insurance is limited by state boundaries. Given that most people will change jobs several times throughout their lives, health insurance must be more portable. Congress and states must act upon opportunities to create regional pooling options, and states should be empowered to explore the potential benefits of creating larger risk pools, larger provider networks and more competitive choices.
- **Empower state innovation.** A one-size-fits-all healthcare solution will not suit a nation as diverse as ours, which is why federal legislation should encourage states to enact innovative solutions that meet the needs of their residents. Reform measures should be aggressive in their efforts to reduce costs for small employers and their employee communities. Some states are already moving toward these goals by including defined contribution models for employers and wellness programs that provide real, bottom-line savings for both employers and employees. Opportunities to actively encourage and facilitate other options outside the traditional employer-based model should be explored at the state level so that job creators have more choices and benefit design options.
- **Preserve and expand consumer-driven healthcare.** Consumer-driven health insurance products, such as Flexible Spending Accounts (FSAs), Health Savings Accounts (HSAs), and Health Reimbursement Accounts (HRAs) enable businesses and consumers to cut costs while preserving quality care. Restoring and enhancing the ability of consumers to use these accounts offers significant progress toward giving individuals control over their own healthcare spending and offers true portability for today's highly mobile workforce.
- **Enact medical liability reform.** NFIB/Kansas strongly supports efforts to inject more fairness into the medical malpractice legal system, and reduce unnecessary litigation and legal costs that currently take a heavy toll on our members' ability to obtain affordable healthcare for their employees and dependents. The cost and uncertainty also make it more difficult for physicians to run their practices as small businesses, rather than working for larger entities. Federal and state efforts must be made to enable the reform of today's overly litigious tort system.

*NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB gives small and independent business owners a voice in shaping the public policy issues that affect their business. NFIB's powerful network of grassroots activists sends its views directly to state and federal lawmakers through our unique member-only ballot, thus playing a critical role in supporting America's free enterprise system. NFIB's mission is to promote and protect the right of our members to own, operate and grow their businesses. More information about NFIB is available online at [www.NFIB.com/newsroom](http://www.NFIB.com/newsroom).*

## Top 12 Reforms to Consider

Up through 2010, NFIB advocated strongly for healthcare reform, but always insisted that meaningful reform would have to lead to lower costs. On this score, Patient Protection and Affordable Care Act (PPACA) failed, as evidenced by the rapid rise in premiums following the law's enactment. Small business needs real reform that deals with costs. Here are one dozen reforms with which to begin.

### **Tax Reforms**

- 1. Tax breaks in the employer-sponsored market ought to be available in the individual market.** Tax laws favor employer-sponsored insurance and discourage individual purchases. Employees can only use pre-tax dollars for insurance if their employers choose, purchase and administer their insurance policies. This asymmetry generates well-documented problems. (1) The individual market is small. (2) Administering health insurance distracts employers from their core businesses. (3) The employer/insurance nexus creates "job lock," where employees cannot leave a job for fear of losing health insurance. (4) With employees unable to shop around, insurance is less competitive. (5) Differences in tax treatment should not determine whether a person secures health insurance in the workplace or on their own.
- 2. The tax treatment of insurance purchased by the self-employed should be equivalent to the treatment of employer-sponsored coverage.** Self-employed individuals do not receive the same tax treatment as individuals who receive health insurance through their employers. While the self-employed can claim a deduction for the cost of purchasing their own health insurance, the tax benefit is not equal to the tax exclusion for employer-provided coverage.
- 3. Tax and insurance regulations should allow for a defined contribution option for employers.** This would make health insurance simple for employers and would give employees a broad range of choices. Small businesses generally lack health insurance expertise, human resource departments and market power. They would like the option of contributing dollars to employees' health insurance without actively choosing, purchasing or managing the plans. With defined contribution health insurance, an employer could contribute pre-tax funds toward employees' insurance. (This amount should remain deductible to the employer.) Employees could then purchase their own insurance policies.

### **Insurance Purchasing Reforms**

- 4. Insurance markets need an adequate information structure for consumers to make intelligent choices; this demands transparent and easily comparable measures of cost, options and quality.** Currently, comparative data are difficult or impossible to obtain. At present, neither consumers nor healthcare providers have adequate information-based tools to drive costs down. In other industries – computers, automobiles, finance, for instance – information technology allows consumers to make informed, intelligent choices. Healthcare needs to catch up with these industries in assembling comprehensive data with user-friendly interfaces.
- 5. Private exchanges should be widely available; states and other entities should have adequate flexibility to experiment with different models.** Centralized portals can give consumers a seamless venue for comparison shopping, purchasing, and conducting business with insurers. It is vital that states and other entities have the ability to experiment with various exchange models. The goal should always be a purchasing environment with enough insurance carriers to unleash competitive forces. Unfortunately, the top-down, heavily regulated exchanges contemplated in PPACA will not create an environment where market forces can work.
- 6. Small businesses and individuals should be able to pool risks and purchase insurance across state lines.** Large businesses, labor unions and governments generally self-insure, so under the federal ERISA law, they can pool their risks across state lines. This allows them to develop larger, more stable risk pools, thereby lowering costs and reducing uncertainty. The fully-insured market (mostly small businesses and individual purchasers) has no such ability to pool risks across state lines. Another virtue of an interstate market is that it provides a check on overzealous state regulations by offering out-of-state options to purchasers.
- 7. Employers should be able to voluntarily join with other employers to form larger risk pools and purchasing arrangements.** Properly crafted, Small Business Health Plans legislation would enable groups of employers to band together to form larger, more stable risk pools.

## Market Access & Choice Reforms

8. **Health insurance reform ought to enable individuals with pre-existing conditions to obtain and maintain health insurance.** People with pre-existing conditions often have difficulty obtaining affordable insurance. The individual market can be a difficult place to secure health insurance if an individual has a pre-existing condition or illness. Reforms should be in place to mitigate these practices. Whichever means is adopted should not discourage employers from hiring individuals with pre-existing conditions.
9. **People should be able to move from one job to another, between a job and no job, and from state to state without losing insurance coverage or encountering excessive cost increases for changing.** Insurance portability has always been a problem in a system dominated by employer-sponsored insurance. Changing jobs or moving sometimes entailed lapses in coverage or, potentially, loss of coverage altogether. Insurance laws should make it possible for those who maintain their coverage to continue doing so after changing jobs or stopping work altogether.
10. **Laws should permit individuals broad latitude in using consumer-driven tools such as high-deductible policies, HSAs, HRAs and FSAs.** For many consumers and small businesses, a high-deductible policy can be an attractive way of managing risks and holding down costs. Premiums are less expensive because insurers deal with less paper flow and because high-deductible policies give patients incentive to reduce unnecessary procedures. Pre-tax accounts, such as HSAs, HRAs and FSAs help prepare consumers for expected and unexpected expenditures before the insurance kicks in. These tools encourage consumers to take an active role in managing their expenses and risks.
11. **Employers and insurers ought to be able to offer consumers price breaks and other incentives to encourage them to maintain their health.** Companies like Safeway have made headlines by incentivizing their employees to engage in healthy lifestyles and prudent preventive and wellness care. Incentives could include price breaks on health insurance for those who engage in healthy behaviors or participate in company-endorsed wellness programs. Most importantly, businesses should be free to tailor such incentives to their specific workforces.

## Lawsuit Reform

12. **Medical liability laws should limit non-economic damages, rationalize economic penalties for malpractice, and offer options for arbitration and no-fault malpractice insurance.** Through excessive malpractice judgments, we penalize good doctors practicing good medicine, when their patients happen to experience bad outcomes. At the same time, most patients who suffer actual acts of malpractice are never compensated. This incoherent system raises costs and damages doctor-patient relationships.

## Other Elements to Consider

13. Small business desperately needs healthcare reforms that lead to lower costs. This document has outlined some private health insurance market reforms. It has not touched on two other areas that should be part of any meaningful reform – entitlements and medical delivery systems.

## **Small Business & Health Insurance: One Year After Enactment of PPACA**

One year after the passage of sweeping health-insurance reform legislation, the lasting impact of the Patient Protection and Affordable Care Act (PPACA) on the small business community remains to be seen. A July 2011 study by the NFIB Research Foundation indicates that the overwhelming majority of small business owners do not expect the law to reduce cost or regulatory burdens, and nearly two-thirds agree that the law will result in premium increases but not in better care.

Other highlights of the study include:

- One year after passage of PPACA, 42% of small employers-- defined as businesses employing 50 or fewer people other than the owner(s) – offer employee health insurance. In the last 12 months, 1% of offering small employers added health insurance as an employee benefit while 4% of non-offering employers dropped it.
- The number of small employers offering employee health insurance is likely to change little over the next 12 months. Virtually no small employer now offering expects to drop health insurance in the next year and virtually no nonoffering employer expects to add it in that time frame.
- 20% of small employers currently offering expect to significantly change their benefit package and/or their employees' premium cost-share the next time they renew their health insurance plans. Almost all significant changes expected involve a decrease in benefits, an increase in employee cost-share, or both.
- Since enactment, one in eight (12%) small employers have either had their health insurance plans terminated or been told that their plan would not be available in the future. Plan elimination is the first major consequence of PPACA that small-business owners likely feel.
- 18% of small employers think they are "very familiar" with PPACA and another 40% think they are "somewhat familiar" with the new law.
- By overwhelming margins, small employers who have some knowledge of the new law think that PPACA will not reduce the rate of health care (insurance) cost increases, will not reduce the administrative burden, will increase taxes, and will add to the federal deficit. They agree that PPACA will result in more people having health insurance coverage, but do not think it will yield a healthier American public.
- The principal factor explaining the PPACA outcomes that small-business owners expect is their current offer/nonoffer status. Those offering employee health insurance are notably more pessimistic about the new law's projected outcomes. Neither the degree of familiarity with PPACA nor employee size-of-business is associated with their expected outcomes.
- Low-wage employees, particularly those experiencing a large premium cost-share, have a powerful incentive to bolt an employer's health plan for the newly established and heavily subsidized exchanges. Should employees begin to leave for an exchange, 26% of currently offering small employers are very likely to explore dropping their health insurance plans and another 31% are somewhat likely to do so.
- A key factor in a small employer's decision to drop a current health insurance plan will be the proportion of employees who leave their health plan for an exchange; 43% report that a majority of employees would have to leave before they would drop their plan and 35 claim it would require all of them.
- An estimated 245,000 (out of 5,228,000 employers with fewer than 25 employees) are eligible for a full PPACA tax credit. Another estimated 1.165 million are eligible for the partial credit.
- The PPACA tax credit acts almost exclusively as a windfall for small employers who currently offer health insurance rather than as an incentive to encourage its purchase. Considering eligibility and awareness issues, the full credit incents, but does not necessarily change behavior, of only about 2% of small employers having fewer than 25 employees.
- 57% of small employers express interest in contributing to defined contribution-type health plans. Their interest assumes employees benefiting from their contributions receive equitable tax treatment compared to that in employer-sponsored plans.