Insight

# Obama-Era Labor Regulations: Where Are They Now?

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## INTRODUCTION

The Obama Administration issued a series of labor market regulations intended to increase worker pay and enhance collective bargaining. The most consequential of these were the overtime pay and persuader rules from the Department of Labor (DOL), and the joint employer, micro-union, and union election regulations from the National Labor Relations Board (NLRB). Since their introduction, these regulations have faced scrutiny in the courts and in Congress. The Trump Administration also has efforts underway to repeal several of these rules. This brief report reviews the implications of these rules and their current status.

## OVERTIME PAY

In May 2016, the DOL finalized the overtime pay rule, which would expand the number of workers entitled to time-and-a-half pay when working beyond 40 hours per week. Under current federal labor law, workers are exempt from overtime pay if they are salaried, earn a minimum weekly amount, and meet certain duties requirements. The Obama Administration intended to expand the number of workers entitled to overtime pay by increasing the minimum pay requirement from $455 to $913 per week ($23,660 to $47,476 per year)—a threshold that would automatically increase every three years. This means that the rule would make currently exempt workers who earn between $455 and $913 per week eligible for overtime pay.

A close inspection of the rule reveals that it would not only fail to significantly increase worker pay, but also impose massive costs on businesses. The Congressional Budget Office (CBO) found that that 4 million people who would be newly eligible for overtime pay. Yet,

only 900,000 of those employees actually work more than 40 hours per week and would get a raise.  But even for these workers, the increase in pay would be marginal; CBO estimates their annual earnings would rise by just 2 percent. Meanwhile, businesses would face massive payroll and compliance cost burdens. The CBO estimates that businesses would, on average, spend over $1 billion annually to simply familiarize themselves with the rule, modify their payroll systems, and manage their workers' hours. More troubling, the CBO concludes that businesses would pass these burdens directly on to consumers through higher prices. Consequently, while 900,000 workers may receive a small raise, the combination of higher prices and lower profits for family-owned businesses would cause real family income to decline by $2.1 billion in 2017 and by an average of $1.2 billion per year thereafter.

Over the past year, the overtime rule has been in legal limbo. Although the DOL intended for the rule to take effect on December 1, 2016, U.S. District Judge Amos Mazzant granted a nationwide injunction in November, preventing its implementation. In his ruling, Judge Mazzant explained that the DOL cannot base overtime eligibility solely on salary level. While the DOL challenged the decision at the end of the Obama Administration, under the Trump Administration, the DOL decided to abandon the original overtime regulation and issue its own. In June the DOL asked the appeals court to uphold Judge Mazzant's decision, but still affirm its ability to raise the salary threshold. At the end of August, Judge Mazzant issued his final decision in the case and officially invalidated the regulation. In his ruling, the judge clarified that the DOL can still adjust overtime pay regulations by raising the salary threshold. He concluded, however, that President Obama's overtime pay rule raised the salary threshold by so much that it effectively made irrelevant the duties requirements that are also needed to exempt workers from overtime. Following the judge's latest decision, the DOL dropped its appeal.

The DOL is in the preliminary stages of writing a new overtime rule and is currently seeking public comment. The DOL is largely seeking information regarding appropriate methods for setting the salary threshold. Given that the DOL sought to maintain its authority in raising the salary threshold, the new rule will likely increase the salary threshold but to a much lower level than in the previous regulation.

## JOINT EMPLOYER STANDARD

In August 2015, the NLRB overturned decades-long precedent by broadening the legal standard for designating a firm a joint employer. When a firm is considered a joint employer, the federal government holds it responsible for the labor practices of a separate independent business. Traditionally, a firm is a joint employer if it exerts "direct control"

over the employment or pay practices of a separate business. In its August 2015 decision, however, the NLRB introduced a new "direct or indirect control" standard that is far more ambiguous and could be applied to multiple business relationships. Soon after, the DOL followed suit, abandoning the traditional standard in favor of the new one in application of federal labor law.

As is clear in the general council's amicus brief, the NLRB broadened the joint employer to empower collective bargaining. Yet, there is little reason to believe the new standard will increase union membership. The NLRB's general council asserted that the previous joint employer standard, established in 1984, eroded collective bargaining and that the broader standard would help reverse the long-term decline in private sector union membership. As illustrated in a previous AAF report, however, there is no evidence suggesting a link between the 1984 standard and collective bargaining.

Meanwhile, the new standard threatens to upend the franchise business model, one of the most dependable sources of job creation in the United States. Since 2012, franchise jobs have grown at 3.4 percent annually, far outpacing the rest of the private sector's 2 percent job growth rate. Yet, the new standard could slow job growth, as corporations may opt to open company-owned stores instead of selling franchise licenses to independent franchisees. Given that franchises grow more quickly than non-franchises, this could result in a loss of up to 1.7 million jobs over 10 years.

Early evidence indicates that the new standard is already harming the industries that are particularly vulnerable to it. In particular, a major portion of hotel workers are employed by franchises. Since the NLRB introduced the new standard, growth in hotel employment, wages, and hours have all stalled. Consequently, the sum of all pay earned by all workers in the hotel industry went from rising 5.7 percent annually before the NLRB's decision to declining by 1.2 percent after its decision.

The new joint employer standard faces challenges in all three branches of government. Under the Trump Administration, the DOL announced that it is reversing course and returning to the traditional joint employer standard. In the judicial branch, the United States Appeals Court is reviewing the legality of the NLRB's ruling. Finally, lawmakers on Capitol Hill are currently considering a bill that would return joint employer to the previous standard and permanently prevent the NLRB from adjusting it in the future.

## PERSUADER RULE

In 2016, the DOL finalized its persuader rule, which would require that businesses disclose any outside legal advice they receive when facing a union organizing campaign. Moreover,

the person providing the advice would have to disclose all labor relations advice or services. This means that the outside legal adviser would have to report not only the persuader activities at a certain company, but possibly also *all* labor relations activities for *any* company. Many fear that this new requirement would undermine attorney-client privilege. As a result, instead of disclosing their relationships, labor lawyers could simply decide to not provide persuader advice to any company that is facing a union organizing campaign. Smaller businesses that do not have in-house lawyers would likely be subject to more collective bargaining agreements.

In November 2016, however, a federal judge deemed the persuader rule unlawful and granted a permanent injunction to block its implementation. Under the Trump Administration, the DOL has already taken steps to remove the rule all together. In June 2017, the DOL released a proposal to rescind the rule, which began a 60-day comment period.

## REPRESENTATION-CASE PROCEDURES RULE

Taking effect in 2015, the NLRB's Representation-Case Procedures rule made drastic changes to the union election process, giving unions more tools to win elections. Among the NLRB's many changes, employers must now provide unions with workers' personal information, such as personal email addresses and phone numbers. In addition, the rule substantially speeds up the election process. Prior to the rule, since 2010 an election on average took place 38 days after the employer received a copy of the petition. Under the rule, however, an election can occur in as little as 10 days after the employer receives a copy of the petition. As a result, employers now have less time to make their case and it is easier for unions to win elections.

Currently, the rule faces challenges on Capitol Hill, where members of the House of Representatives have proposed multiple laws to dismantle this regulation. This includes the Workforce Democracy and Fairness Act (H.R. 2776), which would return the duration of union elections to their traditional length, and the Employee Privacy Protection Act (H.R. 2775), which would repeal the rule's requirements that employers disclose employees' personal information to union organizers.

## MICRO-UNIONS

In 2011, the NLRB ruled that workers are allowed to organize in mini-bargaining units or micro-unions. In other words, certain groups of workers within a business are now allowed to organize as their own unit. This can facilitate unionization because while traditional labor

unions must get a majority approval from all workers at a company, micro-unions require support from far fewer employees. A 2014 Bloomberg BNA study found that after the NLRB ruling went into effect, there were signs that this regulation led to more union elections and a higher win rate. However, since micro-unions, by their very definition, are small, the ruling did not appear to successfully increase the number of union members in the labor market. In May, Senator Johnny Isakson re-introduced the Representation Fairness Restoration Act (S. 1217), which would reverse the NLRB's 2011 ruling.

## CONCLUSION

Through multiple executive actions, the Obama Administration attempted to raise wages and empower collective bargaining. Each of the five regulations highlighted in this report, however, has been repealed in the courts, has been reversed by the Trump Administration, or faces an uncertain future in Congress. Perhaps rather than unilaterally enacting misguided regulations, the new Administration would most effectively help the labor force by working with Congress to enact bills that would increase economic growth, spur job creation, and raise wages.