Comments for the Record

Comments to the DOL on Overtime Regulations

BEN GITIS | SEPTEMBER 25, 2017

Thank you for the opportunity to comment on the Department of Labor's (DOL's) ongoing efforts to adjust federal regulations defining and delimiting exemptions from the Fair Labor Standards Act's minimum wage and overtime requirements. As in any regulation, an effective cost-benefit analysis is essential to determining whether a new overtime rule would do more harm than good. My comments highlight the strengths and weaknesses of the cost-benefit analysis performed in prior version of this regulation, which was finalized under the Obama Administration in May 2016. While the accuracy of DOL's benefit analysis was affirmed by the Congressional Budget Office (CBO), it is apparently clear that the DOL both underestimated the rule's compliance costs and failed to consider the economic consequences of the regulation:

- The DOL's estimate of 4.2 million workers becoming eligible for overtime pay is consistent with the CBO's estimate of 3.9 million workers.
- However, the DOL's estimate of $304.3 million in annual compliance costs is far lower than the over $1 billion estimated by the CBO. Other reports indicate that compliance costs could be even higher.
- The DOL did not consider the overtime rule's broader economic implications, such as its impact on prices and family income.
- The DOL failed to consider the impact of the overtime rule on non-profits, which rely on the very workers that the regulation would make eligible for overtime pay.

As the DOL continues to contemplate an update to its overtime regulations, it can be confident in its methods for analyzing the benefits of the rule. The DOL should, however, address the apparent issues in its ability to assess the compliance and economic costs associated with this action. Doing so will provide the department with a more complete

picture of the costs and benefits of expanding the number of workers entitled to overtime pay.

THE OBAMA ADMINISTRATION'S FINAL OVERTIME RULE

Under the Fair Labor Standards Act (FLSA), all employees are required to earn time-and-a-half pay when working overtime, except certain categories of workers who are salaried and well compensated. Most workers who are exempt from this requirement are categorized as either executive, administrative, or professional (EAP). This is commonly referred to as the "white collar" exemption because it traditionally applies to highly paid professionals and office managers. The DOL, meanwhile, has the authority to "define and delimit" the requirements for exempting a worker from overtime pay. There are three primary tests to exempt a worker from FLSA requirements: the worker must be salaried (the salary basis test), the salary must meet a minimum level (the salary level test), and the worker's duties must align with the definition of EAP workers (the duties test). The DOL uses a separate test for highly compensated employees (HCE) that has a higher pay requirement but a less stringent duties requirement.[1]

Under the Obama Administration, the DOL issued a final rule in May 2016 to reduce the number of workers who are exempt from overtime pay.[2] It did so by raising the salary level requirement. Most significantly, it raised the standard salary level test from $455 to $913 per week ($23,660 to $47,476 per year). Thus, all salaried workers earning between $455 and $913 per week would automatically become eligible for overtime pay. In a separate change that would impact a small number of workers, the regulation increased the salary threshold for the HCE exemption from $100,000 to $134,004 per year. Going forward, the rule required the DOL to update both salary thresholds every three years. The standard salary test would be tied to the 40th percentile of earnings of full-time salaried workers in the lowest Census Region (currently the South). The HCE salary test would remain fixed at the 90th percentile of earnings of all full-time salaried workers in the United States.

It is important to note that EAP workers are also exempt from the FLSA's minimum wage requirement. Under the DOL's final regulation, the same workers who would become eligible to receive overtime pay would also be entitled to earn at least the federal minimum wage, $7.25 per hour. However, the current standard salary threshold of $455 per week equates to $11.38 per hour for a standard 40-hour workweek. Since that wage rate is well above the federal minimum wage, the effects of increasing the federal minimum wage's coverage are extremely small. Thus, this comment only focuses on the effects of expanding eligibility for time-and-a-half overtime pay.

THE DOL'S ANALYSIS OF THE OVERTIME RULE'S BENEFITS

In the text of the Obama Administration's final overtime rule, the DOL provided a cost-benefit analysis that details the rule's benefits to workers and its compliance costs to businesses. On the benefits side, the DOL can be confident that its methods are yielding accurate projections. In November 2016, the Congressional Budget Office (CBO) released an analysis of the effects of repealing the Obama Administration's overtime rule.[3] The CBO's estimates of the rule's benefits paralleled the DOL's figures. Table 1 contains both sets of estimates.

Table 1: DOL and CBO Benefits Estimates

Benefits	DOL	CBO
Workers no longer exempt from FLSA minimum wage and overtime requirements	4,200,000	3,900,000
Work over 40 hours per week	855,000	900,000
Increase in Pay	$19.97 per week	2% per year

The DOL estimated that the final regulation would make 4.2 million salaried workers no longer exempt from FLSA requirements and thus eligible time-and-a-half overtime pay, should they work over 40 hours per week. That is similar to the CBO's estimate of 3.9 million workers. Of the 4.2 million newly eligible workers, the DOL found that only 855,000 actually work more than 40 hours per week and would get a raise. Similarly, the CBO estimated that 900,000 of the 3.9 million newly eligible employees work more than 40 hours per week. Finally, both the DOL and the CBO concluded that the actual raise that those roughly 900,000 overtime workers would receive is small. The DOL projected that most of these overtime workers would only earn an additional $19.97 per week.[4] Likewise, the CBO estimated that their annual earnings would only rise by 2 percent.

The CBO report affirms the DOL's benefit analysis. Thus, as the DOL considers a new overtime pay regulation, it can be confident that its methods would effectively gauge the benefits of the rule.

THE DOL'S ANALYSIS OF THE OVERTIME RULE'S COSTS

While the DOL's analysis of the Obama Administration's final overtime rule's benefits appears valid, the DOL must reevaluate its methods for analyzing the rule's consequences.

Its analysis of the rule's costs is not consistent with analyses by independent groups including the CBO, Oxford Economics, and the Chamber of Commerce. In particular, the DOL greatly underestimated the overtime rule's compliance costs, failed to consider its negative economic consequences of those costs, and did not account for the way the rule would impact non-profits that significantly rely on EAP workers.

Compliance Costs

Independent analyses concluded that the compliance costs from Obama Administration's final overtime rule would be much larger than what the DOL projected. This raises serious concerns about the DOL's methods for estimating the overtime regulation's compliance burdens. Table 2 contains the CBO's and the DOL's estimates of the compliance costs imposed by the Obama Administration's final overtime rule.

Table 2: DOL and CBO Compliance Cost Estimates

Source	Annual Compliance Costs (millions)
DOL	$304.3
CBO	$1,031.7

While the DOL found that the rule would impose a total of $304.3 million in annual compliance costs (including deadweight loss),[5] the CBO projected that businesses would actually face over $1 billion in annual compliance burdens. In other words, the CBO's annual compliance cost estimate is over three times larger than the estimate published by the DOL.

The CBO report is not the only one that suggests the DOL greatly underestimated the compliance burdens of the final overtime rule. Both Oxford Economics and the Chamber of Commerce concluded that the rule's compliance costs would be much larger than the DOL projected. Table 3 compares initial year compliance cost estimates from the DOL, the CBO, Oxford Economics, and the Chamber of Commerce.

Table 3: DOL, CBO, Oxford Economics, and Chamber of Commerce Initial Year Compliance Costs Estimates

Source	Initial Year Compliance Costs (millions)
DOL	$684.3

CBO	$1,810.0
Oxford Economics	$5,660.0
Chamber of Commerce	$36,950.0

The DOL estimated that during the first year the overtime rule is in effect, businesses would face $684.3 million in compliance costs. The CBO estimated that the rule would actually cost businesses over $1.8 billion.

Meanwhile, Oxford Economics and the Chamber of Commerce indicated that the compliance costs of this regulation could be even larger.[6] According to Oxford Economics, implementing the rule would cost retailers alone $745 million in the first year, which is larger than the DOL's estimate of $684.3 million across the entire economy.[7] Retailers, meanwhile, only employ a small portion of private sector workers. As illustrated in an American Action Forum report, if one assumes that the cost of the rule is distributed equally among workers, the Oxford Economics estimate suggests that the overtime rule would cost private sector employers almost $5.7 billion in the first year.[8] Even more dramatic are estimates from the Chamber of Commerce, which put compliance costs at $37 billion in the rule's initial year.[9] That is roughly 54 times larger than the DOL suggested.

All of this indicates that the DOL needs to take a critical look at and reevaluate its methods for estimating the compliance costs of the overtime rule. Doing so will ensure that the DOL is using the most accurate information when determining how to adjust federal overtime regulations.

Broader Economic Costs

The CBO's analysis of repealing the Obama Administration's final overtime rule also highlights the ways that the DOL failed to consider the regulation's broader economic effects. In particular, the CBO found that the overtime rule would cause prices to rise and real family income to fall. Table 4 contains the CBO's results.

Table 4: The Overtime Rule's Impact on Prices and Real Family Income (millions)

Category	Initial Year Cost	Annual Average Costs
Prices	$1,300.0	$1,116.7
Real Family Income	-$2,100.0	-$1,375.0

The CBO concluded that businesses would simply pass the massive payroll and compliance costs on to consumers by raising prices. The CBO estimated that the rule would cause prices to increase by $1.3 billion in its initial year and by $1.1 billion per year on average. Moreover, the combination of higher prices and lower profits for family-owned businesses would cause real family income to decline. The CBO estimated that real family income would fall by $2.1 billion in the initial year and by $1.4 billion per year on average.

The DOL did not consider the broader economic effects of Obama Administration's final overtime rule. Going forward the DOL needs to start doing so and the CBO report illustrates why. The objective of the Obama Administration's overtime rule was to increase wages and improve family welfare. Yet, after considering the ways the overtime rule would impact prices, the CBO concluded that the regulation, on net, would leave families worse off because their real incomes would decline. Clearly, the CBO's analysis indicates that the final overtime rule would have been counterproductive to the Obama Administration's ultimate goals. For the DOL to effectively determine the best way to adjust federal overtime standards, it must start accounting for the broader economic consequences of this executive action.

Consequences for Non-Profits

The DOL should pay closer attention to how changing overtime regulations impacts non-profits. In particular, the final overtime rule issued during the Obama Administration would be extremely disruptive to charities and institutions of higher education. Both rely on the EAP workers that the regulation would have made eligible for overtime pay.

Charities raised concerns about the overtime rule when it was initially proposed.[10] For many, the rule would disrupt their employment model, and may very well hamper their charitable mission. Operation Smile, which provides cleft lip surgeries, estimated that its payroll costs would rise by $1 million annually and, as a result, it would perform 4,200 fewer surgeries per year. Habitat for Humanity estimated that the rule would impact 65 percent of its affiliates. Meanwhile, the Salvation Army stated that the regulation would make 50 percent of its workforce newly eligible for overtime pay, severely compromising its mission to help those in poverty. Finally, America's Blood Centers estimated the rule would cost an average non-profit community blood center $1.5 million. That would have "negative consequences for maintaining the infrastructure needed for a robust blood supply."

Institutions of higher education also raised serious concerns about the Obama Administration's overtime rule, which would impact many non-teaching personnel in colleges and universities. This includes postdoctoral researchers, admissions counselors, recruiters, financial aid specialists, food service managers, and campus police. In a previous

American Action Forum report, we found that at colleges and universities there are about 485,100 non-teaching workers who earn between $455 and $913 per week, and thus would become eligible for overtime pay under the Obama Administration's rule.[11] Of those workers, 42,100 work more than 40 hours per week. Consequently, it would cost universities $724.3 million to comply with the final regulation and provide these workers with overtime pay. To afford the rule, colleges and universities would have to either pass the cost directly on to students through higher tuition, or cut back hours and employment among non-teaching personnel, which would adversely impact students as well.

Going forward, the DOL should start considering the ways that an update to federal overtime regulations would adversely harm non-profits. Charitable missions to serve those in need could be compromised and institutions of higher education would have to make college even less affordable.

CONCLUSION

As the DOL considers issuing a new overtime regulation, this is a great opportunity for it to critically evaluate its methods for analyzing the effects of the rule. Over the past few years, independent reports of the Obama Administration's overtime rule have revealed the strengths and weaknesses of the DOL's analysis. While the DOL can be confident in its methods for estimating the benefits of the rule, the same cannot be said for its cost analysis. The CBO, Oxford Economics, and the Chamber of Commerce all revealed that the DOL greatly underestimated the compliance costs of the Obama Administration's overtime rule. Moreover, the DOL failed to account for the broader economic effects of the rule and was poised to implement a policy that, according to the CBO, would do more harm than good. Finally, the DOL failed to consider that the rule would impede charitable missions and increase the cost of college. In the next overtime pay rule, the DOL should consider revising its methods for estimating the rule's compliance costs. Moreover, it should also consider the many other economic consequences of the regulation. Doing so will enable the DOL to effectively determine the best way to adjust federal overtime regulations.

Sincerely,

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[1] William G. Whittaker, "The Fair Labor Standards Act: A Historical Sketch of the Overtime Pay Requirements of Section 13(a)(1)," Congressional Research Service, May 9, 2005, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1240&context=key_workplace.

[2] "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees," RIN 1235-AA11, Final Rule, 81 FR 32391, Wage and Hour Division, Department of Labor, May 23, 2016, https://www.federalregister.gov/documents/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and.

[3] "The Economic Effects of Canceling Scheduled Changes to Overtime Regulations," Congressional Budget Office, November 14, 2016, https://www.cbo.gov/publication/51925.

[4] The average weekly salary increase of $19.97 applies to employees impacted by the standard salary level increase and who regularly work more than 40 hours per week.

[5] Ben Gitis & Dan Goldbeck, "Final Overtime Rule: Minimal Benefits and Major Costs," American Action Forum, May 19, 2016, https://www.americanactionforum.org/research/final-overtime-rule-minimal-benefits-major-costs/.

[6] It is important to note that both analyzed the cost of the proposed version of the overtime regulation. However, the proposed and final versions are very similar, and the analyses by Oxford Economics and the Chamber of Commerce still serve as useful benchmarks.

[7] Matthew R. Shay, "Comments on Proposed Rulemaking Regarding the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees," National Retail Federation, September 2, 2015, https://nrf.com/sites/default/files/NRF%20Comments%20on%20Proposed%20Overtime%20Rule.pdf.

[8] Ben Gitis, "The Regulatory Burdens of Implementing DOL's Overtime Pay Rule," American Action Forum, December 14, 2015,

https://www.americanactionforum.org/insight/the-regulatory-burdens-of-implementing-dols-overtime-pay-rule/.

[9] Randel K. Johnson & Marc Freedman, "RIN 1235-AA11, Proposed Rule, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 FR 38516 (July 6, 2015)," Chamber of Commerce of the United States of America, September 4, 2015, https://www.uschamber.com/sites/default/files/documents/files/u_s_chamber_-_comments_-_part_541_nprm.pdf.

[10] Ben Gitis, "DOL's Overtime Rule Hurts Charities & Non-Profits," American Action Forum, May 23, 2016, https://www.americanactionforum.org/insight/impact-dols-overtime-rule-non-profit-services/.

[11] Ben Gitis & Chad Miller, "The Overtime Rule: Effects on Institutions of Higher Education," American Action Forum, November 22, 2016, https://www.americanactionforum.org/research/overtime-rule-effects-institutions-higher-education/.