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National Federation of Independent Business 6/3/91 [OA 8324] [2]

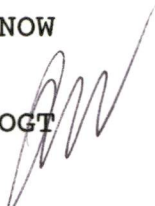
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THE WHITE HOUSE

WASHINGTON

MEMORANDUM FOR TONY SNOW

FROM:

JEFF VOGT 

SUBJECT:

NFIB JUNE 3 EVENT; SMALL BUSINESS ISSUES

Per our discussion, attached is the following:

- 1) Gallup/NFIB parental leave member survey with revealing statistics;
- 2) NFIB's testimony on health care; and
- 3) Proposed solutions offered to R. Porter from then SBA Administrator Susan Engeleiter and her working group.*

*There are some solid recommendations here which we should consider, many of which require no legislation but could show we are proactive (i.e. tort reform; deductibility of health premiums for self-employed/small business; information dissemination on availability and cost to encourage private sector market forces. As is most often the case, it would be nice to "push" the policy process through incorporating health care in the NFIB remarks. If no "new" policy can be pushed, I think it is essential to acknowledge the health care crisis, especially as it relates to small business.

Let me know your thoughts once you have reviewed. Thanks, Tony.

**NFIB
NEWS**



SMALL BUSINESS AND FAMILY LEAVE

**A GALLUP/NFIB SURVEY OF
950 SMALL BUSINESSES**

Hold for Release Until 2 p.m. Monday, May 6, 1991

Contact: Terry Hill (202) 554-9000

NFIB SURVEY ON PARENTAL LEAVE

The following are the results of a telephone survey conducted by the Gallup Organization during the weeks of March 25 through April 19 across a sample of 950 small and independent business owner members of the National Federation of Independent Business. The sample was subdivided into four groups [businesses with 2-14 employees, 15-49 employees, 50-99 employees, and 100 employees or more]. The purpose of the subsamples was to obtain sufficient responses from owners of larger small firms to make observations about various sized businesses.

Survey results are presented in three ways. The column "Sm(all) Bus(iness) W(ei)ghted Total" contains the survey results weighting each subsample for its proportionate share of the total small business population. The weights applied were: 2-14 employees = 84.4%, 15-49 employees = 11.1%, 50-99 employees = 2.6%, and 100 employees or more = 1.9%. The column, "Empl(o)ye(e) W(ei)ghted Total," contains the survey results weighting each subsample for its proportionate share of people employed in small businesses. The weights applied were 27.5%, 50-99 employees = 14.3%, and 100 employees or more = 29.5%. The weights were developed from the Small Business Data Base. (See, *The State of Small Business, 1990*, Office of Advocacy, Small Business Administration, pp. 74-75 and 124-125.) Finally, the unweighted total response, "Survey Total" column, is presented for questions 2 through 8. The reason for this form of presentation is that the number of respondents to these questions was so small that weighting responses could provide misleading data. Therefore, the results of questions 2 through 8 should be considered no more than suggestive.

Empl* = employee size of business

	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Sm Bus Wghted Total	Empl Wghted Total
1. Do you have a policy regarding employees who request time off for a serious family illness, including the birth of a child; or, do you handle such requests for time off on a case-by case basis?	n=260	n=236	n=231	n=233	n=950	n=950
1. Policy	1%	6%	14%	22%	2%	10%
2. Case-by-case	92	89	84	76	91	86
3. Never thought about it	7	5	2	1	6	4
4. Don't Know/No Answer	1	0	0	1	1	0
	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Survey Total	
2. If "Policy" — Is the policy written and available to employees on request?	n=2	n=14	n=32	n=48	n=96	
1. Yes	*%	*%	84%	98%	91%	
2. No	*	*	13	2	8	
3. Don't Know/No Answer	*	*	3	0	1	
2a. Do you have a different policy for employees requesting time off to care for a sick family member and employees requesting time to deliver a child? If "Yes," which gives more time off — maternity leave or leave for a family illness?	n=2	n=14	n=32	n=48	n=96	
1. Yes, maternity leave is more generous	*%	*%	25%	31%	31%	
2. Yes, leave for family illness is more generous	*	*	0	10	6	
3. No/About the same	*	*	66	53	57	
4. Don't Know/No Answer	*	*	9	6	6	
3. Which <u>best</u> describes your policy on such matters? Is it that:	n=2	n=14	n=32	n=48	n=96	
1. An employee can come back to work when he or she is ready	*%	*%	22%	33%	31%	
2. Time off is given, but it is limited	*	*	69	58	62	
3. No Time off is given, but you try to rearrange the employee's schedule or duties	*	*	3	4	3	
4. No time off given	*	*	0	0	0	
5. Don't Know	*	*	6	2	4	
4. If limited leave given — What is the limit? (Open)	n=1	n=8	n=22	n=28	n=59	
1. Less than one week	*%	*%	4%	4%	5%	
2. A week to a month	*	*	14	18	17	
3. One to three months	*	*	59	32	41	
4. Three months or more	*	*	14	28	24	
5. Don't Know/No Answer	*	*	9	18	13	

	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Survey Total	
5. Is the time an employee spends on family leave with pay or without pay?	n=2	n=14	n=29	n=44	n=89	
1. Without pay	*%	*%	70%	68%	69%	
2. With pay and/or disability	*	*	10	11	12	
3. With disability for maternity leave and without pay for a family illness or paternity leave	*	*	0	5	6	
4. (Depends on other factors, e.g., length of employment)	*	*	10	14	11	
5. Don't Know/No Answer	*	*	10	2	2	
6. How long does an employee have to be work for your firm to be eligible for family leave? (Open)	n=2	n=14	n=29	n=44	n=89	
1. Less than four months	*%	*%	45%	46%	45%	
2. Four months to a year	*	*	31	27	27	
3. More than a year	*	*	14	16	18	
4. Don't Know/No Answer	*	*	10	11	10	
7. Does your family leave policy apply identically to male and female employees?	n=2	n=14	n=29	n=44	n=89	
1. Yes, Identically	*%	*%	87%	84%	86%	
2. Identical for family illness; different for birth of a child	*	*	7	2	3	
3. No, different for males and females	*	*	0	9	6	
4. Family leave for males has never been an issue	*	*	3	5	4	
5. Don't Know/No Answer	*	*	3	0	1	
8. Why did you establish a family leave policy? Was it because:	n=2	n=14	n=32	n=48	n=96	
1. You had so many requests for leave that you needed a policy	*%	*%	6%	6%	6%	
2. A state law or regulation forced you to	*	*	9	8	7	
3. You established a policy to avoid potential problems	*	*	25	42	38	
4. It was part of a union contract or labor negotiation	*	*	3	4	4	
5. To use as a benefit to attract employees	*	*	31	27	27	
6. Don't Know/No Answer	*	*	3	13	9	
	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Sm Bus Wghted Total	Emplee Wghted Total
9. If you handle requests for time off on an individual-by-individual basis, what factors do you use (or would you use) to determine whether to give leave or how much leave to give?	n=258	n=222	n=199	n=175	n=854	n=854
A. The number of prior requests the employee has made for time off						
1. Very Important	35%	37%	32%	32%	35%	34%
2. Important	44	42	46	46	44	44
3. Not Too Important	11	15	14	15	12	14
4. Not At All Important	5	4	7	5	4	5
5. Don't Know/No Answer	5	2	1	2	5	3
B. The length of time the employee has worked for you						
1. Very Important	26%	29%	28%	25%	27%	27%
2. Important	47	47	48	51	47	48
3. Not Too Important	17	16	18	17	17	17
4. Not At All Important	8	6	5	7	7	7
5. Don't Know/No Answer	2	1	2	0	2	1

	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Sm Bus Wghted Total	Empley Wghted Total
C. Whether the business is busy at the time						
1. Very Important	38%	38%	31%	29%	38%	34%
2. Important	42	37	35	43	41	40
3. Not Too Important	12	18	26	18	14	18
4. Not At All Important	6	6	8	8	6	7
5. Don't Know/No Answer	2	0	0	2	1	1
D. The difficulty of replacing the employee						
1. Very Important	39%	35%	33%	33%	38%	35%
2. Important	35	40	39	41	36	39
3. Not Too Important	17	16	16	18	17	17
4. Not At All Important	6	7	9	8	6	7
5. Don't Know/No Answer	3	2	3	0	3	2
E. The seriousness or nature of the employee's family situation						
1. Very Important	46%	47%	44%	42%	46%	45%
2. Important	43	45	45	51	43	46
3. Not Too Important	5	4	5	3	5	4
4. Not At All Important	4	2	4	3	4	3
5. Don't Know/No Answer	3	2	3	1	2	2
F. The employee's value to the business						
1. Very Important	44%	49%	49%	46%	45%	46%
2. Important	47	41	38	42	46	43
3. Not Too Important	4	5	6	7	5	6
4. Not At All Important	3	3	5	4	3	4
5. Don't Know/No Answer	2	2	2	1	1	1
G. The amount of time the employee intends to take						
1. Very Important	43%	43%	42%	37%	43%	41%
2. Important	44	42	49	53	44	47
3. Not Too Important	7	12	5	7	7	8
4. Not At All Important	3	2	4	3	3	3
5. Don't Know/No Answer	3	1	0	0	3	1
10. If a typical employee, someone working for the average wage, average job tenure, etc., asked you tomorrow for indefinite time off to care for a seriously ill child or parent, what would you be most likely to say? Would you say:						
	n=258	n=222	n=199	n=175	n=854	n=854
1. You can have time off; your job will be here when you come back	23%	21%	18%	23%	23%	22%
2. You can have time, but I can't hold your job open indefinitely	45	49	56	56	46	51
3. I can't give you more than a day or two off, but let's try to rearrange your schedule	16	16	13	10	16	14
4. At most I can give you a day or two, but I have to have someone in the job	11	9	10	6	11	9
5. Don't Know/No Answer	4	5	3	5	4	4
11. If the law required you to provide unpaid family leave of up to 90 working days a year, how would change the way you currently handle requests for family leave						
	n=252	n=234	n=231	n=223	n=940	n=940
1. Generally increase the amount of time off	17%	26%	29%	38%	19%	28%
2. Generally decrease the amount of time off	25	17	19	8	23	17
3. Increase time off for some and decrease for others	13	16	11	11	13	13
4. (Nothing/Wouldn't change much of anything)	29	29	29	30	30	29
5. Don't Know/No Answer	15	13	11	13	15	13

	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Sm Bus Wghted Total	Emplye Wghted Total
12. If the law required you to provide unpaid family leave of up to 90 working days a year, would you be more likely or less likely to:	n=260	n=236	n=231	n=223	n=950	n=950
A. Require a doctor's excuse or other documentation before granting leave						
1. More Likely	74%	82%	84%	82%	76%	80%
2. Less Likely	12	7	2	4	11	7
3. (No More or Less Likely)	13	10	14	14	13	13
4. No Answer	1	1	0	0	0	0
B. Hire young women						
1. More Likely	12%	4%	6%	5%	11%	7%
2. Less Likely	46	42	38	32	45	40
3. (No More or Less Likely)	39	51	53	59	41	50
4. No Answer	3	1	3	4	3	3
C. Reduce or eliminate other employee benefits such as paid vacations, unpaid personal leave or health insurance						
1. More Likely	55%	50%	52%	46%	55%	51%
2. Less Likely	17	16	14	18	16	17
3. (No More or Less Likely)	24	31	30	33	25	29
4. No Answer	4	3	3	3	4	3
D. Reduce the number of jobs for low-skilled workers						
1. More Likely	48%	37%	34%	31%	46%	38%
2. Less Likely	18	20	19	17	18	19
3. (No More or Less Likely)	29	39	45	47	31	40
4. No Answer	5	4	2	5	5	4
13. Within the last three years, have you had an employee request time off for a serious family illness or to give birth?	n=260	n=236	n=231	n=223	n=950	n=950
1. Yes	29%	60%	73%	78%	34%	59%
2. No	71	40	27	21	66	41
3. Don't Know/No Answer	0	0	0	1	0	0
14. If Yes — About how many times has it occurred in the last three years? (Open)	n=75	n=142	n=168	n=175	n=560	n=560
1. Once	39%	25%	13%	5%	36%	22%
2. Two to three	43	45	35	21	42	38
3. Four to five	6	10	17	12	7	11
4. Six to nine	7	13	15	12	8	11
5. 10 or more	2	6	15	34	4	15
6. Don't Know/No Answer	3	1	5	6	3	3
15. Think of the most recent instance. Did it involve a serious family illness or birth?	n=75	n=142	n=168	n=175	n=560	n=560
1. Serious family illness	70%	46%	39%	33%	66%	48%
2. Birth	29	53	60	65	33	51
3. Don't Know/No Answer	1	1	1	2	1	1
16. What best describes how you handled the request for family leave?	n=75	n=142	n=168	n=175	n=560	n=560
1. Granted the request	95%	89%	87%	93%	94%	92%
2. Scaled back the time off requested, but gave leave	0	7	8	5	1	5
3. Rearranged the schedule and duties, but didn't give time off	4	1	4	0	4	2
4. Denied the request	0	0	1	1	0	0
5. Don't Know/No Answer	1	2	1	1	1	1

	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Sm Bus Wghted Total	Emplye Wghted Total
17. If leave given — How did you make up for the employee's absence? Did:	n=71	n=137	n=160	n=171	n=539	n=539
A. You hire a temporary employee?						
1. Yes	20%	32%	34%	35%	22%	30%
2. No	80	67	64	65	78	70
3. Don't Know/No Answer	0	1	0	0	0	0
A1. If Yes — Did that temporary employee eventually draw unemployment benefits?	n=14	n=44	n=55	n=59	n=172	n=172
1. Yes	*%	7%	15%	8%	7%	8%
2. No	*	89	75	72	80	79
3. Don't Know/N/A	*	4	10	20	13	13
B. You have other employees cover or work more hours?	n=71	n=137	n=160	n=171	n=539	n=539
1. Yes	79%	85%	91%	87%	80%	85%
2. No	20	15	9	13	19	15
3. Don't Know/No Answer	1	0	0	0	1	0
C. You or a family member of yours work more hours?						
1. Yes	93%	55%	43%	32%	86%	57%
2. No	7	45	57	68	14	43
3. Don't Know/No Answer	0	0	0	0	0	0
D. The work did not get done; it was postponed						
1. Yes	34%	26%	24%	24%	32%	27%
2. No	66	74	76	75	68	73
3. Don't Know/No Answer	0	0	0	1	0	0
E. You sent the work to another firm to be done						
1. Yes	7%	4%	6%	2%	7%	5%
2. No	93	96	94	97	93	95
3. Don't Know/No Answer	0	0	0	1	0	0
F. You limited the amount of business you accepted for awhile						
1. Yes	23%	8%	8%	6%	20%	11%
2. No	76	92	92	94	79	89
3. Don't Know/No Answer	1	0	0	0	1	0
G. You reduced customer services — made fewer sales calls, etc.						
1. Yes	31%	14%	17%	12%	28%	19%
2. No	69	85	83	88	72	81
3. Don't Know/No Answer	0	1	0	0	0	0
18. What was the principal problem caused by the employee's absence?	n=71	n=137	n=160	n=171	n=539	n=539
1. Finding a temporary replacement	6%	1%	7%	5%	5%	4%
2. Increased workload for others	37	33	35	31	36	34
3. Cost of maintaining benefits and paying the replacement	6	4	4	6	5	5
4. Training the replacement	3	8	8	12	3	8
5. Lost productivity/disruption of work or client relationship	20	13	10	12	19	14
6. Shifting workers around to fill in	17	30	29	26	19	25
7. None/No real problems	11	6	2	4	10	6
8. Other	0	5	8	4	1	4
9. Don't Know/No Answer	0	0	0	0	0	0

	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*	Sm Bus Wghted Total	Emplye Wghted Total
19. Did you continue to pay all or part of the absent employee's health insurance premium?	n=71	n=137	n=160	n=171	n=539	n=539
1. Yes	45%	72%	72%	82%	50%	67%
2. No	10	4	9	6	9	7
3. Employee not covered by health insurance	45	23	18	10	41	25
4. No Answer	0	1	1	3	0	1
20. When family leave was given in the last three years, did an employer ever:	n=75	n=148	n=168	n=175	n=566	n=56
A. Not use the leave for the intended purpose						
1. Yes	15%	8%	17%	14%	14%	13%
2. No	83	85	76	78	83	81
3. Don't Know/No Answer	2	8	7	8	3	6
B. Quit just before he or she was supposed to return						
1. Yes	8%	21%	37%	37%	11%	24%
2. No	91	78	61	61	88	74
3. Don't Know/No Answer	1	1	2	3	1	2
C. Use the family illness as an excuse to get out of things at work they didn't want to do						
1. Yes	19%	14%	23%	18%	18%	18%
2. No	77	81	75	76	78	78
3. Don't Know/No Answer	4	5	2	6	4	4
D. Stay out longer than necessary						
1. Yes	25%	23%	31%	25%	25%	25%
2. No	74	73	64	69	73	71
3. Don't Know/No Answer	1	5	5	6	2	4
21. Suppose an employee quit his or her job to care for a sick family member or to give birth. Would you be likely to rehire that person when a job opened for which he or she is qualified?	n=260	n=236	n=231	n=223	n=950	n=950
1. Yes, likely	74%	68%	71%	73%	73%	72%
2. No, unlikely	7	10	7	5	7	7
3. Totally dependent on prior employee performance and other job applicants	18	22	19	20	19	20
4. No Answer	1	0	2	2	1	1
22. What if the government required employers to notify such former employees of any job opening for which they are qualified? Would you favor or oppose such a law?	n=260	n=236	n=231	n=223	n=950	n=950
1. Favor	20%	14%	10%	6%	19%	13%
2. Oppose	76	83	85	92	77	84
3. (Don't Care)	3	2	3	1	3	2
4. No Answer	1	1	2	1	1	1
23. Please tell me a little about the people working for you. How many employees work: (Open)	n=260	n=236	n=231	n=223		
A. Full-time (ave)	5	24	57	154		
B. Part-time (ave)	1	9	34	48		
24. How many are:						
A. Full-time employ-under the age of 40 (ave)	1	4	15	45		
B. Part-time employee are women under the age of 40 (ave)	1	3	14	28		

	2-14 Empl*	15-49 Empl*	50-99 Empl*	100+ Empl*
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25. How many are:

A. Full-time employees are paid less than, or within a few cents of, the minimum wage (ave)

1	1	2	5
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B. Part-time employees are paid less than, or within a few cents of, the minimum wage (ave)

1	3	7	16
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Demographic Information —

Sex (interviewer designation)

1. Male	79%	84%	87%	86%
2. Female	21	16	13	14

Please tell me how old you are?

1. < 30	4%	4%	0%	3%
2. 30 thru 39	24	22	22	20
3. 40 thru 49	31	31	27	35
4. 50 thru 59	25	22	32	22
5. 60+	15	20	19	20
6. No Answer	1	0	0	0

State (member data)

SIC (member data)

Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Memo	Susan Engeleiter to Roger Porter, re: Status Report on SBA Health Insurance Initiative. (16 pp.)	02/14/91	~~P-5~~	

Collection:

Record Group: Bush Presidential Records
Office: Speechwriting, White House Office of
Series: Speech File, Backup
Subseries:
WHORM Cat.:
File Location: National Federation of Independent Business 6/3/91 [2]

Open on Expiration of PRA
 (Document Follows)

By SN (NLGB) on 4/5/2005

Date Closed: 10/28/2004 FOIA/SYS Case #: Re-review Case #: 2004-2265-S P-2/P-5 Review Case #:	OA/ID Number: 08324
MR Case #: MR Disposition: Disposition Date:	Appeal Case #: Appeal Disposition: Disposition Date:

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
 (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

COPY

TO: Roger Porter
Assistant to the President for Economic and Domestic
Policy and Director, Office of Policy Development

FROM: Susan Engeleiter
Administrator

RE: Status Report on SBA Health Insurance Initiative

DATE: February 14, 1991

As you know, affordable health care and health insurance are No. 1 issues on the agendas of most trade associations representing small and medium businesses. In my role as an advocate for small enterprises, I began a process last October to produce policy recommendations on this issue. This memo provides you with an interim report. The policies presented here do not comprise a final or comprehensive health-care initiative, but rather a status report on policies emerging from an evaluation of small business insurance issues.

Background

A major component of the "health care crisis" is the problem of the uninsured. Between 34 million and 36 million Americans lack health care coverage. In the last quarter of 1988, some 63 million Americans went without health coverage for at least one month.

Many of these Americans are "working uninsured". According to the Survey of Income and Program Participation (SIPP) conducted by the U.S. Bureau of the Census in 1984, 8.2 million of the uninsured are private wage-and-salary workers. An additional 1.6 million are small business owners, primarily sole proprietors. Almost half of the working uninsured are employed in firms with fewer than 25 employees; a third work in firms where there are fewer than 10 employees.

The bottom line is that the small business community is a large part of the health insurance problem, and can be a large part of the solution.

The significance of these figures is underscored by the following: 1) health care coverage in the U.S. is predominantly employment-based; and 2) the U.S. attained almost full employment at the end of the 1980s. Based upon the experience of the previous decades, policymakers anticipated that rising employment would result in a corresponding increase in health care coverage among workers. Instead, as millions of new jobs were created in the last decade, the number of uninsured also increased. Small firms (those with fewer than 500 employees) were responsible for two-thirds of all the new jobs created since 1980. Health policy officials began to examine why these firms were unable to provide health insurance to their employees.

Employers of all sizes sponsor benefit packages for their employees for a variety of reasons -- attracting qualified employees in an increasingly competitive market, retaining employees, minimizing employee turnover and the concomitant costs of training new workers, maintaining employee morale and minimizing lost production time due to worker illnesses.

Data from the SBA's Office of Advocacy indicate that these pressures will intensify on small and medium businesses in the years immediately ahead. The growth in the labor force is shrinking, while the number of jobs, most created by small companies, will continue to increase. To attract and retain those workers, small companies will have to offer competitive benefit packages, including health insurance.

A number of factors conspire to make this goal more difficult and the cost of health insurance more burdensome for small companies than for larger companies. For example:

- * The composition of the small business work force is different from that of larger firms. Small firms proportionally hire more younger and older workers than larger firms (61 percent and 80 percent, respectively, in 1988). These groups are often harder and more expensive to insure.

- * The turnover rate in small firms is much higher than in larger firms. About 27 percent of workers in small firms move every year, compared with 15 percent in large firms. Also, more workers in small firms are likely to be returning to jobs after absences.

- * Small businesses use many part-time workers. Over 20 percent of all those employed in small firms in 1988 worked less than 35 hours per week.

- * Very small firms, usually with fewer than 20 employees, and individuals are medically underwritten, which is an expensive process. Medical underwriting assesses the health status of each

individual to determine whether or not the firm will be accepted for coverage and whether certain employees or illnesses will be excluded from coverage. This differs from group coverage where the rating is based on the group as a whole.

- * In a small firm, where fewer people are available over which to spread the risk, a single high-cost illness has a much greater effect.

- * The administrative costs of insurance are higher for small companies. It's more costly for an insurance company to cover 10 employees in 100 firms than 1,000 employees in one large firm.

- * Costs are also higher because the insurance company, rather than the employer's in-house staff, must absorb many of the administrative functions of the plan.

- * Moreover, small firms are less likely to self-insure; only 5 percent of firms with fewer than 100 employees are self-insured, compared to 40 percent of firms with more than 500 workers.

- * Plans may also be relatively more expensive for very small employers because small employers are more likely to pay all health premium costs rather than require some employee contribution. Seventy percent of firms with fewer than 100 workers pay all of their employees' single premium contracts, compared to 61 percent of firms with 100 or more workers.

Premiums for health plans provided by small firms can run as high as 30 to 40 percent above the cost of the same or a similar plan for larger firms. This is primarily attributable to medical underwriting and administration costs.

No one -- not employers, not employees, not the health insurance industry, not the federal government, not state governments, not the uninsured unemployed, not the providers of health care services -- no one doubts that something needs to be done to address the problems facing this nation's health delivery and payment system. The dilemma continues to be how to do it -- who will pay, how much, for what services.

We are not in want of studies and recommendations on the issues and we are not in want of coalitions of interested parties promoting possible solutions to the problems of the current system. We are in want, however, of consensus on how to design and implement comprehensive health care delivery and payment system reforms.

Without affordable and available health care we have (to name a significant few problems):

- * Low birthweight babies who need additional care and nurturing to meet learning potential;
- * Workers who are less productive because of absences due to illness;
- * Families who postpone routine diagnostic and preventive health care because they cannot pay for the health care services;
- * Higher health care costs when postponed routine and lower-cost preventive health care results in the need for higher cost acute care and needless deaths from treatable diseases;
- * Increasing demand for programs to address the needs of the medically uninsurable.

In his 1990 State of the Union address, President Bush charged Secretary Sullivan with formulating a health care strategy. That work continues. Secretary Sullivan reportedly has talked about stressing prevention during the coming year -- a theme mentioned in the President's 1991 State of the Union address -- and has discussed the need to strive for a national consensus on health policy.

Despite the current lack of consensus on comprehensive reform, I believe that in the interim, the Administration can begin work with the small business sector to improve the price and frequency of insurance coverage. These interim steps can show progress on the health care front, delivering coverage to more Americans and easing the sense of frustration the business community feels over this issue.

Process

I initiated a five-step process last fall to engage small business leaders in a discussion of potential solutions to the health insurance problem. The five steps were as follows:

- * On October 25, 1990, I convened a roundtable that included representatives of key small business, insurance, regulatory and medical industry groups. (TAB A lists participants.) Mike McKeivitt, Chairman of the SBA National Advisory Council (NAC) Health Care Committee, co-chaired this meeting. From it emerged a great deal of background information on the problems of insuring small companies and a number of consensus ideas for addressing those problems. This information was provided to NAC.

* In early December, Mr. McKeivitt's Health Care Committee recommended, and the entire NAC endorsed, a series of recommendations on what the Administrator of SBA should advocate to address the health care issue. (TAB B lists participants.)

* In mid-December, the NAC recommendations were presented to the 11th Annual Small Business Legislative Conference sponsored by the SBA in Atlanta. The comments of conference participants, mostly state legislators, were folded into the evolving policy recommendations.

* In December and January, the emerging recommendations were reviewed by a nationally regarded consultant on health care issues, Prof. Roger Formisano of the University of Wisconsin-Madison School of Business.

* SBA's Office of Advocacy, a statutorily created office of attorneys and economists who specialize in small business issues, reviewed all of the materials generated thus far and made its recommendations to me.

Recommendations

1. "Basic Health Needs" Coverage for Employees of Small Businesses

Issue: Federal law reserves to states the right to regulate health insurance. Many states have established mandates on health services. In some cases, mandates prescribe offerings; in others, they bind employers and the insured to specific policy benefits.

The growth in the number and nature of these mandates has been substantial. A recent study ("The Price of State Mandated Benefits", Jon R. Gabel and Gail A. Jensen, Inquiry, Winter 1989) counts 730 state mandates, up from 343 in 1978. These mandates significantly increase the cost of health insurance coverage for small companies. Gabel and Jensen strongly suggest a relationship between mandated benefits and decisions by small firms not to offer health coverage.

Most larger companies, because of economies of scale, can escape these mandates and state premium taxes by self-insuring, which exempts them from state regulation under the terms of ERISA. Thus, state mandates not only raise the cost of coverage for small firms, but contribute to inequities between the insurance capabilities of large and small firms.

On the positive side, mandates can assure that health consumers have access to certain important types of health care, such as prenatal care and mammography. It is not likely or necessarily

advisable that all state-imposed mandates be rolled back. However, market forces can be expected to exert significant pressure on businesses to offer some coverage now mandated by states. Demographic factors like the slowing growth of the workforce will require that small companies offer the best fringe benefit packages possible in order to attract and retain the best workers.

Because the cost of mandated coverage can price insurance beyond the reach of small companies, there are signs of a movement to roll back state mandates. Several states have now legislated rollbacks (Rhode Island, Virginia, Kentucky, Florida, Illinois, Missouri and Washington) in order to make basic coverage available to small companies. More states are expected to follow suit this year.

Some states have minimized the objections of the health care and insurance industries to these rollbacks by extending eligibility for basic coverage only to very small firms (less than 25 employees is a common cutoff) who have had no insurance during the previous year. Thus, rollbacks do not reduce participation in the insurance market; they add participation by applying to companies previously unable to participate in the market.

There are several options for leveraging rollbacks. The least intrusive is to encourage states to roll back their mandates voluntarily. The most intrusive option is to amend ERISA to preempt state regulation of health insurance with uniform federal regulation.

A middle-ground option would be for the federal government to "qualify" insurance plans that meet certain basic standards. Standards might include managed care, copayments and deductibles, dependent coverage, minimum employer contributions, enlightened underwriting practices and other policies recognized as beneficial to help lower the overall costs of insurance. The Administration could convene a task force to define these standards. Qualified plans would be exempt from state-imposed mandates and premium taxes. While this option is not as intrusive as blanket federal regulation of health insurance, it would still allow selective preemption of state regulation and would raise serious federalism questions. In addition, it would require the creation or expansion of federal bureaucracy to qualify insurance plans.

On the positive side, the option would allow exemption from state mandates to be used as leverage for the spread of model health insurance coverage.

This option was suggested by University of Wisconsin Business School Professor Roger Formisano, who consulted with SBA during the health policy process. The option was neither considered nor endorsed by the SBA National Advisory Council or the SBA's national roundtable in October.

Proposals: The National Advisory Council has recommended that I strongly advocate the rollback of state-imposed mandated coverage, allowing small businesses to purchase "Basic Health Needs" coverage.

As a former state legislator sensitive to state rights, I favor the voluntary approach, at least initially. I recently published an editorial in the Christian Science Monitor urging states to act. Federal officials can promote state action by advocating the need to make basic coverage available to small companies that otherwise can afford none. We can point out a number of arguments, ranging from the troubling human dimension of employees and families going without health coverage to the fact that affordable health insurance must now be regarded as a basic business climate issue in each state. In other words, businesses considering where to locate should investigate the costs of providing health coverage in host states.

Federal officials can praise states that voluntarily roll back their mandates. The Administrator of SBA, for example, can name an "Honor Roll" of rollback states each year during Small Business Week.

The majority of small business trade associations favor firmer and faster action: the amendment of ERISA to preempt states' ability to impose mandates.

2. Full Deductibility of Health Premiums for Sole Proprietorships and Partnerships

Issue: Current tax incentives are inequitable for employer-sponsored health care. Corporations, with the exception of Chapter S corporations, are allowed to deduct 100% of the cost of health insurance provided to themselves, their spouses and their dependents.

Most small businesses are organized as partnerships, sole proprietorships or Chapter S corporations. Under the Tax Reform Act of 1986, these businesses can deduct only 25% of their health care costs. This temporary deduction was extended by the last Congress.

Apart from deductibility, large companies enjoy a number of competitive advantages over small businesses in regard to health benefits for employees. As I mentioned earlier, large companies often have sufficient numbers of employees to self-insure, which allows them to escape state mandate and premium taxes. The economies of scale of larger companies tends to lower their per-employee costs. Because they command larger groups of consumers, large companies can bargain rates with health care providers, who then shift the cost of those lost revenues to small businesses without bargaining power. Thus, small business trade associations view full deductibility as an important issue of equity.

In addition to the equity issue, expansion of this deduction makes for sound health care policy since most of the working uninsured are found in smaller firms. A major reason for this is cost. As mentioned on the first page of this memo, 8.2 million of the uninsured are private wage-and-salary workers. An additional 1.6 million of the total are small business owners (primarily sole proprietors). Almost half of the working uninsured are employed in firms with fewer than 25 employees; a third work in firms where there are fewer than 10 employees.

Therefore, increasing the deduction for small employers makes sense if we are to encourage the provision of health care. The net cost of health insurance to the small business owner will be reduced, resulting in an increase in the acceptability of offering health insurance to employees.

The Joint Committee on Taxation estimated on Jan. 15, 1991, that 100% deductibility for partnerships, sole proprietors and Chapter S corporations would cost \$8 billion over five years, including \$1.1 billion the first year. However, these costs must be weighed against the health costs suffered by small business employees who lack sufficient insurance coverage.

Proposal: The Administration previously has advocated extension of 25% deductibility, but has opposed full deductibility. I would recommend that the Administration endorse full deductibility.

3. Education for Small Employers

Issue: Small businesses need clear and consistent information on how to find and provide health insurance for their employees. Information should be disseminated on strategies for reducing health insurance costs, such as deductibles, copayments and managed care programs. Training sessions should also be held to provide the technical assistance needed.

Proposal: Assuming sufficient budget resources, the SBA will undertake a nationwide effort to train small businesses in how to construct, shop for and maintain affordable health coverage for their employees and how to educate employees in the proper use of health care.

SBA will work with private organizations and other interested public agencies to design and disseminate educational programs to small employers. Key subjects of the educational programs will be prevention; the use of cost-containment strategies, including deductibles, copayment and managed care; techniques for sharing and/or spreading risk (risk pooling, the use of employee leasing, etc.); understanding insurance company renewal and underwriting

practices; the use of other fringe benefits to support health care needs, and the education of employees in health care costs and consumerism.

4. Reform of Medical Malpractice Insurance

Issue: Medical malpractice and defensive medicine significantly increase health care costs. While various states have enacted tort reform, many believe that federal legislation is needed. The threat of medical malpractice claims is estimated to add some \$4 billion to the costs of health care each year. It is also estimated that 70% of physicians order more diagnostic care; 14% were found to order unnecessary tests and procedures. This defensive action on the part of doctors costs an estimated \$100,000 per year per physician.

Proposal: States have begun to act on tort reform at the state level. The SBA should continue to advocate medical malpractice reform and to support the efforts of the Domestic Policy Council working group addressing tort reform.

5. Managed Care Programs

Issues: Managed care programs involve restricting employee access to doctors and hospitals as a means of controlling costs (e.g., PPOs, HMOs), thereby leading to an increase in health insurance coverage in small businesses. These programs can reduce the cost of health insurance based on arrangements made between the payers and providers. Studies show that the use of a managed care health plan with built-in restraints on the use of health services can cut costs by 5 to 10 percent.

Most insurance carriers offer a variety of managed care features, including prior approval for hospital admissions, second opinions for surgery, case management and discharge planning. A number of insurers also offer preferred provider organizations (PPO), a group of doctors who agree to discount their fees, usually by about 10 to 20 percent.

Studies reveal, however, that providers and employees tend to lack enthusiasm for managed care programs. At issue for employees is the fact that deductibles and co-payments are much higher if covered participants seek care from doctors that are not on approved lists. Insured employees are also often not willing to change doctors to those in the PPO. For providers, these programs have resulted in changes in their levels of control over medical decisions. Also, they do not necessarily wish to reduce their fees.

Proposals: SBA will conduct a data search to determine and publicize savings that small and medium businesses can achieve

through managed care strategies. If no data exist, SBA will contract for a study to quantify those savings.

Managed care will be emphasized in the SBA national education and training initiative outlined above. Other Administration officials may also want to emphasize the importance of managed care so that employees are gradually persuaded that this strategy is necessary.

6. Reconsideration of COBRA's provisions on continuation coverage for employees

Issues: The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires employers to offer up to 18 months of continued health care coverage to employees who terminate employment, except those who were fired for gross misconduct. In addition, up to 36 months of coverage must be offered to employees' dependents who lost health care coverage because of the death of the employee, divorce or marital separation. Employers are permitted to charge beneficiaries a premium of up to 102% of the group rate.

In 1989, the law was amended to allow former employees to obtain coverage for 29 months if they are ineligible for Social Security benefits. In addition, individuals with pre-existing medical conditions can retain COBRA benefits even if they are later covered by another employer plan.

According to employers, COBRA has become extremely expensive. Employers' costs often exceed the 102% they can charge beneficiaries. Also, the ability of the original employer to change insurance carriers is limited since many insurance companies will not insure employers who have former employees or their dependents taking advantage of COBRA benefits.

COBRA provides a disincentive to employers to offer coverage, since it applies only to companies that offer coverage.

Proposal: Assuming sufficient budget resources, SBA will undertake a study that examines the impact of COBRA on health care costs to small employers. A current SBA health benefits survey of 5,000 businesses, scheduled to be completed in June/July 1991, will determine the extent to which COBRA is a barrier to offering health insurance coverage. However, a follow-up study will be needed to determine actual costs of continuation coverage to small employers.

SBA will also attempt to determine how costs to the employer could be reduced by various reforms. Reforms advanced to date include increasing the amount a beneficiary has to pay by a certain percentage, repealing the 1989 amendments, and approving a new amendment that forbids insurance companies from denying coverage to small businesses whose former employees have utilized COBRA.

In addition, the Administration should press for congressional hearings to examine COBRA and its impact. At no time has a Congressional Committee addressed the impact of COBRA. If the committees of jurisdiction are reluctant to hold the hearings, the House and Senate Small Business Committee should be approached.

7. Copayments and Deductibles

Issues: Although cost control mechanisms are necessary and should be encouraged, significant numbers of employees are finding it difficult to meet the copayments and deductibles imposed by employers. Under some policies, once the deductible is met, full payment will occur without limit. Other policies, to control costs, have copayment clauses. Copayments often require the insured to pay a certain amount for health care in excess of the deductible. Deductibles and copayments can be expensive for the employee. For employers, however, the higher the deductible, the lower the health insurance premium. In addition, when insured make copayments, they are more likely to shop for the most cost-effective treatment available. Studies show that cost sharing substantially reduces the demand for medical care.

Proposal: As a component of any comprehensive approach to the problem of the uninsured, SBA should encourage utilization of deductibles and copayments to hold down the cost of health insurance.

SBA should also work with appropriate business and insurance groups to develop appropriate levels of cost-sharing for smaller employers, with consideration given to ensure the availability of insurance to low-income individuals.

SBA's national health training program should emphasize and explain cost sharing, including how employers can "sell" these features to employees. Cost sharing is not necessarily a popular option among employees, and employers should be given assistance in presenting information to their employees which demonstrates that these additional costs are necessary and will lead to increased health care coverage.

8. Cafeteria Plans/Flexible Spending Accounts

Issues: A cafeteria plan allows an employer to control benefit costs by defining the employer contribution to group benefits. Instead of providing benefits at a particular cost level, the employer provides dollars or credits for employees to buy needed benefits from a menu of options offered by the employer. This approach converts the group benefits program from a defined benefit design to a defined contribution design, giving the employer more control over benefit expenses.

A cafeteria plan includes choices among several benefits and, within each, several levels of benefit. The employer contribution is used by the employee to buy the desired level of each benefit. For example, choices might be provided among several health care plans, different levels of group term life insurance, plus a flexible spending account (FSA). A flexible spending account is an additional benefit, providing an employee with the chance to pay for premiums, unreimbursed health care, day care or legal expenses on a pre-tax basis.

In addition to controlling the employers' costs, cafeteria plans help employees lower their costs. Employees are allowed to purchase their benefits with pre-tax dollars, i.e., before federal, state and Social Security taxes have been withheld, thereby lowering tax liability. It is estimated that an FSA can save employees 20 to 35 cents on the dollar, since state and federal income taxes and Social Security taxes are not imposed.

Cafeteria plans have several advantages: the employer has greater control over total benefit costs; utilization and costs of benefits decrease since employees elect new options and reduce the incidence of duplicate coverage, and employees have a greater appreciation of their benefits due to a better understanding of benefit costs.

There is a range of design alternatives from which to choose. Premium conversion is the simplest approach to a cafeteria plan. Under this arrangement, employees have the ability to reduce their salaries on a pre-tax basis and use these funds only for health-related costs. The employer's contribution to health care coverage does not change.

FSAs represent the next level of complexity in terms of plan design. FSAs allow employees to reduce their taxable income by a predetermined amount and use these funds to pay for a wide range of tax-qualified benefits. Benefits that can be purchased under an FSA include: medical expenses, covering such things as deductibles; copayments; vision care; any non-covered health care costs; and dependent care, including children or disabled dependent adults.

Multiple choice cafeteria plans are the most sophisticated approach to plan design and, therefore, are usually adopted by larger employers.

An issue with regard to cafeteria plans is legislative uncertainty. There have been considerable efforts by Treasury and the Congress to limit the tax advantages of these plans. It is anticipated that pressure to address the budget deficit problem may result in legislation which limits, rather than expands, cafeteria plans.

The legislated "use or lose" clause, which requires an employee to use all monies placed in an FSA by year end or forfeit the money, is of concern to employees.

The method of payment to the employee from an FSA account also concerns employers. Employers are required to reimburse employees up-front for medical costs, even if their deposits to the FSA have not accrued enough to cover the amount. Employers may, therefore, have to absorb expensive payments if an employee leaves before his or her account can cover the actual cost of medical expenses.

As an alternative to conventional insurance, cafeteria plans represent a method of softening other cost containment measures, such as higher deductibles and copayments. Since cost-sharing must be a component of any comprehensive approach to reducing the cost of health care, employees will be able to pay for these added expenses with pre-tax dollars.

Proposals: Working with appropriate small business groups and insurance leaders, SBA will determine a "model" approach for the small employer. SBA might encourage employers with 15 employees or less to implement, as a first step, a premium conversion plan. SBA could develop a how-to document describing the procedures for putting a premium conversion plan in place. Another manual might be developed on FSAs for small employers.

The appropriate level of employer contributions to a cafeteria plan would need to be developed as well. Typically, an employer will pay for some benefits directly. In some cases, the employer will also provide flexible credits or flex dollars that each employee can use to purchase optional benefits.

SBA should work with Congress to revise the "use or lose" and up-front reimbursement provisions of current law.

9. Expansion of Medicaid

Issues: It is estimated that if Medicaid were expanded to cover everyone earning up to 100% of the poverty line, a third of the uninsured would be covered.

One design for Medicaid expansion is to allow certain classes of people -- in many states employees in businesses with fewer than 25 employees and no health insurance -- to buy into the Medicaid program, paying a portion of the premium out of pocket. One way to expand eligibility is to develop a Medicaid buy-in. Under this approach, a person would receive Medicaid benefits up to 100% of federal poverty; above that, there would be a sliding scale so that those with higher incomes would pay less-subsidized Medicaid premiums.

At issue are the cost of Medicaid buy-in, which is estimated to be too high, and a lack of uniformity. Since Medicaid is state directed, standards and eligibility vary from state to state. Devising a package of benefits that will afford small business employees adequate health insurance coverage will be difficult in many states.

Proposal: If Medicaid buy-in were based upon the "basic benefits package" proposed in Item 1 above, the costs of buy-in presumably would be reduced. SBA should conduct studies to estimate the cost of buy-in based upon a basic benefits package.

10. Spreading Risk

Issues: The cost of health coverage often can be reduced by spreading the risk over larger groups of insured individuals. However, risk avoidance rather than risk spreading appears to have become the norm for health insurers. The decision of insurance companies to only insure low-risk individuals makes it more difficult for small businesses, who are subject to medical underwriting practices, to obtain affordable coverage.

Small businesses are seeking ways to spread risk. For example, some small businesses, in concert with associations, pool their employees to create larger groups.

Employee leasing is also gaining in popularity, although the Department of Treasury has made efforts to reduce the availability of this option. Under this arrangement, a company is created to lease employees to employers. The leasing company, whose employee pool is larger than the individual companies it serves, pays health insurance costs for the employees. In this way, small business employees can benefit from the same kind of health care coverage as larger business employees. Small employers pay the cost of health care through their employment agreements with the leasing company. Employees often benefit from that arrangement.

Risk pools have also been created to help insure individuals with higher medical risks, i.e., individuals with preexisting medical conditions. For particular employers, removing these individuals from small business policies reduces the risk of cancellation at renewal and may lower the cost for the group. State risk pools, which, in part, allow for coverage for this kind of employee, are insurance programs that are usually funded by state tax revenues or insurance company contributions. Small businesses can obtain health care coverage at a more affordable rate than through the private health insurance market.

At issue is the fact that small businesses are responsible for paying the state premium taxes to support state risk pools since they cannot self-insure and avoid taxes like the larger companies.

Multiple Employer Welfare Arrangements (MEWAs) have also been tried in many states. MEWAs are legal trusts established by a plan sponsor to bring together a number of small, unrelated employers for the purpose of providing group medical coverage on an insured or self-funded basis at lower costs. MEWAs, however, are loosely regulated and there have been problems with fraud in some states.

Proposals: Since there has been fraud associated with MEWAs, no action supporting them should be undertaken unless there is a simultaneous push for regulation. The regulation in the past has been very loose and therefore many employees who thought they had health care coverage found they had been swindled when they tried to collect from the MEWA. In addition, MEWAs may be a topic for study. SBA and HHS may want to collaborate on a study to determine how widely they are being used, their impact on small businesses and their potential for expanded use. SBA will also examine a proposal by former Secretary of Labor Elizabeth Dole to provide federal regulation of MEWAs.

Risk-spreading techniques will be part of the national training program SBA undertakes for small and medium businesses.

SBA should work with Treasury in an attempt to resolve any disagreements about federal tax policy on employee leasing.

11. NAIC and HIAA Model Legislation

Issues: Small businesses have complained about the renewal, underwriting and rate-setting practices of insurance companies. Because small companies offer small pools of employees, and thus less ability to spread risk, a major illness on the part of one employee can result in the cancellation of coverage or an increase in premiums for all the members of that pool. Because of modern communications technology, these changes in coverage or rates can occur quickly. Computers now allow insurance companies to learn with unprecedented speed of the health problems of its customers.

Two national associations -- the National Association of Insurance Commissioners (NAIC) and the Health Insurance Association of America (HIAA) -- are developing model proposals meant to address concerns with small employers' health insurance underwriting, rating and renewability.

The NAIC has endorsed model state legislation designed to promote the availability of health insurance coverage to small employers, prevent abusive rating practices, require rate practices disclosure to insurance purchasers, establish rules for continuity of coverage for employers and covered individuals, and improve the efficiency and fairness of the small group health insurance market place.

An NAIC Committee continues to consider other approaches in addition to the above: a perspective reinsurance option, a retrospective reinsurance option, allocation options, pooled employee options, "designated carrier" options, and mandatory reinsurance.

The HIAA has developed a model proposal designed to make health insurance coverage more universally available through employers. In the HIAA model: private health insurance coverage would be available to entire employer groups; neither an employer nor an insurer would be able to exclude high-risk individuals from the group; at renewal time, coverage of certain employees could not be denied because of deteriorating health; an individual would need to meet the pre-existing condition only at the outset of coverage, and insurance carriers would be required to limit how much their rates could vary for groups in similar geographic areas, demographic composition and plan design. A carrier's premium for small groups could not vary by more than 35% from the carrier's midpoint and there would be a 15% limit on how much a carrier could vary rates by industry. Carriers would also have to limit a group's year-to-year increases to no more than 15% above the carrier's "trend" (the year-to-year increase in the lowest new business rate).

Proposal: SBA is studying both models to determine whether their provisions are beneficial to small businesses and whether the models successfully "package" many of the policies presented in this paper.

Professor Formisano has suggested a way the federal government could encourage states and insurers to comply with these models. Assuming the models are compatible with the Administrator's and Administration's positions, a federal commission could be created to review insurance plans to determine and publicize compliance with the model. The Administrator of SBA would be a participant on this commission to ensure that the needs of small businesses are considered. The commission could be chaired by a health agency such as the Department of Health and Human Services.

The Administrator could also push for the creation of a federal panel to certify states that adopt small business health insurance regulations at least as stringent as those proposed in the models. In both of these alternatives the states would be relied upon to impose sanctions.



National Federation of
Independent Business

STATEMENT OF

John J. Motley III
Vice President
Federal Governmental Relations

NATIONAL FEDERATION OF INDEPENDENT BUSINESS

SUBJECT: Small Business Access to Affordable Health Care and
Health Insurance

BEFORE: House Ways and Means Committee

DATE: April 24, 1991

On behalf of the more than 500,000 small business owner members of the National Federation of Independent Business (NFIB), I am pleased to participate in this hearing. NFIB's membership mirrors the national business population in its make-up. This parallel to the general business community and our large membership base are particularly important as it provides validity to the numerous studies the NFIB Foundation and the NFIB have conducted.

Small businesses have always been a dynamic force in the American economy. Millions of Americans own and operate small businesses. Over 19 million Americans report income or losses from business activity and self-employment is the principal job for over 13.8 million of our fellow citizens. Of the 10.5 million jobs created in the past decade, a vast majority were created by small business. Small business employs over half the work force and provides income for millions of families.

To better understand and evaluate the health insurance issue, NFIB has conducted three comprehensive surveys. These surveys, conducted in 1978, 1986 and 1989, reveal the practices, opinions and attitudes of small business owners. Other surveys have been conducted to fill in the gaps. These surveys are unique in the field and are the basis of today's testimony and our "Access for Small Business" strategy.

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The Guardian of
Small Business

3. Imposition of government erected barriers. These barriers include state health insurance mandates; state anti-managed care laws which limit flexibility and cost savings; COBRA, which drives up the cost of insurance for current employees; and ERISA, which distorts that marketplace.

4. An unpredictable and distorted insurance market that rejects the time-honored insurance principle of the law of large numbers and cross subsidization.

5. Usurpation of individual choice and responsibility, coupled with a tax code that discriminates against non-employer-based health insurance purchases and purchases by unincorporated businesses.

State of Small Business and Health Insurance

As mentioned previously, for small business workers and their employees, access to health insurance and quality health care is determined by cost.(2) Cost also explains a recent phenomenon -- the slight decline in the number of small firms offering health insurance as a fringe benefit.(3) Cost prevents new firms from offering health insurance(4) and jeopardizes the continuation of existing health insurance benefits.(5)

The cost of health insurance can be the greatest payroll line-item cost in a small business -- many times exceeding the combined cost of workers compensation and liability insurance.(6) Exacerbating the problem, a majority of small firms pay 100% of the premium cost. These same businesses have little access to managed care or cost-containment measures because of the incessant churning that is occurring in the marketplace. In addition, small firms are unable to obtain the benefits of self-insurance(7) and therefore must comply with expensive state-mandated benefit laws(8), pay state premium taxes, and shoulder a larger portion of the carrier's administrative expenses.(9) Further, churning has resulted in higher tracking costs and brokers commissions.

Small businesses are reaching the peak of the frustration level.(10) This reluctant call for help comes as a result of the clash between values and reality. Small business owners believe that every American has a right to health care.(11) Small business owners also desire to offer health insurance as a fringe benefit out of both a sense of familial obligation (12) and competitive necessity. (13) However, the reality of 20 to 300% premium increases, a low profit margin (14), struggling regional economies, and restricted cash flow impairs the business' ability to purchase health insurance.(15)

Two thirds of small businesses offer health insurance.(16) In general, these firms tend to be more mature, more profitable, and have more full-time employees than their counterparts that do not offer health insurance.

some of the insurance costs are directly related to traits which are inherent in a small business. Rising health care costs, on the other hand, result from a non-competitive medical services marketplace. Still other small business costs are the direct result of changes that have occurred in the sale of insurance, changes which have forced carriers to respond in ways adverse to the interests of individual and small business purchasers.

To recap, the characteristics of smaller businesses that most significantly impact premiums, include the potential for adverse selection, the demographics of the small business work force, high turnover resulting in unpredictable participation rates, and a lack of expertise and clout in purchasing plans. Many of these factors drive up the carriers' administrative costs and make the small business community a less profitable marketing target.

Rapidly rising health care costs are driving the entire problem. Without medical cost containment, all mentioned solutions are simply short-term, temporary measures that will have little long-term impact. The medical inflation costs can be tackled through a combination of research, public information, education and enhanced consumerism. Health care providers and their patients must be educated to understand that more does not necessarily equal better, and expensive does not necessarily connote quality. Patients must be encouraged to question providers' fees and practices. Specific cost containment proposals are presented in NFIB's "Access for Small Business" strategy described later.

Increasing health insurance costs are also linked to the destruction of the industry's risk pool, induced by the passage of ERISA, which has forced almost 60% of the business community to self-insure to escape costly state regulation and taxes. The shrinking of the traditional insurance marketplace coupled with the trend toward reliance upon employer-based insurance has lead to new and aggressive underwriting practices for small firms.

Aggressive underwriting artificially raises premiums as insurers seek to protect themselves from all foreseeable, rather than potential, health risks. These practices have also institutionalized "churning," where insurers induce premature and frequent changes from carrier to carrier. This in turn leads to unforeseen adverse consequences. First, the preexisting condition clauses imposed on new customers can leave employees and owners without coverage for critical medical conditions. Second, each time a small business changes carriers in pursuit of lower premiums, it inadvertently raises the cost of the premium by increasing the carrier's administrative costs and by paying brokers' commissions. Third, frequent changes preclude the formation of small business associations or pooling mechanisms. And, fourth, this unstable marketplace means that insurers are unable to apply managed care concepts to the small group, thus leading to higher utilization costs.

to these markets. Simply bringing predictability and competition to the marketplace will significantly drive down the cost of premiums. Further, reforms will help to reduce the cost of insurance packages even further and cost containment will control medical spending.

It is important, however, to understand the small business "definition" of insurance. Insurance is first and foremost a risk transfer mechanism. It is a necessary means by which one is protected from huge financial burdens, not simply a method by which to pay providers. Insurance is also a valuable fringe benefit. It is a means to attract and retain good workers, and it is a way to protect what is in effect the owner's extended family -- his/her employees.

Market Reforms and Incentives (21)

Several ways exist to reduce the impact of disproportionate administrative costs on smaller firms. It has been estimated that a large business receives 95 cents of benefits for every premium dollar. On the other hand, a small business receives only 65 to 75 cents for every dollar spent, thus 25 to 35% of its premiums are used to pay the administrative costs and profits of insurance companies. This administrative burden can be 20 times higher than that borne by a larger company. If the administrative costs alone could be reduced, the savings could be passed along to the small business. We can start that process by reducing the amount of paperwork flowing through the health care system. Streamlining and computerizing insurance and health delivery forms, including Medicare and Medicaid, will save thousands, if not millions of dollars. Further savings may be possible by eliminating the duplicate coverage that occur in home, auto, business and health policies.

* NFIB recommends the standardization of ratings practices. Small groups should be rated and charged premiums on the same basis as a larger business and should have the same predictability in premium increases. Through our surveys, NFIB has found that the inability to predict future premium costs keeps a great many small firms out of the insurance market and puts other firms on an expensive treadmill. NFIB believes that the practice by some aggressive insurers of arbitrary cancellation should be curbed. We also recommend the elimination of durational rating by restricting the ability of companies to lowball the initial premium through preexisting condition clauses.

* NFIB recommends that greater information be available to the consumer. Access to plain English information serves several purposes. First, it induces competition. Second, it aids small business owners (who themselves are the benefits managers and administrators) to be wiser, informed shoppers. Third, it aids in cost containment if the concept is boldly applied. And, finally, it instills accountability in the system and makes "deceptive" or aggressive ratings practices and defensive medicine less likely to occur. Further, NFIB

deduction is a needed and obvious incentive to encourage expanded, voluntary provision of health insurance and would end the current tax code discrimination against the self-employed, partnership, S-corporation, sole proprietorship and farm owners.(22)

* NFIB recommends the establishment of a tax deduction or a tax credit for individuals for the cost of health insurance. This deduction, made available to non-itemizers, would provide an important and necessary subsidy for people to purchase health insurance on their own. A large part of the solution to this crisis is to recognize that individuals bear some responsibility for their own health care.

* NFIB recommends that cafeteria plans and flexible spending accounts be simplified in order to encourage their usage. These plans have several advantages. They allow employees to purchase care with pre tax dollars and permit the employer to have greater control over total benefit costs. Unfortunately, the complexity of the requirements, the "use or lose" and other financing provisions, coupled with the legislative uncertainty surrounding these devices make them unattractive to small businesses.

* The most important reform NFIB recommends is the across the board elimination of state mandates. The preemption of the 800-plus state health insurance mandates and state anti-managed care laws are essential to lowering the cost of health insurance. The state health insurance mandates -- ranging from herbal medicine care to invitro fertilization to chiropractic care to mental health care -- cumulatively can raise the cost of health insurance for small businesses and individuals by more than 30%. They also have a proven impact on increasing utilization and medical inflation.

The elimination of state health insurance mandates would enable "essential care" packages or standardized nationwide policies to be sold. These policies would be designed to be mass marketed, at a lower cost, to cover basic medical and catastrophic needs. NFIB data indicates that a lower cost plan would have great appeal to firms that currently do not offer health insurance coverage and to those that are struggling to make ends meet. Individuals would also be able to purchase this lower cost plan.

It is important, however, that the mandates be eliminated across the board. In order to have the ability to choose and design an insurance package, the mandates must be completely eliminated and not simply eliminated for a federally-determined "minimum benefit" package. This step is not without precedent. Already over 60% of the business community escapes the costly burden of state health mandates and taxes through self-insurance. This proposal simply provides the same treatment accorded larger firms be given to smaller ones.

for quality care.

Counterproductive mechanisms

Any government policy that mandates small business owners to cover their employees will be accompanied by small business failures(24), changes in employment policies, higher unemployment and higher product costs to consumers(25). It also will mean an increase in the burden placed on public health programs. Small business owners overwhelmingly oppose mandated benefits(26), pay or play programs(27) and national health insurance(28). Beyond the philosophical opposition to mandates, there is the fear of the high uncontrollable costs it would impose. Most small firms cannot absorb the high cost and fluctuations in premiums that a mandated program would impose, nor can they afford to provide extensive benefits to workers who have little attachment to the work force(29). It is important to remember that many times when a firm does not provide health insurance as a fringe benefit or drops coverage, the owner and his or her family also loses coverage.

A pay or play program is opposed because it is a tax on labor. Already 37 to 50 cents of every dollar in compensation goes toward mandated programs such as workers compensation, unemployment insurance, Social Security, etc. This has had a significant impact on the growth in salary compensation. In fact, there has been no real growth in salary compensation for over six years, a fact mainly attributable to the growth in the tax burden borne by employees. Unfortunately, this runs counter to the desire of the employees who would prefer a wage increase to an increase in benefits,(30) putting small business owner/operators in the unenviable position of denying the former to comply with the latter.

Finally, small business workers oppose national health insurance systems. They remember the efficiency of the Post Office, the compassion of the IRS, the demeanor of OSHA inspectors and Pentagon prices. They have come to the conclusion that the private sector, for all of its problems, can deliver a higher quality and more efficient product than the federal government.

For a number of personal and business reasons the overwhelming majority -- almost 90% -- of America's small business owners want to provide health insurance for their employees. Unfortunately, because of run-away medical inflation, rapidly rising health insurance costs, and an inability to absorb either, they cannot provide coverage or are finding it difficult to continue to do so.

Conclusion

NFIB data collected over a decade clearly shows that cost is the main barrier to increased coverage and the primary cause of reduced benefits. The only solution is to stabilize health care and insurance costs. Medical inflation must be

HEALTH INSURANCE AND SMALL BUSINESS

The number one problem facing small businesses since 1983 remains the rising cost of health insurance.

The Dilemma: First, cost is a barrier to expanding coverage to the uninsured; second, rising costs threaten current coverage.

The Causes:

A. Medical Inflation

B. Government Intervention

1. Cost shifting from the discounts "given" to the federal government and large businesses;
2. Expensive state health insurance mandates;
3. State anti-managed care laws that limit flexibility and cost savings;
4. COBRA provisions which drive up premium cost for current employees; and
5. ERISA law which distorts the health insurance market place.

The Small Business Situation: Two-thirds of small businesses offer health insurance as a fringe benefit. One-third have no insurance plan, with a majority of those citing cost as the reason for not offering insurance. Two out of three who currently are uninsured indicate that they would offer insurance if it was affordable. Further, 22% of the uninsured are self-employed workers.

* In 1990, almost 90% of small business owners indicated that it was becoming "prohibitively expensive" to provide health insurance to their employees.

The Small Business Problem: Increasing costs, coupled with problems finding affordable insurance.

A. Some costs are inherent to small business, such as:

1. Lack of expertise in designing and choosing plans;
2. High employee turnover;
3. Labor force demographics of the business;
4. The higher probability of adverse selection; and
5. Higher administrative costs -- an estimated 25-35% higher for small businesses.

B. Others costs are related to changes in the marketplace, such as:

1. Splitting and reducing risk pools through the prevalence of self-insurance;

END NOTES

- (1) A telling illustration of this is the increase in the number of uninsured self-employed business owners from 19% in 1989 to 22% in 1990.
- (2) The NFIB Foundation has conducted three comprehensive health surveys: 1978, 1986, and 1990. In addition, in 1983 and 1986, small business owners were asked to rank in order of importance 75 issues from liability insurance to garbage collection to taxes. Health insurance was ranked number one. Surprisingly, health insurance even ranked higher than liability insurance (ranked #2) at a time when the liability insurance crisis was at its peak (1986).
- (3) Two-thirds of small businesses offer health insurance. Between the first NFIB study (1978) and the second study (1986), the number of small firms offering health insurance increased by 8 percentage points. Between 1986 and 1990, the percentage of small firms declined by less than 2 percentage points. The decline may be within the range of statistical error or may be the indication of a trend. A 1990 follow-up field survey indicates the latter may be operating. These results were confirmed by the ICF study sponsored by the Small Business Administration.
- (4) "New" refers to both established and start-up firms. While two distinct groups, they share at least two common characteristics -- marginality and very limited cash flow. In addition, new firms have no past experience upon which insurance companies can assess the risk.
- (5) In 1990, over 89% of small business respondents cited the cost of health insurance as becoming "prohibitively expensive." In 1990, 19.7% of firms surveyed without health insurance indicated that health insurance was offered at some time in the past.
- (6) Between 1987 and 1990, small business health insurance premiums rose from an average of \$1,942 to an estimated \$3,192 [Foster & Higgins data].
- (7) Over 50% of the business community self insures, and that number has been rapidly increasing since ERISA's passage in the 1970s. Most firms that self insure tend to be large and profitable. Less than 49% of small firms are

- (14) The median small businesses owner takes out of his/her business less than the median wage and salary worker. About 40% of the 1989 study respondents took out of their business less than \$30,000 last year.
- (15) Small firms are price sensitive. Of those firms not offering health insurance, 28% said they would offer insurance if premium costs were lowered at least 20%.
- (16) To date, the employee-provided health insurance system has been successful. The number of Americans covered by employment-based insurance has risen from 40% in the 1940s to over 80% in 1988.
- (17) Small businesses typically engage in "one-stop shopping. One independent insurance agent is used to provide all of the business' insurance needs. In addition, there is limited expertise in the small business with respect to benefit design and negotiation. The owner is typically the benefits manager, payroll administer, etc. The average small business owner spends 8 to 10 hours a week on paperwork alone.
- (18) Small business owners view full-time employees (defined as working over 25 hours a week) as distinct from part-time employees. The limited connection to the workplace and the part-timers' preference for cash compensation or flex-time explain a difference between the benefits offered the two types of employees. This difference has been institutionalized by the insurance industry, which charges higher premiums for part-timers or refuses to cover such employees.
- (19) Less than one percent of those not offering health insurance stated that under no condition would health insurance be offered.
- (20) Less than 4% use HMOs or self insure.
- (21) NFIB currently has a follow-up survey in the field seeking to specifically identify insurance reforms beyond those mention in this section. The small businesses owners will be asked for their opinions on items such as guaranteed issue, community rating, tax preferences and risk pools.)
- (22) The implications of such an expansion are immense -- over 21% of self-employed workers are uninsured and 30% of these businesses employ one to four people. If the full deduction were restored, possibly one quarter to one half

APPENDIX 2
Access for Small Business Strategy

OBJECTIVE: To improve access to health care through affordable health insurance and cost-effective quality medical care.

I. Renewal of Federal Government Obligations

- A. Medicaid reforms
- B. Medicare reforms
- C. 100% deduction for the self-employed, sole proprietorship, partnership, and S-Corporation business owners (HR 784)

II. Removal of Government Barriers

- A. Pre-emption of state health insurance mandates
- B. Pre-emption of state managed care restrictions
- C. Simplification of cafeteria plans and METs
- D. Reinstatement of the individual line-item deduction for health insurance premiums.
- E. COBRA reform

III. Cost containment mechanisms

- A. Consumer information
- B. Outcomes research
- C. Physician practices guidelines
- D. Wellness education/preventive care promotion
- E. Medical malpractice reforms
- F. Living wills
- G. Coinsurance
- H. Hospital outcomes data

IV. Insurance Industry Preforms

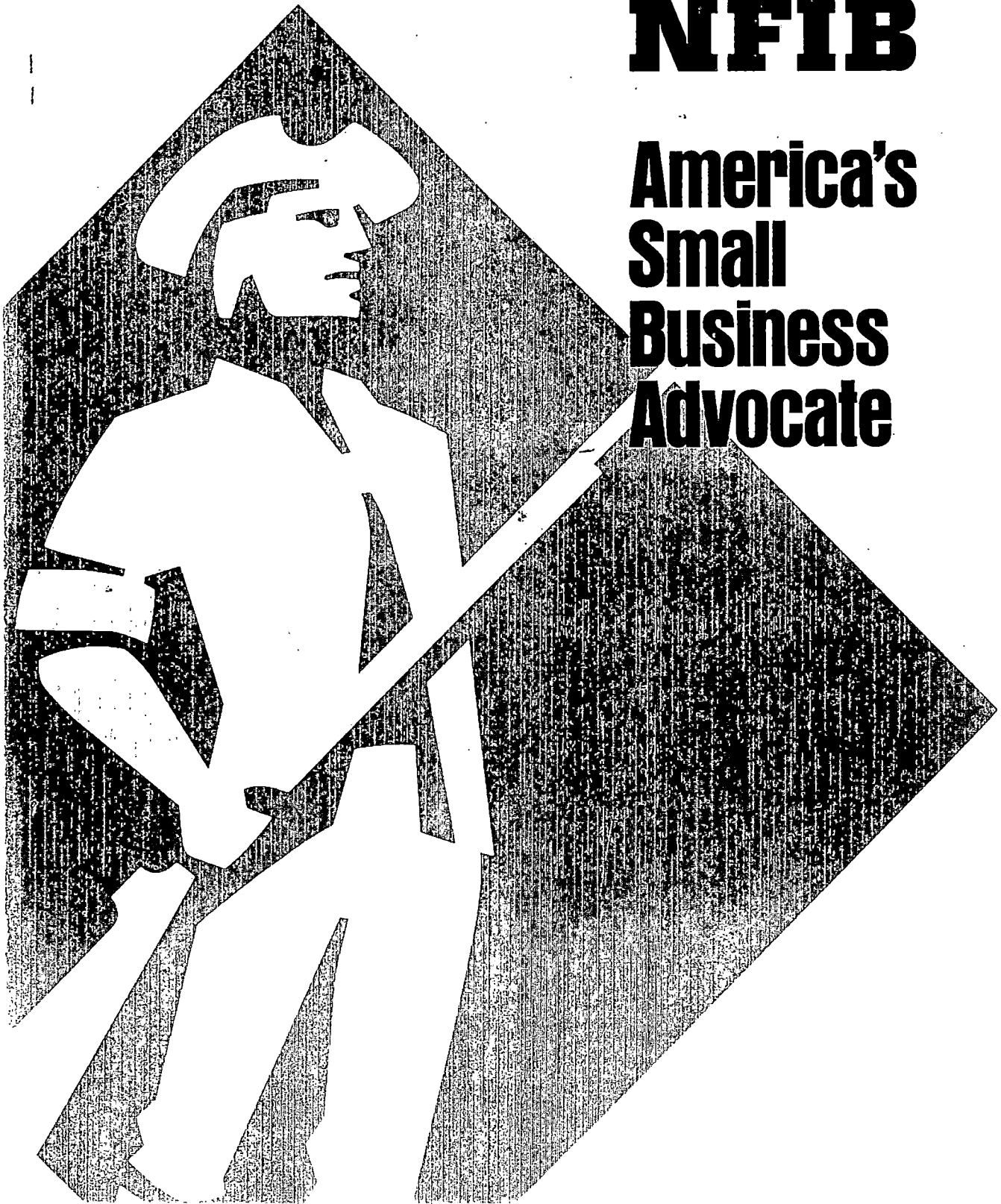
- A. Return to the "law of large numbers"
- B. Underwriting reforms

V. Unacceptable Mechanisms

- A. Mandated benefits
- B. "Pay or Play" schemes
- C. Triggered mandates
- D. National health insurance

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SMALL BUSINESS ANGLE®

by John Sloan

STRIKER REPLACEMENT LAW WOULD BE LABOR BONANZA

What do Continental Airlines and your neighborhood auto repair shop have in common? For different reasons, large and small companies are the targets of aggressive efforts by organized labor to pass a law to prohibit companies from permanently replacing striking workers.

It is easy to read labor's motive in preventing the airline from permanently replacing strikers. The unions want to shut off an employer's option to continue operating with newly hired workers during a strike.

But what's the small business connection? Union organizers see a way to boost sagging membership by targeting the hundreds of thousands of non-union employees who work in small firms. The striker replacement bill would allow labor to tap the small workplace.

The bill, introduced by Rep. William Clay, D-Mo., and Sen. Howard Metzenbaum, D-Ohio, would prohibit employers from hiring *permanent* replacements for workers who walk out in disputes over the terms or conditions of employment. Temporary replacements would be allowed, but business owners know that attracting skilled, qualified workers for jobs that could last as little as three days or more than six weeks is difficult. Hiring temporary replacements for skilled positions, such as mechanics or plumbers, or finding ready pools of workers in rural areas is nearly impossible.

And don't forget the union organizing threat. The proposed legislation contains the term "bargaining unit work" when referring to what kind of labor disputes would be covered. Sen. Metzenbaum asserts that this term covers only unionized workers. Legal precedent suggests otherwise. Bargaining unit work in this context includes anyone doing his or her job.

Therefore, the impact of this legislation would be felt by every business owner who employed two or more workers, and those workers could not be permanently replaced if they walked off the job in protest over wages, benefits or schedules.

The employees could return at any time. The employer would be forced to rehire them, and the employer would be prohibited from showing preference to those employees who stayed on the job during the dispute. Because workers could strike with impunity, the threat of a strike could be enough to coerce employers into holding an election for union representation.

The AFL-CIO does not acknowledge an ulterior motive in its drive for passage of the striker replacement legislation. The union says the measure simply would correct an anomaly in the law. It also argues that the practice of permanently replacing workers is on the rise. However, a study cited by the Congressional Research Service indicates that employers rarely use permanent replacements. In the two years the study reviewed, 1985 and 1989, employers followed through with permanent replacement of workers in only 15 percent of strikes.

Groups such as the National Federation of Independent Business, which represents few unionized firms, see the striker replacement bill as a further attempt by organized labor to leverage its congressional clout as a substitute for declining membership. If it works, of course, the unions look for a reversal in their declining membership roles with a concomitant rise in union dues and political influence. If it fails, they will still be in a position to push Congress to substitute mandates and other legislative mischief for collective bargaining between employer and employee.

Congress should see this effort for what it is and bow out of its role as the unions' negotiator of last resort.

John Sloan is President of the National Federation of Independent Business, representing more than half a million small-business men and women.

ORGANIZED LABOR HAS FOUND ITS ULTIMATE ORGANIZING TOOL

H.R. 5 SO-CALLED "STRIKER REPLACEMENT"

H.R. 5 COULD AFFECT EVERY SMALL BUSINESS IN AMERICA

H.R. 5 COULD AFFECT ALL SMALL BUSINESSES -- UNION AND NON-UNION

H.R. 5 WILL AFFECT EVERY DISPUTE WHERE TWO OR MORE EMPLOYEES WALK OFF THE JOB

***Union organizing attempts would flourish under H.R. 5**

If enacted, H.R. 5 would give unions undue influence to force any non-union small business owner to hold an election for union representation or even outright recognition of the union by encouraging a strike by just two of the employer's current key employees. Small employers who are unable to permanently replace the striking workers, would either have to give in to the demands of the strikers or face economic hardship, possibly even bankruptcy.



***Non-Union small business especially hard hit by H.R. 5**

Whenever two or more employees act in concert and walk off the job in protest over wages, benefits or schedules their jobs would be guaranteed whenever they chose to return. Small business, which is labor intensive, cannot simply shift personnel to cover the duties of striking workers. Where does a plumbing contractor find a *temporary* expert plumber? Where does a computer firm find *temporary* engineers?

And when the striking employee returns, what does the small business owner do about the employee that has been hired in the meantime?



***The MacKay doctrine is not a flaw in the law**

The doctrine is a manifestation of Congressional intent. For over 53 years the Supreme Court has consistently ruled that hiring replacement workers has "legitimate and substantial business justifications." Why now do unions believe that the doctrine is a flaw? *H.R. 5 throws aside business justification to give unions the power to unconditionally guarantee a striking worker his or her job upon the conclusion of the strike.*



***Fairness and Equity must Prevail**

The proponents of H.R. 5 want to forget *53 years of equity* in labor negotiations and settlements and install a system skewed toward the interest of organized labor. In every conflict there are two sides, but H.R. 5 would put the "fix" in for every labor conflict in the future. No longer would an individual have the right not to strike and no longer would an employer have the right to stay in business. NFIB, representing over 500,000 small businesses across the country does not want to see the scales toppled. Small business urges you not to give unions the ultimate organizing tool and the unconditional strike guarantee. ***Oppose H.R. 5 to maintain the balance in labor disputes.***



National Federation of
Independent Business



Sent to Full House

BOEHLERT/WILLIAMS FAILS TO "FIX" H.R. 5

April 29, 1991

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The Guardian of
Small Business

Amendments adopted in the Public Works and Transportation Committee and the Education and Labor Committee attempted to eliminate the applicability of H.R. 5 to a non-union small business. The amendments were offered by Representative Sherwood Boehlert (R-NY) and Representative Pat Williams (D-MT) in their respective committees.

The National Federation of Independent Business (NFIB), upon review of the Boehlert/Williams amendments, find that they fail to take care of the multi-faceted problems facing small businesses if H.R. 5 is passed. In no way should members be led to believe that these amendments take care of small business. They do not. H.R. 5, as amended, continues to pose a direct and detrimental threat to this nation's small business.

This paper will lay out the main reasons small business finds the amendments objectionable.

AMBIGUOUS LANGUAGE OF BOEHLERT/WILLIAMS

The focus of this paper will be on the Williams amendment to Section 1, dealing with the National Labor Relations Act (NLRA) as small businesses are primarily covered by the NLRA. The Boehlert amendment contained nearly identical language, but is only applied to the National Railway Act (NRA).

As was the case in H.R. 5 unamended, the Williams language fails to define any of the terms used. Without definition, the language can be described, at best, as ambiguous.

Moreover, the NFIB believes the Boehlert/Williams amendments pose two separate problems for non-union small business. By virtue of the vagueness of the language used, H.R. 5 would still prohibit replacement of any two individuals working in a small business who choose to walk off a job to protest some working condition.

The operative language, ("collective bargaining representative", "labor organization" and "bargaining unit") based upon existing legal definitions and pertinent case law overwhelmingly justifies the legitimate concern of small business.

The second problem posed by H.R. 5 is derived from the use of the word "acting." Part II of the paper provides greater detail into increased union interference in non-union small business labor relations.

The Williams amendment added language to Section 1(6)(i) of H.R. 5. The language of the amendment is underlined below.

COLLECTIVE BARGAINING REPRESENTATIVE

The use of the term collective bargaining representative would superficially lead one to believe H.R. 5 applies only to certified or recognized unions. In reality, the use of this phrase in no way limits the applicability of H.R. 5 to union shops.

In this section, we will clarify the meaning of collective bargaining representative as used in the Williams amendment.

"(6)(i) to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute between the employer and the labor organization that is acting as the collective bargaining representative involved in the dispute;"

By incorporating this phrase, proponents assert that they have limited immediate coverage of H.R. 5 to only union shops. What they have not mentioned is that there is nothing within the (NLRA) which defines collective bargaining representative as a certified or even recognized union. The one term the NLRA does define is representative.

"The term 'representatives' includes any individual or labor organization." [NLRA, Section (2)(4)]

Obviously, this definition, contained in the law which is being amended by H.R. 5, indicates that a representative need not be a certified or recognized union. Moreover, a "labor organization" within the context of the amendment also need not be a certified or recognized union to trigger coverage under H.R. 5 as will be discussed later in this analysis.

Further, looking at the accepted definition of collective bargaining there is still no concrete evidence that a "labor organization" under this amendment is either a recognized or certified union as proponents of H.R. 5 would lead one to believe. The NLRA does not define collective bargaining. But consulting Black's Law Dictionary, collective bargaining is defined as negotiations between an employer and organized employees.

Collective bargaining is: "Negotiation between an employer and organized employees as distinguished from individuals for the purpose of determining by joint agreement the conditions of employment." (Black's Law Dictionary, Fifth Edition)

Organized employees are not, by law or legal precedent, union-affiliated employees. Any group of employees who come together to negotiate a change in employment conditions, like wages or vacation time or even the temperature of an office, with an employer is considered organized and is engaged in collective bargaining. The group could even be appointed on an ad hoc basis by a large body of employees to act on its behalf. That group, by definition, is the collective bargaining representative.

LABOR ORGANIZATION

In earlier hearings, proponents asserted that the term "labor organization" limits coverage of H.R. 5 to union shops. This assertion has been disproved in the past. Labor organization is defined in the NLRA, and that definition shows that a certified or recognized union is not the exclusive "labor organization" recognized under the NLRA.

"(6)(i) to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute between the employer and the labor organization that is acting as the collective bargaining representative involved in the dispute;"

The NLRA definition is sufficiently broad to define "labor organization" to include any employees who are working together for the same goals:

The term labor organization means "any organization of any kind, or any agency or employer representation committee or plan, in which employees participated and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." [NLRA, Section (2)(5)]

Nowhere in the NLRA is a union specifically identified as the only labor organization recognized. Even in the context of the surrounding language, discussed above, the use of "labor organization" does not alter the fact that under labor law, a group of individuals acting in concert is considered a labor

organization. In fact, two significant court decisions, a Third Circuit decision in NLRB v. Kennametal. Inc., 182 F.2d 817 and a Seventh Circuit decision in NLRB v. Jasper Seating Co. Inc. affirms that labor organization does indeed expand beyond a union setting. With the inclusion of the Williams amendment, a labor organization made up of five non-union employees of a small business working together to collectively bargain for a change in their conditions of employment would trigger coverage of H.R. 5, and their action would be protected if they chose to walk off the job.

BARGAINING UNIT

Bargaining unit was used in H.R. 5 prior to the Williams amendment. It was discussed in our previous Definitional Analysis, but needs to be further explored in the context of Rep. Williams' language.

"(ii) to offer, or grant, an individual any other employment preference based on the fact that such individual performed bargaining unit work, or indicated a willingness to perform such work, during a labor dispute over an individual who--"

This term again raises the question as to why bargaining unit work is considered by proponents of H.R. 5 to be solely within the context of a union shop. Bargaining unit is not defined in the NLRA, nor has it been defined in existing case law. The following is the closest we have to a legal definition:

**"A particular group of employees with a similar community of interest appropriate for bargaining."
(Blacks Law Dictionary Fifth Edition)**

If one considers the definition in Black's Law Dictionary, any group of employees with similar interests can be considered a bargaining unit. All the secretaries in an office have a similar community of interest and therefore could be considered to be performing bargaining unit work.

Nothing in these terms leads one to the conclusion that bargaining unit work does not mean a group of employees bargaining with an employer without representation of a union.

PART II

BOEHLERT/WILLIAMS WILL LEAD TO UNION

DISRUPTION

In the view of small business, Boehlert/Williams has made a bad bill even worse. By using the word "acting" in the amendments, proponents have given union organizers carte blanche to walk into small businesses throughout this country and generate labor unrest by making outrageous guarantees that cannot be fulfilled.

Union organizers could potentially provoke strategic strikes in small business everywhere in an attempt to economically cripple small businesses to the point of outright recognition. Unlike a large corporation, such strikes would not be long affairs.

Small business cannot withstand a strike of any duration without replacement workers. Ultimately, a small business, forced to recognize a union, is put in an even more precarious position than a large corporation because the union would be given all the power to dictate the policies of that business.

ACTING

The amendment adds language to Section (6)(i) of H.R. 5 which amends the unfair labor practice section of the NLRA by adding: [It shall be an unfair labor practice...]

"(6)(i) to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute between the employer and the labor organization that is acting as the collective bargaining representative involved in the dispute;"

By using the word "acting", the Williams amendment creates significant uncertainty over what triggers coverage of small businesses under H.R. 5. Proponents argue the protections of H.R. 5 exist only when there is a union presence in the work place. Clearly, this is not the case. Even the Majority Counsel to the House Aviation Subcommittee of Public Works during questioning on this issue could not clearly define what specifically triggers a union presence in a work place.

The Williams amendment will encourage unions to contact employees in an open shop small business to talk to them about joining the union. During the conversation, union organizers will guarantee the non-union employee his or her job should the employee choose to walk off the job and assist in organizing the small business. Because the union is acting as that individual's representative for purposes of collective bargaining, the individual could not be replaced.

Thus, two employees in a non-union small business could still walk off the job and have their job protected with one precondition.

As amended, an open-shop employee of a small business who wants to protest some working condition must only declare a union as his or her representative to be protected from being replaced. The declaration could be based upon a conversation the employee had with union officials at some time in the past or upon the employee's signature on a union authorization card used by unions to show support for a representation election. These cards do not necessarily connote support for the union.

The union does not have to be officially recognized by either the business owner or the National Labor Relations Board to have small business covered by H.R. 5 as amended.

This tactic is one unions already use to organize open shops. Unions often attempt to pressure employers into outright recognition of the union without a representation election by employees. Forced recognition can be accomplished by recognition picketing or a simple meeting with an employer to say that a few of the owner's employees have expressed possible interest in union representation.

A recent example bears out the authenticity of these concerns. In September of 1986, a United Mine Workers (UMW) organizer spoke with Hatfield Dock and Transfer Inc. Vice President R. Allen Johnson about UMW representing Hatfield employees. Mr. Johnson told the UMW organizer that the decision to recognize the union was up to the employees and not the employer. That reply prompted the UMW organizer to threaten Hatfield with picketing. A union election petition was never filed with the National Labor Relations Board.

The real world result of the use of the word "acting" is the unfair creation of yet another tool for labor unions to organize small business. A union will have every incentive to go to a non-union small business and entice one or two employees out of the shop with promises of inflated wages and guaranteed job protection. The desires of the majority of employees could be subverted by economic weapons used against the small business owner who cannot afford to lose employees for an unknown duration of time, even if it's a short period.

THE CATCH-22 OF ANY SUPPOSED FIX

It is not unreasonable to assume that proponents of H.R. 5 will come back to the House with yet another attempt to "fix" the non-union problems with H.R. 5. The difficulty encountered with every attempt is the exacerbation of a second problem small businesses face with passage of this legislation.

Interestingly, proponents argue the reason for this legislation is job protection for striking union members. They have argued this one point repeatedly. A closer look at the legislation and subsequent amendments, however, makes clear that perhaps the true impetus of this legislation is not worker protection, but the creation of a union organizing tool.

Section (B) of the Williams amendment makes this point perfectly. One need only read it to realize that the true purpose of H.R. 5 is union organizing.

"(B) in connection with such dispute has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization that is acting as the collective bargaining representative."

With the inclusion of this language, the proponents of H.R. 5 have taken the legislation beyond the union setting to a situation in which a union is attempting to organize a small business. No petition for election would have to be filed, nor would a majority of employees have to leave their jobs in support of the union to trigger protections.

All this provision does is give union organizers the ability to walk into a non-union small business and entice one or more employees off the job so they can assist the organizer in organizing that small business.

The language used in Section (B) is from the NLRA. By incorporating it, however, H.R. 5 gives union organizers the power to selectively strike a small business during an organizing campaign. Any employee who walks off the job during the campaign could simply assert they were assisting in the organizing effort and would be protected.

Currently, non-union small business strikes are infrequent. Passage of H.R. 5, however, would so drastically change the

current balance that non-union small business strikes would become far more frequent because unions would be given the power they need to cripple the small business.

This bill is clearly special interest legislation. Passage of the legislation will threaten the economic vitality of your small business constituents and will mean you have given organized labor a powerful and unfair tool to organize every non-union small business in your district.



National Federation of
Independent Business

IMPACT OF H.R. 5 ON NON-UNION SMALL BUSINESS

Much of the debate on H.R. 5 has focused on technicalities and legal interpretations. While this focus is necessary, it should not be exclusive. To understand the real ramifications of H.R. 5 on this nation's economic prosperity one has to look to the backbone of our economy, small business.

A few little known facts about the characteristics of small businesses could help in understanding the negative impact of H.R. 5. Consider the macroeconomic impact small business has on the economy:

- * Small businesses generate the bulk of the new jobs in the United States. In the decade of the 1980's small business created 23 million new jobs.
- * Ninety percent of small business owners employ 20 people or fewer.
- * Sixty percent of small businesses have gross sales of approximately \$300,000 annually.
- * In the first three years of business, seventy percent of small businesses close. This sector of our economy is the most dynamic and the most fragile.

With these facts in mind, it is easier to understand the implications of H.R. 5.

Attempts have been made to insulate small business from the adverse affects of H.R. 5. These efforts have failed due to the fact that the bill itself poses not only a direct, but an indirect threat to small businesses across the country.

In the view of NFIB, the Boehlert/Williams amendments fail to rectify the direct impact of H.R. 5, allowing two non-union employees to walk off a job and prohibiting an employer from permanently replacing them. (See NFIB paper entitled Boehlert/Williams Fails to "Fix" H.R. 5)

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organizing by enticing non-union employees off the line to engage in union instigated picketing efforts which serve to force an employer to recognize a union without the benefit of a full employee election.

More specifically, small businesses and their employees are adversely affected by enactment of H.R. 5 in five separate ways.

1. INCREASED WORK DISRUPTIONS

H.R. 5, as amended by the Boehlert/Williams language, would still permit any two employees to walk off a job in a "labor dispute" over any employment condition. These conditions could include such things as wages, vacation, the temperature of the office, office hours, even Christmas bonuses.

The subject of the dispute is irrelevant. The criteria that must be met is simply that the two individuals are acting together to protest some aspect of their employment. This being the case, any employer of two or more employees remain covered by the provisions of H.R. 5.

Consider a small plumbing contractor with 10 employees, eight of whom are plumbers. Two plumbers have walked off the job in protest over the amount of overtime they have been able to work. These plumbers are guaranteed their jobs back whenever they choose to return. The owner, however, is left without 20 percent of the work force.

H.R. 5 does allow the owner of this plumbing firm to hire temporary replacements and to substitute management personnel for the jobs left open. In a small business setting neither option is feasible. In most cases, the employer is the management, the accountant, the benefits specialist and the trouble shooter. The owner of the firm could not continue to fill all these duties and cover the job demands of the two plumbers who walked off the job.

Temporaries would also be extremely difficult to find. Where would our plumbing contractor find two experienced plumbers to fill the two vacant positions for an indefinite (perhaps only a few weeks) period of time?

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Without temporaries or internal substitutes, our plumbing contractor is facing an unknown future with twenty

percent of the business' work force gone. If the two employees cannot be persuaded to come back to work, the owner faces significant losses and perhaps the closing of the business. Recall that seventy percent of small businesses close within the first three years of operation. The owner does not have the option of simply shutting down for a short period of time and then reopening. Each contract ensures that the firm can continue operations until the next contract comes in. Without the manpower to complete a pending contract, the business goes into default, loses a customer and loses credibility for reliable service.

2. UNDERMINES ABILITY TO MAINTAIN "OPEN SHOPS" FOR EMPLOYEES -UNDUE POWER TO UNIONS TO ORGANIZE SMALL BUSINESS

The entire employer-employee relationship is drastically altered by H.R. 5. The Boehlert/Williams amendment makes this reality all the more dangerous. Unions are given the power by Boehlert/Williams to foster non-union strikes with job guarantees. Thus, where currently there may be little incentive for a union to approach a non-union small business, the amended H.R. 5 encourages unions to do so.

This, in turn, infuses into the employment setting an element of uncertainty for the remaining employees who may not be involved in the dispute, but could be adversely affected. H.R. 5 places a small business operation and the future of the majority of employees in the hands of a very few.

Currently, workers have the right to choose whether or not to join a union and employers are prohibited from infringing upon that right. Firms whose workers have not chosen to join a union are known as "open shops." Twenty states have built upon this premise by passing what are known as "Right to Work" statutes. These statutes say that it is the public policy of that state that "the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization."

Strategic strikes and pickets may have little effect on a large corporation, but a small business can be devastated by such activity. While employees of the small business may not want to be represented by a union, a union could force such representation on them by using economic weapons against the small business owner. The union needs to only entice one or two employees onto the picket line with promises of unreasonable wage increases and job guarantees to force a small business owner into an economically precarious position.

Small business owners know their employees and have good working relationships with them. A union organizer walking into a small business would irrevocably change the traditional working relationship of conciliation into confrontation, which ultimately could cause the possible bankruptcy of the business.

The bottom line is that H.R. 5 permits unions to foster labor unrest in the small business community which historically has been free of labor friction. H.R. 5 would allow unions working with two employees to dictate to the employer and the remaining employees the work place policy of that business. A democratic system would be circumvented and the rights of the majority could be ignored.

3. INCREASED LIABILITY EXPOSURE

If the owner is fortunate enough to find a temporary, the problem of increased liability exposure remains. Traditionally, a temporary employee does not have the dedication to a job that a permanent employee demonstrates. That lack of determination to do the job right could have serious consequences for the small business owner.

If a temporary plumber does an unsatisfactory job and a pipe bursts and floods a residence, the small business owner is liable for damage. The firm may have to spend scarce resources to retain legal counsel to settle such a claim. The owner could even face punitive or compensatory damages which could put the firm out of business completely.

The cost of liability insurance must also be taken into consideration. Insurance premiums are based upon the insured's history. The small business owner, upon making a claim to cover the cost of damage, faces a dramatic increase in insurance premiums.

The owner not only has to pay for any damage incurred by the customer, pay any punitive and compensatory damages, and pay an increased premium on liability insurance, but the business has also lost a customer. Of even greater consequence is the loss of business that would result from poor word of mouth advertising. Most small businesses rely on satisfied customers to build their business over time. A negative recommendation could have serious adverse affects on that business.

4. INCREASED COSTS OF DOING BUSINESS

Temporary employees, as defined by H.R. 5, can be more expensive than regular employees. Below are listed five factors that come into play each time a temporary is hired to replace a striking worker.

- * Temporaries are often paid more than normal salaried worker wages.
- * Combined Omnibus Budget Reduction Act (COBRA) requirements can be triggered if the temporary is covered under the struck employer's health insurance. The employer is responsible for continuing health insurance under COBRA for 18 months for the temporary and 36 months for the temporary's dependents. Experience shows that on average COBRA costs the employer 150 percent more than the premium paid by the separated worker.
- * An employer may be liable for unemployment insurance compensation for every separated temporary, depending upon the eligibility requirements of the state program and the work and earnings history of the temporary.
- * The employer's unemployment insurance tax could increase when a temporary is laid off or fired to accommodate a returning striking worker.
- * Because temporaries are more likely to be injured on the job, the employer is more likely to be exposed to higher workman's compensation claims.
- * Temporaries will be unable to maintain the level of production that a permanent employee can. Training and familiarization come with time, something a small employer has very little to spare.

5. INCREASED STRIKES WHICH HIT SMALL BUSINESS - "THE RIPPLE EFFECT"

By creating a business setting that favors confrontation, the practical affect of H.R. 5 would be to create more strikes in both union and non-union settings. This has been the case in Canada where a law similar to H.R. 5 exists. Statistical evidence, prepared by M. Gunderson, J. Kervin and F. Reid in their analysis The Effects of Canadian Labor Relations Legislation on Strike Incidence and Duration, proves this to be the case. In their own words, "The strongest effects, (of influencing greater strike activity) both in terms of statistical and economic significance are those of mandatory strike vote, and the prohibition on replacement workers."

No strike takes place in a vacuum. It has repercussions on those employees who chose not to strike, on the customers of the struck company, the small businesses that contract out their services to the struck company, and

most importantly small businesses in the immediate vicinity of the struck company.

The small business contractor is directly affected. Using our example of a plumbing contractor bears out the direct adverse affect increased strike activity has on small business. This plumbing contractor has a \$1 million contract with a local builder to do all the plumbing work on a new construction project. Knowing that a contract of this size would tax the firm's resources, the plumbing contractor has turned down other offers until this job can be finished.

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The bills for the supplies are coming due. The longer the strike continues the more dramatic affect it has on the small business. The owner may be forced to dip into the meager reserves he had to pay for the supplies he bought. Now with no reserve, the owner can only hope the strike will end soon. If it does not, he will have to let his plumbers go because he will not be able to afford to keep them on the payroll. Without work and without his plumbers the small business owner defaults on his own obligations. Ultimately, if the strike is of any real duration, the plumbing contractor faces possible bankruptcy or closure.

Small businesses, which are not directly related to the struck business, are also adversely affected by strikes. The ripple effect goes beyond the subcontractors to other businesses that are dependent upon the health of the local economy. Consider the neighborhood bakery which is dependent upon the workers of the struck company for business. During a strike the workers who normally patronize the bakery are left with limited resources. Morning doughnuts and fresh baked bread become luxury items that cannot be afforded. Business for the bakery drops off. Depending upon the duration of the strike, the bakery could face a dramatic loss of revenue. The same results will be felt by other small businesses in the area. The ripple effect of H.R. 5 is very real.

CONCLUSION

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Sent to Full House

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National Federation of
Independent Business

Sent to Full Senate

April 2, 1991

Honorable
United States Senate
Washington, DC 20510

Dear Senator:

Since its introduction, questions have been raised as to whether or not S. 55 applies to non-union small businesses. The National Federation of Independent Business (NFIB) has reviewed the language contained in S. 55 to ascertain if and how it applies to non-union businesses.

S. 55 incorporates many of the definitions contained within the National Labor Relations Act (NLRA) and existing case law. In so doing, the bill implicitly covers any business that employs two or more employees.

Enclosed is an analysis of the legislation prepared by NFIB. The analysis specifically looks at the terms, "labor dispute," "labor organization" and "bargaining unit work." It provides the context in which each term is used in S. 55, the definition included in the NLRA and any case law that has expanded upon the breadth of the terms.

If you need additional information, please do not hesitate to contact the NFIB at 554-9000.

Sincerely,

John J. Motley III

Vice President

Federal Governmental Relations

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Sent to Full House

Why H.R. 5 Applies to Non-union Small Business

An Analysis of Definitions

The National Federation of Independent Business (NFIB) believes that H.R. 5 poses a direct and detrimental impact on this nation's non-unionized small business community. This paper will outline the legal and technical reasons why NFIB sees the worker replacement legislation as a threat to non-unionized small businesses.

H.R. 5 would amend the National Labor Relations Act (NLRA) to make it an unfair labor practice to permanently replace workers involved in a labor dispute. There are specific terms used in H.R. 5 which would result in its applicability beyond the large corporation setting which is unionized. To ensure a complete and accurate description of the operative phrases contained within the legislation, this analysis uses the definitions found in statute, the National Labor Relations Board (NLRB) decisions and existing case law. The bolded type is the language contained within the bill; an explanation follows. If you have additional questions, please contact NFIB at (202) 554-9000.

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DEFINITIONS OF LANGUAGE IN H.R. 5

LABOR DISPUTE

The legislation amends the unfair labor practice section of the NLRA by adding: [It shall be an unfair labor practice...]

"Section 1 (6)(i) to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute."

This is one of two instances in H.R. 5 in which the term "labor dispute" appears. The legislation does not specifically define labor dispute. Instead it incorporates the definition already contained in the NLRA as follows:

"The term labor dispute includes any controversy concerning terms, tenure or conditions of employment or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation

of employer and employees." [NLRA, Section (2)(9)]

The use of "labor dispute" as defined in the NLRA reinforces the applicability of this legislation to non-unionized small business settings. As was presented in testimony before the Labor-Management Subcommittee of the House Education and Labor Committee, labor dispute is very broad both in definition and interpretation. Any two employees who walk off a job to protest a "working condition" are considered to be engaged in a labor dispute. Every business with two or more employees could be therefore covered by the legislation.

In fact, by incorporating the NLRA's definition of labor dispute, H.R. 5 would cover not only disputes over conditions of employment, but also include union organizing efforts. Thus, not only would two individuals acting "in concert" in protest over an employment condition, such as hours, be covered; but so would two employees who walked off the job at the urging of union representatives seeking to organize a non-union shop.

LABOR ORGANIZATION

H.R. 5 also adds the following to the unfair labor practice section, Section 8, of the NLRA. [Any individual is protected by this Act if he or she...]

"Section 1 (B) has exercised the right to

join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the dispute;"

Proponents of H.R. 5 have argued that by using the words, "labor organization", they are only talking about certified union representation. A look at the definition incorporated from the NLRA, however, disputes this claim.

The term "labor organization" means "any organization of any kind, or any agency or employer representation committee or plan, in which employees participated and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." [NLRA, Section (2)(5)]

This broad definition is certainly inclusive of two or more employees who are acting in concert. It can be generally considered that "whenever any group of employees act in concert for a wage increase, or concerning other terms or conditions of employment, the group constitutes a labor organization within the meaning of the NLRA." (Source: Thompson, Mann & Hudson) In 1950, the Third Circuit in NLRB v. Kennametal, Inc., 182 F.2d 817 reaffirmed this concept. The courts

have also decided in NLRB v. Jasper Seating Co. Inc., (Seventh Circuit 1988) that also inclusive in this definition are spontaneous walkouts made in furtherance of demands. You do not need to have a certified union represent your employees to have a labor organization as recognized by the definition contained in the NLRA.

BARGAINING UNIT WORK

In this section, we will clarify the meaning of bargaining unit work as used in H.R. 5 and the NLRA. [It shall be an unfair labor practice to...]

"Section 6 (i) to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute;

or" *

Ambiguity exists over the definition of "bargaining unit work." Nothing in the NLRA, case law or H.R. 5, however, leads one to the conclusion that bargaining unit work does not mean two employees bargaining with an employer without the representation of a union.

* This language was discussed earlier under the section dealing with labor dispute. It is repeated here for discussion of the term bargaining unit work.

Without a precise definition to the contrary, bargaining unit work can easily mean the work or working conditions about which two employees and their employer are in dispute, and therefore are bargaining.

According to labor experts, past positions taken by the NLRB and the courts make it clear that, while not defining "bargaining unit work", the NLRA has always been interpreted to apply to all workers, whether they are affiliated with a certified union or not. The term "concerted activities" by workers also has not been differentiated on the basis of union affiliation in the past. Brown & Root, Inc. v. NLRB, 634 F.2d 816 (5th Circuit 1981)

The NLRA protects all types of actions of both union and non-union employees who engage in "concerted activities" for "mutual aid and protection." One landmark case in particular is illustrative of this principle, NLRB v. Washington Aluminum Company, 370 U.S. 9 (1962). In this case 7 non-union employees walked off the job in protest over cold working conditions. No specific demands were made on the employer by the protesting employees. The Court found that the actions taken by the 7 employees were considered protected activity under the NLRA.

CONCLUSION

Without specific definitions for the language used in H.R. 5, one must look at the statute being amended and the 53 years of case law governing it. In so doing, it becomes apparent that while perhaps intended to affect only certified union shops, H.R. 5 has consequences for all businesses.



National Federation of
Independent Business

April 18, 1991

Dear Member of the Education and Labor Committee:

The over 500,000 members of the National Federation of Independent Business (NFIB) appreciate the efforts of Rep. Boehlert in the House Public Works and Transportation Committee and Rep. Williams in your committee to offer language which attempts to eliminate non-union small business coverage under H.R. 5. We cannot support their amendment, however, because it fails to adequately resolve the problems small businesses would face under H.R. 5.

NFIB has made a concerted effort to understand exactly how non-union small business would be affected by this legislation. At the request of several Members of Congress, on both sides of the aisle, NFIB initiated discussions across the country with prominent labor attorneys and experts in the field to see if language could be crafted to effectively take non-union small business out of the scope of H.R. 5.

After a complete investigation, it became clear that non-union small business could not be insulated from the coverage of H.R. 5. This includes a careful and thoughtful look at the language Representative Williams will likely offer before this committee.

We took no stand on the Boehlert amendment during its consideration in the Public Works Committee because the amendment applied exclusively to the Railway Labor Act under Section 2 of this legislation.

The same language used within the context of the NLRA, however, forces NFIB to take a strong position against the amendment. We oppose the amendment for one simple reason - it fails to resolve the multi-faceted difficulties H.R. 5 poses for small business. Instead, it misleads members who are truly concerned about H.R. 5's impact on small businesses into a false sense of security that the problems are resolved.

H.R. 5 as amended by the Boehlert/Williams language poses a direct threat to the continued vitality of this nation's small businesses. Further analysis of this legislation should only strengthen members' opposition to H.R. 5 because of its dramatic impact on small business.

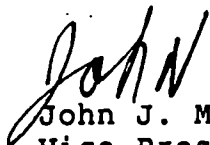
Suite 700
600 Maryland Ave. S.W.
Washington, DC 20024
(202) 554-9000
Fax (202) 554-0496



The Guardian of
Small Business

Please oppose the Williams amendment and vote against
H.R. 5.

Sincerely,

A handwritten signature in cursive script, appearing to read "John J. Motley III".

John J. Motley III
Vice President
Federal Governmental Affairs

An Employer's Nightmare

As an employer, you need to learn now what the proposed Civil Rights Act of 1991 would do to your business.

Supporters of the legislation (H.R. 1) claim that they seek only to reverse several U.S. Supreme Court decisions covering employment discrimination laws. The bill's sponsors, however, have gone beyond restoring federal anti-discrimination law. H.R. 1 would throw out dozens of federal employment laws, statutes that have stood for decades.

NFIB and NFIB members support nondiscriminatory employment practices, but civil rights legislation must remain fair legislation. This brochure addresses the concerns small business has with the proposed civil rights bill, how it would affect your business, what NFIB is doing to correct it and what you can do to help.

Q. How would the Civil Rights Act of 1991 change employment law?

A. For the first time in employment law history, federal discrimination cases could be tried before juries who could award **unlimited** punitive and compensatory damages.

Under the legislation if an employer can show that your workforce does not include a cross-section of the races, sexes,

ages, disabilities and religions consistent with that of your community, that by itself could land you in court. **An employee or job applicant does not even have to prove that any actual discrimination has occurred.**

Under H.R. 1, statistics alone could be enough to drag you into a long, costly legal battle. And the cost of defending yourself is high—even for a frivolous case. “Modest” attorneys’ fees for a case that goes before a jury range from \$80,000 to \$100,000.

Historically current employment law has worked. It allows plaintiffs to file a complaint with the local Equal Employment Opportunity Commission, which reviews the case and negotiates a solution with the employee and employer. If a settlement cannot be agreed upon, the case is sent to a judge.

If discriminatory practices are found, the victim is restored what was lost by the discrimination, such as back pay, restoration of benefits, reinstatement of job and attorney’s fees. On the other hand, if a complaint is deemed frivolous, it’s weeded out here.

The bill Congress is considering would do away with these procedures in favor of a system that invites litigation.

You would not be reimbursed for attorneys’ fees if no discrimination is found (except under extraordinary conditions). But if the plaintiff wins, you would be required to pay witness and attorney’s fees in addition to any compensatory and punitive damages awarded.

A study of employment law in California, where jury trials are available in state cases, showed that plaintiffs were three times more likely to win before a jury than a judge. Jury-awarded damages averaged \$342,000.

These legal expenses would force many business owners—whether they believe they’re innocent or not—to try to settle disputes out of court. Even these settlements cost from \$12,000 to \$50,000 per case. And with the carrot of multi-million dollar damages awards, employees would have little incentive to settle.

H.R. 1 would set up a system that holds employers guilty until proven innocent. With potentially huge damage awards hanging over employers’ heads, plaintiffs’ attorneys could practice legalized blackmail.

The scope of civil rights law is broad. If H.R. 1 is enacted, its provisions would cover employment discrimination based on race, gender, ethnic origin and religious affiliation. Through related laws, discrimination stemming from disability, age and both physical and mental impairments also would be covered.

Q. How would the bill affect my business?

A. The proposed legislation could force you to change your hiring and promotion practices.

All businesses with 15 or more employees would be required to comply with the law. In many states the employee election would be even lower.

If your workforce or a segment consists of a lower percentage of minorities or women than the local working population, an employer or job applicant could file a lawsuit against you.

To stay out of court you would have little choice but to hire by the number rather than by experience, education, certifications and standard application forms—unless you could prove that your hiring criterion is nondiscriminatory.

Supreme Court Justice Sandra Day O’Connor wrote, “If quotas and preferential treatment become the only costly means of avoiding expensive litigation and potentially catastrophic liability measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in empirical terms but will be equally careful to ensure that the quotas are met.”

Continued on page 10

What is NFIB doing about the bill?

When lawmakers introduced the civil rights bill in the 101st Congress, NFIB urged them to negotiate for legislation that would be fair to both you and your employees. But proponents of the bill would have none of it. Although the measure passed in the House and in the Senate in 1990, it was blocked when President Bush vetoed the bill. NFIB helped garner enough votes in Congress to sustain the veto.

In the 102nd Congress, NFIB continues to block this legislation, but the bill is one of the top priorities of congressional leadership.

With this brochure and other materials, NFIB is educating lawmakers and all employers about the measure. NFIB is working to retain language in current law including provisions that

1. Allow employers to hire and promote on the merits of education, skill and experience without using quotas and without the fear of a costly lawsuit.
2. Encourage conciliation and negotiation over litigation.
3. Permit judges rather than juries to decide appropriate remedies.

Q. What can I do to help?

A. Start today by writing, calling or visiting your lawmakers. Acting now may protect you later.

Tell your lawmakers to

1. Forbid using juries to decide employment cases.
2. Oppose punitive and compensatory damages, which would encourage litigation.
3. Oppose quotas for hiring and promotion.

Call your Representative and Senators at (202) 224-3121 or write them at the U.S. House of Representatives, Washington, DC 20515 and at the U.S. Senate, Washington, DC 20510. Send copies of your letters to NFIB, and we'll use them for ammunition on Capitol Hill. See the address below.

If you think your business associates should know about this bill, you can obtain additional copies of this brochure. Write to NFIB, Dept. CR, Suite 700, 600 Maryland Ave. S.W., Washington, DC 20024, or call (202) 554-0822, ext. 244.

NFIB

National Federation of
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Offices in all 50 state capitals

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4/91

The Proposed Civil Rights Act of 1991: An Employer's Nightmare

NFIB

National Federation of
Independent Business

Employment Discrimination Law

Worker Replacement

Issue: Should an employer be able to hire permanent replacement workers during a labor dispute?

Background: In 1938 the U.S. Supreme Court ruled that the National Labor Relations Act (NLRA) does not prevent employers from hiring replacement workers for employees who have walked off the job in an economic strike—a strike over issues such as pay, hours and benefits. However, after a settlement, the striking employees have the right to jobs that replacement workers leave.

During an unfair labor practice strike—one involving an alleged illegal act by an employer—striking employees are guaranteed the opportunity to regain their jobs, even if they displace replacement workers.

During several economic labor disputes in the 1980s, employers exercised their rights under the NLRA to permanently replace striking workers in order to continue to operate. Unions now are advocating changes to the NLRA to prevent employers from continuing to operate their businesses during labor disputes.

Legislative History: In the 101st Congress legislation was introduced that would have barred employers from hiring permanent replacement workers during a labor dispute. Under the legislation two or more employees could have walked off the job, saying only that they were protesting terms and conditions of employment. They would have been guaranteed their jobs back whenever they chose to return. The bills covered both unionized and non-unionized businesses. Hearings were held in both the House and Senate.

NFIB Position: NFIB opposes any attempt to curb employers' rights to replace workers who walk off the job.

Action Needed: Congress should oppose legislation that denies employers the right to replace workers who walk off the job.

Benefits: Worker replacement legislation permits no flexibility to respond to changes in the workplace. As a result it will inhibit the most vibrant, productive sector of the economy—small business. Permitting cooperation and flexibility results in more small businesses and more jobs.

NFIB

National Federation of
Independent Business

JOHN J. MOTLEY III
Vice President



Suite 700
600 Maryland Ave. S.W.
Washington, DC 20024
(202) 554-9000



National Federation of
Independent Business

Sent to over 1600 NFIB Members

MEMORANDUM

To: NFIB Sales Force

From: John Motley
Vice President
Federal Governmental Relations

Subject: Action Request

Date: March 13, 1991

Enclosed you will find 50 copies of an important and hard-hitting Action Request to hand out to NFIB members as you work renewals. A longer, more detailed version is being mailed to over 200,000 members over four weeks. So don't be surprised if a member seems familiar with our request. Just tell them that this shows how important we believe this issue is to them and how hard we're working on their behalf. The Action Request notifies members of three issues:

- Mandated Parental Leave,
- Striker replacement,
- Employment discrimination (the so-called "Civil Rights Act").

They are at the top of Big Labor's and the Democratic Leadership's agenda, and they are moving through Congress like a hot knife through butter. If small business owners don't speak up -- soon and loudly -- these bills will become the law of the land. And they will pave the way for the enactment of even more oppressive anti-small business legislation.

Please distribute the Action Requests to members who you believe will call or write their Senators and Representative. Urge them to get involved and express their opinion -- and good selling.

Suite 700
600 Maryland Ave. S.W.
Washington, DC 20024
(202) 554-9000
Fax (202) 554-0496



The Guardian of
Small Business

ACTION REQUEST

STOP ANTI-SMALL BUSINESS PROPOSALS IN CONGRESS!

The U.S. Congress is considering and may soon vote on legislation that would dramatically change the way you do business and give government bureaucrats and the courts even more authority to control your day-to-day business operations.

If small business owners across the country don't speak up -- soon and loudly -- we will all pay a steep price as these new laws restrict your freedom to run your business.

Mandated Parental Leave

This proposal would require employers to give 12 weeks of unpaid leave to any employee for the birth, adoption, or illness of a child or for the illness of a parent or spouse. Employers must guarantee the employees their jobs and continue their health insurance.

Both the Senate bill, S. 5, and the House bill, H.R. 2, apply to businesses with 50 or more employees. This exemption is an illusion -- a ploy to ensure passage. In fact, Sen. Kennedy has already said that if this legislation passes he intends to begin expanding it.

Striker Replacement

This legislation would require employers to rehire any 2 or more employees who walk off the job for economic reasons. It applies to non-union businesses as well as union ones. It effectively prevents an employer from replacing workers who walk off the job over wages and benefits. And, it overturns 50 years of labor law. With it Organized Labor gains a strong organizing tool.

The Senate bill is S. 55; the House bill is H.R. 5. Passage of this legislation is Big Labor's number one priority. It is a loaded gun meant to help unionize smaller firms.

Employment Discrimination

This legislation, the so-called "Civil Rights Act of 1991," holds you guilty of employment discrimination until proven innocent. If your workforce doesn't mirror the local community in percentages of racial, ethnic, sexual, and religious groups you could be sued, face a jury trial and be fined an unlimited amount of money. It would have the effect of turning equal opportunity and merit promotion into illegal acts -- all in the name of civil rights.

The House bill is H.R. 1; Sen. Kennedy will introduce the Senate version soon. The number "H.R. 1" means that it is the Number 1 priority of the House Democratic Leadership for this Congress.

Contact Your Congressional Delegation

Supporters of these anti-small business bills are working very hard to get them on the books. They are on Capitol Hill every day saying how necessary these bills are, how fair they are, and how cheap they are.

The business owner's side of the story is barely being heard at all. Act today: call and/or write both your Senators and your Representative and express your opinion on these anti-small business bills. Urge them to:

Oppose mandated leave.

Oppose striker replacement.

Oppose the so-called "Civil Rights Act".

You can contact your representatives by writing:

Honorable _____
U.S. House of Representatives
Washington, DC 20515

Honorable _____
United States Senate
Washington, DC 20510

Or calling:

Capitol Switchboard
(Ask for the office you want by name.)

202/224-3121



National Federation of
Independent Business

▼ ▼ ▼
_ Sent to over 1500 Local Chambers _
of Commerce

Your Help Urgently Needed

April 2, 1991

Dear Chamber Executive:

The Democratic Leadership in Congress wants to reward its favorite allies and constituency groups -- big labor, trial lawyers, and others -- with federally mandated benefits and advantages, and they expect your small business members to pay for it. They have announced their intention to pass a series of bills that will undermine the ability of small business owners to run their businesses and support their families.

The Congressional Leadership wants to guarantee an employee's job by mandated parental and family leave. It wants to make it easier for Big Labor to organize even small businesses by guaranteeing workers who strike their jobs back. And, it wants to make it possible to "legally blackmail" business owners into hiring and promoting by quotas.

The bills imposing mandated parental leave, job guarantees for strikers, and outrageous legal expenses for employment discrimination are going to be voted on very, very soon.

These three bills are part of Sen. Kennedy's and Big Labor's agenda to begin a whole new era of unprecedented government intervention in the workplace. The entire labor agenda to socialize the nature of the American workplace is a long one -- but these bills are at the top of its list.

Two of them passed the Congress last year, but never became law only because Congress could not override President Bush's vetoes. Proponents of this "new social contract" are expected to try to ram these bills through the Congress during the upcoming weeks.

Organized labor has pulled out all the stops to enact this agenda -- they're having union members write letters, call and visit their elected officials and demand immediate enactment. They've even produced a soap opera video to plead their case to Congress.

Small business needs your help!

Suite 700
600 Maryland Ave. S.W.
Washington, DC 20024
(202) 554-9000
Fax (202) 554-0496



The Guardian of
Small Business

Enclosed you will find 10 copies of an NFIB Action Request. I would like you to circulate to your small business members. It outlines the disastrous legislation before the Congress and urges them to contact their Senators and Representative.

Our united efforts to get America's small business owners activated will help us defeat this legislation. Thank you for your help.

Sincerely,

John J. Motley III
Vice President
Federal Governmental Relations