Statement
On behalf of the
National Restaurant Association

HEARING: THE EMPLOYER MANDATE: EXAMINING THE DELAY AND ITS EFFECT ON WORKPLACES

BEFORE: SUBCOMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
SUBCOMMITTEE ON WORKFORCE PROTECTIONS
EDUCATION & THE WORKFORCE COMMITTEE
U.S. HOUSE OF REPRESENTATIVES

BY: JAMIE RICHARDSON
WHITE CASTLE SYSTEM, INC.

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Statement for the hearing "The Employer Mandate: Examining the Delay and Its Effect on Workplaces"

Before the

Subcommittee on Health, Education, Labor, and Pensions, Subcommittee on Workforce Protections, Education & the Workforce Committee, U.S. House of Representatives

By
Jamie Richardson,
White Castle System, Inc.

On behalf of the
National Restaurant Association

July 23, 2013

Chairmen Roe and Walberg, Ranking Members Andrews and Courtney, and members of the Subcommittees on Health, Education, Labor and Pensions, and on Workforce Protections of the House Education & the Workforce Committee; thank you for the opportunity to testify before you today regarding the employer mandate and the impact of the Administration's recent announcement of transition relief on employers and employees.

My name is Jamie Richardson and I serve as Vice President of Government, Shareholder and Community Relations of White Castle System, Inc. It is an honor to be here to share our perspective on behalf of our company and the National Restaurant Association.

WHITE CASTLE SYSTEM INCORPORATED

White Castle is the Taste America Craves - We believe good business, great food, and responsible citizenship should all *go together.* As a family company, we are *part of the neighborhoods we serve. We live here, work here, and raise our families here* – that's why we are committed to having a positive impact on the families and communities around us. Our dedication to serving our community isn't just a company priority – it's a *personal commitment*.

Currently based in Columbus, Ohio, White Castle first opened its doors in 1921 in Wichita, Kansas. To this day, we are a family-owned, privately-held company. The majority of

our roughly 10,000 team members work in our 406 restaurant locations across 12 states. We have built several locally-based divisions to supply each restaurant, including bakeries, meat processing plants, frozen food plants and manufacturing plants that, together, produce everything we offer to White Castle customers.

As White Castle, along with restaurants throughout the country, implements the new requirements determined by the health care law, we face unprecedented challenges that must be addressed.

We're committed to addressing those challenges in a way that enables us to continue serving our customers with excellence – and to do that effectively, we need Congress' help.

Allow me to be frank: First, the definition of "full-time employee" does not reflect our workforce needs or our employees' desire for flexible work schedules. Second, the calculation to determine whether you are a large or small business is unnecessarily complicated – and especially burdensome for small businesses who are forced to closely track their status from year to year. Third, automatic enrollment must be eliminated. For employees, passive enrollment would avoid confusion and potential financial hardship for employees. Auto-enrollment would lead to duplicative requirements for employers who are already offering the same employees coverage or facing penalties under the new law.

I would like to tell you today that White Castle's growth has continued uninterrupted. I would like to tell you we've continued to open more restaurants in more neighborhoods, providing more jobs, and serving more customers.

I'd like to tell you that, but I can't. In fact, White Castle's growth has halted.

Last year, when I testified before House Oversight & Government Reform Committee, we had 408 White Castle restaurants. Today, we have 406. In the five years prior to the health care law, we were opening an average of eight new White Castle restaurants each year. In 2013, we plan to open just two new locations.

While other factors have slowed our growth, it is the mounting uncertainty surrounding the health care law that brought us to a standstill.

As you know, restaurants run on narrow margins, and White Castle is no exception. In an environment where hard-working Americans are struggling to make ends meet, we are facing record food prices – typically one-third of a restaurant's bottom line – and now we are staring down the barrel of dramatic increases to our health care coverage costs.

THE RESTAURANT AND FOODSERVICE INDUSTRY

The National Restaurant Association is the leading trade association for the restaurant and foodservice industry. Its mission is to help members establish customer loyalty, build rewarding careers, and achieve financial success. The industry is comprised of 980,000

restaurant and foodservice outlets employing 13.1 million people who serve 130 million guests daily. The simple fact is that restaurants are job-creators. While small businesses comprise the majority of restaurants, the industry as a whole is the nation's second-largest private-sector employer, employing about ten percent of the U.S. workforce.[1]

The unique characteristics of our workforce create compliance challenges for restaurant and foodservice operators within this law. It's much more difficult for employers to determine how the law impacts them and what they must do to comply. Many of the determinations employers must make to figure out how the law impacts them – for example the applicable large employer calculation – are much more complicated for restaurants than for other businesses who have more stable workforces with less turnover.

Restaurants are employers of choice for many looking for flexible work schedules and the ability to pick up extra shifts as available. As a result, we employ a high proportion of part-time and seasonal employees. We are also an industry of small businesses — more than seven out of ten eating and drinking establishments are single-unit operators. Much of our workforce could be considered "young invincibles," and with 43 percent of employees under age 26 in this industry, high turnover is the norm.[2] In addition, the business model of the restaurant industry produces relatively low profit margins of only four to six percent before taxes, with labor costs being one of the most significant line items for a restaurant.[3]

Business owners crave certainty, because it enables us to plan for the future and make decisions that benefit our employees, customers, and communities. One of the most difficult things to predict about the impact of this law is the choices employees will make.

> Will they accept restaurant operators' offers of minimum essential coverage more than they do today?
>
> Will exchange coverage be less expensive than what our operators can afford to offer under the law?
>
> Will our young workforce choose to pay the individual mandate tax penalty instead of accepting the employer's offer of coverage in 2015, 2016 and beyond?

With the younger, healthier population of the workforce, we may find that more team members than expected will favor the tax penalty because it is less expensive than employer-sponsored coverage. This provides less certainty for employers to predictively model. At White Castle, 80 percent of team members who are eligible for coverage currently select it, which leaves 20 percent a part of the unknown population. Future enrollment rate of coverage is very hard to predict, given many new factors, but could mean a significant increase in the cost for restaurant and foodservice operators when offering coverage to their employees.

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[1] *2013 Restaurant Industry Forecast.*
[2] Bureau of Labor Statistics, U.S. Department of Labor.
[3] *2013 Restaurant Industry Forecast.*

COMPLYING WITH THE HEALTH CARE LAW IS CHALLENGING FOR RESTAURANT AND FOODSERVICE OPERATORS GIVEN THE UNIQUE CHARACTERISTICS OF THE INDUSTRY

Since the law was enacted in 2010, the National Restaurant Association has taken steps to educate America's restaurants about the requirements of the law and the details of the Federal agencies' guidance and regulations. Through the National Restaurant Association Health Care Knowledge Center website (Restaurant.org/healthcare), we offer thorough, practical education so that restaurant operators of every size can better understand the law's requirements.

The National Restaurant Association has actively participated in the regulatory process to ensure that the implementing regulations and Federal agencies' guidance consider the implications for businesses who are not just one type or size. As co-leaders of the Employers for Flexibility in Health Care (E-Flex) coalition, we have partnered with other businesses and organizations with similar workforce characteristics to advocate for greater flexibility and options in implementing regulations, especially those that employ many part-time, seasonal, or temporary employees.

The overarching challenge restaurant and foodservice operators face in complying with the law is to first understand its complicated and interwoven requirements. By far, the definition of "full-time employee" under the law poses the greatest challenge. It does not reflect current workforce practices and could have a detrimental impact on a restaurant operator's ability to offer flexible schedules for his or her employees.

In addition, the applicable large employer determination is too complex. It stifles smaller employers' ability to manage their workforces, expand their businesses and prepare to offer health care coverage. Finally, the automatic enrollment provision could cause financial hardship and greater confusion about the law for some employees, without increasing their access to coverage.

All of these factors combine to complicate what a restaurant and foodservice operator must consider when adapting their business to comply with the law. This means real time and money that will be poured into interpreting and complying with the law, instead of creating jobs, investing in the community, and serving customers.

APPLICABLE LARGE EMPLOYER DETERMINATION

The statute prescribes a very specific calculation that must be used by employers to determine if they are an applicable large employer and hence subject to the Shared Responsibility for Employers and Employer Reporting provisions. Due to the structure of many restaurant companies, determining the employer may be more complicated than expected.

Aggregation rules in the law require employers to apply the long-standing Common Control Clause[4] in the Internal Revenue Code (Tax Code) to determine if they are considered one or multiple employers for the purposes of the health care law. These rules have been part of the Tax Code for years, but this is the first time that many restaurateurs, especially smaller operators, have had to understand how these complicated regulations apply to their businesses. The Treasury Department has yet to offer guidance to help smaller operators understand how these rules apply to them – and to our knowledge, it has no plans to do so. Restaurant and food service operators are forced to hire expensive tax advisors to determine how the complicated rules and regulations associated with this section of the Tax Code apply to their specific situations. Often, entrepreneurs own multiple restaurant entities with various partners. Though these restaurateurs consider each operation to be a separate small business, many are discovering that, for the purposes of the health law, all of the businesses can be considered one employer due to common ownership.

Once a restaurant or foodservice operator determines what entities are considered a single employer, they must determine their applicable large employer status annually. For employers like White Castle, it is clear that we have more than 50 full-time equivalent (FTE) employees employed on business days in a calendar year. However, this determination may be much more difficult for smaller businesses who lack the stability and consistency larger employers enjoy.

Unfortunately, operators on the cusp of 50 full-time equivalent employees are struggling to understand how to complete this complicated calculation each year. An employer must consider each employee's hours of service in all 12 calendar months each year. Immediately after they achieve this cumbersome calculation at the end of the year, they must begin to offer coverage January 1st.

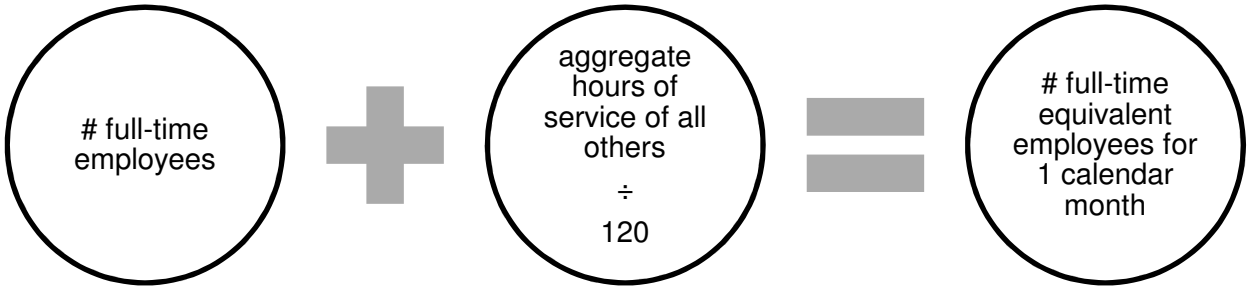
Will small employers just reaching the applicable large employer threshold on December 31, 2015, for example, be able to offer coverage a day later on January 1, 2016? We need clarification on when such employers must offer coverage in future years.

The applicable large employer determination is complicated. Employers must determine all employees' hours of service each calendar month, calculate the number of FTEs per month, and finally average each month over a full calendar year to determine the employer's status for the following year. The calculation is as follows:

1. An employer must first look at the number of *full-time employees* employed each calendar month, defined as 30 hours a week on average or 130 hours of service per calendar month.
2. The employer must then consider the hours of service *for all other employees*, including part-time and seasonal, counting no more than 120 hours of service per person. The hours of service for all others are aggregated for that calendar month and divided by 120.

[4] Internal Revenue Code, §414 (b),(c),(m),(o).

3. This second step is added to the number of full-time employees *for a total full-time equivalent employee* calculation for one calendar month.



4. An employer must complete the same calculation for the remaining 11 calendar months and average the number over 12 calendar months to determine their status for the following calendar year.

This annual determination is administratively burdensome and costly, especially for those employers just above or below the 50 FTE threshold, who must most closely monitor their status – most likely smaller businesses. Many restaurant operators must rely on third-party vendors to develop technology or solutions to help them comply with these types of requirements but, in addition to the added costs and time this requires, vendors are backlogged and solutions are not easily accessible at this time.

OFFERING COVERAGE TO FULL-TIME EMPLOYEES

The health care law requires employers subject to the Shared Responsibility for Employers provision to offer a certain level of coverage to their full-time employees and their dependents, or face potential penalties. The statute defines full-time as an average of 30 hours a week in any given month.

This 30-hour threshold is not based on existing laws or traditional business practices. In fact, the Fair Labor Standards Act does not define full-time employment. It simply requires employers to pay overtime when nonexempt employees work more than a 40-hour workweek. As a result, 40 hours per week is generally considered full-time in many U.S. industries. In the restaurant and foodservice industry, operators have traditionally used a 40-hour definition of full-time. Adopting such a definition in this law would also provide employers the flexibility to comply with the law in a way that best fits their workforce and business models.

Compliance based on a 30-hour a week definition is further complicated by the fact that, for restaurant and foodservice operators who are applicable large employers, it is not easy to predict which hourly staff might work 30 hours a week on average and which will not. During the peak seasons, hourly employees can be scheduled for more hours as customer traffic increases, but then reduced as business slows.

One reason so many Americans are drawn to restaurant jobs is the flexibility to change your hours to suit your own personal needs. However, under this law, for the first time, the

federal government has drawn a bright line as to who is full-time and who is part-time. As a result, employers with variable workforces and flexible scheduling must alter their practices and be deliberate about scheduling hours due to the greater financial impact and potential liability for employer penalties if employees who work full-time hours are not offered coverage. If the definition is not changed to align with workforce patterns, the flexibility so many employees value will no longer be as widely available in the industry. This could result in significant structural changes to our labor market.

The National Restaurant Association and White Castle System, Inc. support efforts, such as Congressman Todd Young's bill H.R. 2575 and Senators Susan Collins' and Joe Donnelly's bill S. 1188, that would define a full-time employee under the Affordable Care Act as someone working 40 hours or more a week.

We appreciate that the Treasury Department, in its proposed rule, recognized that it may be difficult for applicable large employers to determine employees' status as full-time or part-time on a monthly basis, causing churn between employer coverage and the exchange or other programs. Such coverage instability is not in our employees' best interests. We are pleased that the Lookback Measurement Method is an option that applicable large employers may use.

While the Lookback Measurement Method's implementing rules are complex, it could be helpful for both employers and employees. Employers will be better able to predict costs and accurately offer coverage to employees as required. Employees whose hours fluctuate (variable hour and seasonal employees) have the peace of mind of knowing that if their hours do decrease from one month to the next, coverage will not be cut short before the end of their stability period.

CHALLENGES FOR APPLICABLE LARGE EMPLOYERS OFFERING COVERAGE TO THEIR FULL-TIME EMPLOYEES AND THEIR DEPENDENTS

Once an applicable large employer has determined to whom coverage must be offered, he or she must make sure that the coverage is of 60 percent minimum value and considered affordable to the employee, or face potential employer penalties.

Minimum value is generally understood to be a 60 percent actuarial test; a measure of the richness of the plan's offered benefits. This is a critical test for employers especially relating to what the employer's group health plan covers and hence what the premium cost will be in 2014. Business owners strive for certainty, and that means the ability to plan for their future costs. Employers are eager to know what their premium costs will be under the new law. Minimum value is paramount to determining that information.

On February 25, 2013 the Health and Human Services Department included the Minimum Value Calculator, one of the acceptable methods to determine a plan's value, in its Final Rule, Standards Related to Essential Health Benefits, Actuarial Value, and Accreditation. Minimum value can now be determined using this calculator or other options, but it is still difficult to anticipate premium costs this far in advance.

Why? Rates are not usually available until a few months before the employer's plan year begins because insurance companies provide quotes based on the most current data with the greatest amount of claims history. This gives operators a short timeframe to budget and make business decisions in advance of the new plan year. Restaurant operators are eager to see premiums for 2014 and better evaluate the impact and costs associated with the employer requirements.

Employers must also ensure at least one of their plans is affordable to their full-time employees or face potential penalties. A full-time employee's contribution toward the cost of the premium for single-only coverage cannot be more than 9.5 percent of their household income to be considered affordable. Employers will not know household income – which the statute specifies – nor do they want to know this information for privacy reasons. They needed a way to estimate before a plan is offered if it will be affordable to employees.

What employers do know are the wages they pay their employees. Almost always, employees' wages will be a stricter test than household income. Employers are willing to accept a stricter test in the form of wages so that they know they are complying with the law and are provided protection from penalty under a safe harbor. The Treasury Department's proposed rule allows employers to use one of three Affordability Safe Harbors based on Form W-2 wages, Rate of Pay or Federal Poverty Line. The option of utilizing these methods will be helpful to employers as they determine at what level to set contribution rates and their ability to continue to offer coverage to their employees.

The law speaks to affordability for employees but is silent regarding whether the coverage required to comply with the Shared Responsibility for Employers section of the law is affordable to employers. As restaurant and foodservice operators implement this law, considering all of the interlocking provisions, some will be faced with difficult business decisions – between offering coverage they cannot afford with a finite dollar for benefits, and paying a penalty – an option they do not want to take, but that is equally unaffordable to them as well.

We encourage policymakers to address the cost of coverage so that the employer-sponsored system of health care coverage will be maintained, and businesses aren't forced to choose between plans they cannot afford and penalties they cannot afford.

As a family-owned American business, at White Castle, we are committed to putting people first. We have offered a health insurance benefit since 1924. This is available to all team members who work 35 hours or more per week – about half of our nearly 10,000 team members. If we were to maintain current hiring practices, we estimate the change in the definition of full-time employment will increase our health care costs as much as 35 percent.

Team members come to White Castle because of the benefits. They stay because we're a family.

Our benefits package is one of the main reasons so many of our colleagues remain with the company for so long. Twenty-seven percent of our team members have been with us 10

years or more. Many starting with the idea of working with us for a few months, and end up making it a career.

We're proud of that fact ... We're humbled by their loyalty ... And we're committed to continuing to make White Castle a rewarding place to work.

White Castle's annual turnover rate – well below the industry average – is a testament to our ability to recruit and retain great team members through the exceptional benefits we offer and tailor to fit the needs of our team members. Year after year, employees name their benefits package (health care coverage and pension) as the reason why they come to work at White Castle, and why they stay.

Because our employees remain with the company for years, our restaurants have deep roots in the communities we serve. Generations of customers and employees have shared the same great tastes, experiences, and hospitality.

We are committed to asking our employees what they value in their experience with White Castle, and what can be improved ... To truly listening to their answers ... And to taking action to respond to their needs, offering benefits they want and need.

To help us craft a benefits package that truly meets those needs, we conduct an engagement survey that measures team loyalty and what drives company commitment. Wellness incentives such as a non-tobacco user discount have been incorporated into the health plan to encourage employees to live healthy lifestyles, and to reduce coverage costs for everyone.

AUTOMATIC ENROLLMENT REQUIREMENT

Applicable large employers who employ 200 or more full-time employees are also subject to the Automatic Enrollment provision of the law. This duplicative mandate requires these employers to enroll new and current full-time employees in their lowest cost plan if the employees have not opted out of the coverage.

This provision also interacts with the prohibition on waiting periods longer than days and effectively means that on the 91st day, employers must enroll a new full-time hire in their lowest cost plan if they do not opt out by that deadline. Employee premium contributions will begin to be collected.

White Castle and many other American restaurants are concerned that this could cause financial hardship and greater confusion about the law, especially for our young employees. Since 43 percent of restaurant employees are under age 26, and therefore more likely to change jobs frequently or enroll in their parents' plans, many are likely to inadvertently miss opt-out deadlines and will be automatically enrolled in their employer's health plan. This would cause significant, unexpected and, most importantly, unnecessary financial hardship.

White Castle currently employs roughly 10,000 team members, almost half of which are under the age of 26. Of those eligible for our plan, only 53 percent are enrolled, substantially less than our overall average of 80 percent enrollment.

Automatically enrolling an employee and then shortly thereafter removing them from the plan when the employee opts out increases costs without increasing our employee's access to coverage as the law intended. Since the health care law's employer Shared Responsibility provision already subjects large employers to potential penalties if they fail to offer affordable health care coverage to full-time employees and their dependents, the auto-enrollment mandate is redundant. It adds a layer of bureaucracy and, burdens businesses without increasing employees' access to coverage.

Some compare automatically enrolling employees in health benefit plans to automatically enrolling them in a 401(k) plan, but this isn't a good parallel. The financial contribution associated with health benefits can be much larger, for example: 9.5 percent of household income toward the cost of the premium for employees of large employers versus an average 3 percent automatic 401(k) contribution.[5] The financial burden on employees of automatic enrollment in health benefit plans would be much greater than that of 401(k) plans. Additionally, 401(k) rules allow employees to access their contributions when they opt out of automatic enrollment; however, health benefit premium contributions cannot be retrieved.

We will educate our employees about how this provision impacts them, but if an employee misses the 90-day opt out deadline, a premium contribution is a significant amount of money, which can be a serious financial burden. Since the same full-time employees must be offered coverage by the same employers subject to the Automatic Enrollment provision and the Shared Responsibility for Employer provisions, we believe the automatic provision is unnecessary and should be eliminated.

The National Restaurant Association and White Castle System, Inc. support H.R. 1254, legislation introduced by Congressman Richard Hudson, together with Congressman Robert Pittenger, that would eliminate the automatic enrollment requirement that could hurt both employee and employers.

APPLICABLE LARGE EMPLOYER REPORTING REQUIREMENTS

The employer reporting requirements is a key area of implementation for employers: the required information reporting under Tax Code §6055 and §6056 from the Internal Revenue Service and the Treasury Department. These employer reporting requirements are a critical link in the chain of the law's implementation. They represent what could be a significant employer administrative burden and compliance cost.

[5] "Disparities in Automatic Enrollment Availability," Bureau of Labor Statistics, August 2010.

The Administration's July 2, 2013 announcement and subsequent July 9, 2013 IRS Notice 2013-45 provides transition relief and voluntary compliance in 2014 for the Employer Reporting requirements under Tax Code Sections 6055 and 6056, and hence the Employer Shared Responsibility requirements under Tax Code Section 4980H.

The restaurant and foodservice industry welcomes this transition relief after asking the Administration and Congress for more time to receive, understand, and comply with the complex implementing regulations for Employer Reporting under Sections 6055 and 6056. As early as October 2011, the National Restaurant Association, as part of the E-Flex coalition, submitted comments to the Administration requesting transition relief and time to implement the reporting requirements under Tax Code Sections 6055 and 6056 once the rules were issued. The proposed rule from the Treasury Department concerning Tax Code Section 4980H was published in the *Federal* Register on January 2, 2013 to implement the employer mandate, but employers have been waiting for the proposed rules on Tax Code Sections 6055 and 6056.

Employers need the rules for these reporting requirements to set up the systems that will track data on each full-time employee and their dependents to then report this data to the IRS annually. While the first report was not originally required to be submitted to the IRS until January 31, 2015, six months (July-Dec 2013) was too short a time frame for employers to receive the rule, set up systems or engage vendors to develop information technology systems that would begin tracking the necessary data as of January 1, 2014.

We welcome the transition relief and await the proposed rule on Tax Code Sections 6055 and 6056 that the Administration stated it plans to issue later this summer.[6] Regarding those rules, of particular concern is the flow of information and the timing of reporting employers must make to multiple levels and layers of government. Streamlining employer reporting will help ease employer administrative burden and simplify the process. The restaurant and foodservice industry, along with other employer groups, have advocated for a single, annual reporting process by employers to the Treasury Department each January 31st that would provide prospective general plan information and wage information for the affordability safe harbors, as well as retrospective reporting as required by Tax Code Section 6056 on individual full-time employees and their dependents.

CONCLUSION

Since the law was enacted, America's restaurants have taken an active role in constructively shaping the implementing regulations of the health care law. Nevertheless, there are limits to what can be achieved through the regulatory process alone.

[6] "Continuing to Implement the ACA in a Careful, Thoughtful Manner," Mark Mazur, Treasury Notes Blog, July 2, 2013: http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx

The simple truth is, given the challenges that White Castle and other restaurant and foodservice operators face, the law cannot stand as it is today.

Congress must address key definitions in the law: The law should more accurately reflect restaurant and foodservice operators' needs – and our employees' desire for flexible hours.

We ask you to simplify the applicable large employer determination and remove the unnecessary burdens on small businesses, who must closely track their status from year-to-year.

And we ask you to eliminate the duplicative automatic enrollment provision, as it has the potential to confuse and financially harm employees while burdening employers, without ever increasing employee's access to coverage.

Thank you again for the opportunity to testify before you today regarding the employer mandate and how the transition relief is impacting restaurants like White Castle.

This law is one of the most significant requirements our industry has had to comply with that any can remember. While we appreciate the transition relief, giving us the opportunity to receive and understand the rules and then implement them, the industry still faces challenges only Congress can address: the definition of full-time employee, the determination of who is an applicable large employer under the law, and the elimination of the automatic enrollment provision.

We are both proud and grateful for the responsibility of serving America's communities – creating jobs, boosting the economy, and serving our customers. We are committed to working with Congress to find solutions that foster growth and truly benefit the communities we serve.