



Challenging the U.S. Department of Labor's New Overtime Rule

Media Background

History of the Rule

“The Department of Labor’s new overtime rule is just the latest in a series of unlawful, overreaching and unilateral actions taken by the current presidential administration. Moreover, this unlawful rule will seriously impact state and local budgets, as well as small businesses.” --Nevada Attorney General Adam Paul Laxalt

- The Fair Labor Standards Act (FLSA) requires that all hourly employees receive a minimum wage and one and a half times their regular rate of pay for all hours worked in excess of 40 hours a week.
- The federal hourly minimum wage may only be established by Congress.
- The FLSA specifically exempts from its minimum wage and overtime requirements “executive, administrative, or professional” employees. This is known as the “white collar” exemption.
- On March 13, 2014, President Obama issued a presidential edict to the Department of Labor ordering the revision of the FLSA’s overtime exemption for salaried employees.
- On May 23, 2016, the Department of Labor “revised” the existing overtime regulations to more than double the minimum threshold where overtime pay is required.
- Beginning on December 1, 2016, all employees are entitled to overtime if they earn less than \$913 a week, regardless of whether they perform “executive, administrative, or professional” duties.

How the Rule Works

- The rule sets a minimum threshold salary of \$913 a week before an employee is eligible to be considered an “executive, administrative, or professional” employee exempt from FLSA’s overtime requirements.
- By using a so-called minimum “salary test” to determine whether an employee is exempt from overtime under the white collar exemption, the Department of Labor has violated federal law by ignoring Congress’ requirement that “bona fide executive, administrative, or professional” employees that fall below the threshold are exempt from the Fair Labor Standards Act’s overtime requirement.
- The new rule also contains an indexing mechanism to automatically raise the salary level cut off every three years without being subject to the notice and comment requirements of administrative rulemaking.
- This new rule applies to both public and private employers.

“nothing in the legislative or regulatory history ... would support indexing or automatic increases The Department believes that adopting such approaches in this rulemaking is both contrary to congressional intent and inappropriate.”

--U.S. Department of Labor, April 23, 2004

Implications of the Rule

- The Department of Labor's emphasis on the salary test, as opposed to actual work performance, defies Congressional intent.
- The new federal dictate, which was never authorized by Congress, violates the Constitution and fundamental principles of federalism by forcing states to pay state employees higher wages at the expense of state budgets, services and governmental programs.
- States and private businesses will be hurt by the increasing number of employees that will be eligible for overtime, thus encouraging public and private employers to covert many salaried positions to hourly positions.
- The rule will force employers, including state and local governments, to reduce services, reduce hours, reduce hourly pay, shift workload and work priorities, and change budget allocations. Layoffs may also be necessary.

“Nevada’s businesses are small businesses ... According to NFIB research, nearly half of all small businesses employ at least one person who would be affected by this overtime rule. To place such a big burden on small businesses that are gearing up for the make-or-break holiday season is cruel and unusual punishment.”

--Randi Thompson, State Director for the National Federation of Independent Business

The Lawsuit: Causes of Action

- The new rule violates the Tenth Amendment by dictating the wages that States must pay their employees to carry out governmental functions, thus commandeering the States and their budgets.
- The new rule exceeds Congressional authorization by imposing a minimum salary threshold without considering whether the employee performs “bona fide executive, administrative, or professional” duties.
- The indexing mechanism violates the Administrative Procedure Act by automatically updating the salary level every three years without going through the notice and comment process required by law.
- The new rule is arbitrary, capricious and an abuse of discretion because it is, amongst other things, based on deficient data and failed to consider lawful alternatives.
- In the alternative, Congress has improperly delegated its legislative authority by granting the Department of Labor the ability to establish qualifications for the “white collar” exemption without any intelligible principles or limits.