Testimony before the House Committee on Oversight and Government Reform
Subcommittee on Health Care, District of Columbia, Census, and the National Archives

Christopher J. Spiro, J.D.
Managing Director, Health Policy
The Center for American Progress Action Fund

Thursday, October 6, 2011

Mr. Chairman, Ranking Member Davis, and members of the Committee—thank you for the opportunity to testify today about employer responsibility under the Affordable Care Act and the Act's impact on temporary workers and their employers. My name is Topher Spiro, and I am the Managing Director of Health Policy at the Center for American Progress Action Fund, which promotes effective implementation of the Affordable Care Act.

Today's hearing focuses on an important issue, as temporary staffing firms employ about 10 million workers each year. My testimony is organized into three parts. First, I will describe the broad benefits to temporary workers and their employers under the Affordable Care Act. Then, I will explain the purpose and design of employer responsibility under the Affordable Care Act. My testimony will close with observations of how employer responsibility is practical and flexible for temporary workers and their employers.

Benefits to Temporary Workers and Their Employers

Starting in 2014, all Americans will have access to affordable health insurance. As Carl T. Camden, President and CEO of Kelly Services, Inc. – one of the largest employers of temporary workers – has observed, the Affordable Care Act "will create long-overdue opportunity for non-traditional workers to access affordable health care." Mr. Camden explains how the Affordable Care Act benefits temporary workers and their employers better than I could, so I will quote him at length:

> The United States remains the only advanced nation in which individuals lack access to affordable group health coverage outside the employment setting. As a result, health insurance-related 'job lock' afflicts millions, which is bad for entrepreneurship, worse for economic dynamism, and frustrating for an industry

> that relies on a free-agent workforce. Simply put, non-traditional workers are treated badly by the current model…Any policy choice that enhances the availability and mobility of talent is a good thing for the staffing industry and the economy as a whole.

As Mr. Camden observes, access to affordable health insurance will benefit not only workers, but also their employers. Preventive care will reduce absenteeism and increase the productivity of workers. Health care costs for the uninsured will no longer be shifted onto employers that do offer coverage through higher premiums. And for staffing firms, millions of newly insured Americans seeking health care will create demand for health care workers.

In addition to these economic benefits, on a more human level, many temporary workers – who work long, hard hours but may be struggling to pay the bills and cannot afford health insurance, through no fault of their own – will not lay awake at night out of fear that a family member will suddenly become sick, sending the family over the edge into bankruptcy.

Why Employer Responsibility?

If you agree with Mr. Camden that access to affordable health insurance is long overdue, as I do, then employer responsibility is an essential piece of the puzzle. It provides an incentive for employers that currently offer coverage to maintain that coverage, the primary source of coverage for millions of Americans. Otherwise, many employers might drop coverage and allow taxpayers to pick up the tab, which would increase the federal deficit by billions of dollars. This is not conjecture on my part; the nonpartisan Congressional Budget Office concluded that the absence of employer responsibility would significantly erode employer-based coverage.

Based on this logic, employer responsibility under the Affordable Care Act imposes "free-rider" penalties on large employers to help cover the cost if taxpayers subsidize their employees. Large employers that do not offer coverage to their full-time employees must generally pay a penalty of $2,000 per full-time employee (excluding the first 30 employees). Large employers that *do* offer coverage must pay a penalty of $3,000 for each full-time employee who receives a premium tax credit through the Exchange. That would be the case if the coverage is unaffordable to the employee or does not provide minimum value.

Simple financial comparisons of potential penalty liabilities to the costs of coverage may not drive employer decisions about whether to offer coverage. In addition to employer responsibility, there are several other important reasons why employers will continue to offer coverage. Some may offer coverage because their employees and potential employees expect them to do so, and they want to remain competitive in the labor market. Others may view offering coverage as one of their responsibilities to their employees. Since individuals will have a responsibility to maintain coverage, there will be much more demand for their employers to offer it. Small business tax credits will reduce the cost of offering coverage, particularly for very small firms. And finally, the cost of coverage will still be excluded from income and payroll taxes – which for the vast majority of workers will provide a larger subsidy than they can receive through the Exchange.

In fact, research on the experience in Massachusetts found that enrollment in employer-based coverage actually *increased* – even during the recession. Therefore, it is

not surprising that CBO concluded that the Affordable Care Act would have very little effect on employer-based coverage.

A Practical and Flexible Design of Employer Responsibility

Congress carefully targeted employer responsibility under the Affordable Care Act. And the Treasury Department is carefully examining how to implement the law so that it is practical and flexible for employers. I want to highlight several aspects of the statute and its implementation that demonstrate this careful approach.

First, and most importantly, employer responsibility only applies to large employers with at least 50 full-time employees. As a result, 96 percent of all employers will be exempt from employer responsibility altogether. And since the vast majority of employers that are not exempt already offer coverage, less than 0.2 percent of all employers might be subject to penalties. It is worth noting that in Massachusetts, employer responsibility is much broader in scope, applying to employers with more than 10 full-time employees.

Second, small employers do not become large employers just because they hire seasonal workers. In general, a "seasonal worker" is an employee who is employed for less than four months of the year.

Third, penalties do not apply with respect to part-time employees; they only apply with respect to full-time employees.

Fourth, since penalties apply with respect to full-time employees, the definition of "full-time employee" is important. In general, a "full-time employee" is an employee who works an average of at least 30 hours per week. If full-time employee status is

determined on a monthly basis, an employee who works more than 30 hours per week for only one month would be considered a "full-time employee" who triggers employer responsibility for that month.

Alternatively, Treasury has proposed a safe harbor in which an employer can generally look back up to twelve months to determine whether employees averaged at least 30 hours per week. For example, suppose that a temporary worker works 40 hours per week, but is employed for only three months of the year. If the employer looks back six months, that worker will have averaged only 20 hours per week over the six-month period. Therefore, that worker would not be considered a "full-time employee", and would not trigger employer responsibility.

Treasury's rationale for this safe harbor is to ensure that there is a sufficient attachment between the employer and the employee to trigger the employer's responsibility to the employee. Otherwise, temporary workers might bounce around between employer coverage and coverage through the Exchange, which could disrupt continuity of care and place an administrative burden on both employers and the Exchange.

Employers for Flexibility in Health Care – a coalition of employers that relies on large numbers of part-time, temporary, and seasonal workers – strongly supports Treasury's proposal, commenting that it "has the potential to provide the flexibility employers need to preserve flexible work arrangements, provide a stable source of coverage, and allow for the practical administration of benefits."

In addition to proposing the safe harbor, Treasury has requested comments on alternative possible methods of determining full-time employee status. Of course, any

method must not undermine the purpose of employer responsibility that I discussed earlier – to prevent erosion of employer-based coverage, which would be disruptive and increase costs to taxpayers. In addition, the method must not create an incentive to convert permanent full-time employees into temporary workers, and must be consistent with the Affordable Care Act's 90-day limitation on waiting periods.

And finally, Treasury has proposed a practical method for determining whether coverage is unaffordable to an employee, which could trigger a penalty if the employee receives a premium tax credit through the Exchange. In general, coverage is unaffordable if the cost to the employee exceeds 9.5 percent of the employee's income. Because total income is not something that is known to the employer, employers might not be able to figure out whether the coverage they are offering is affordable, and whether they will be subject to penalties. To address this concern, Treasury proposed a safe harbor in which coverage is unaffordable if the cost to the employee exceeds 9.5 percent of the employee's *W-2 wages* – which is information that is known to the employer. This proposal would adopt wholesale the recommendation of Employers for Flexibility in Health Care, the broad coalition of employers that relies on temporary workers.

In short, Treasury is clearly examining ways to implement employer responsibility in a manner that is practical and flexible, and that takes into account employees with highly variable work schedules and limited employment periods.

Conclusion

In closing, employers of temporary workers need not fear employer responsibility. It is an essential part of health reform, which will expand access to affordable health

insurance to millions of Americans. Mr. Camden, of Kelly Services, writes: "Some have suggested that higher penalties imposed on staffing firms will narrow the cost advantage of using temporary employees and thus weaken demand for our services. I think that concern is misplaced." Rather, Mr. Camden sees significant opportunity: that the Affordable Care Act "will accelerate the growth of non-traditional workers and remove longstanding barriers to employment options."

Mr. Chairman, this concludes my testimony, and I am happy to answer any questions members of the Committee may have.