



## Obama Administration Implements New Rules for Overtime Pay

On May 17, the White House issued a press release explaining that today the Department of Labor will finalize a rule expanding the conditions under which employers will be required to pay overtime to their employees. "Overtime" is generally understood to mean that employees are paid one and one half times their usual hourly wage for hours worked in excess of 40 hours in a single work week. The new rule takes effect on December 1, 2016. The new regulations are not the result of any legislation passed by Congress. They are, instead, notes the White House statement, the result of President Obama having signed a memorandum in March 2014 "directing the Department of Labor to modernize our nation's overtime rules."



The new changes that will be put in place as a result of this "modernization" include:

- Raising the salary threshold at which companies can deny overtime pay from \$23,660 to \$47,476 a year, or from \$455 to \$913 a week.
- Extending overtime protections to 4.2 million additional (mostly white-collar, salaried) workers who are not currently eligible for overtime under federal law.
- Updating the salary threshold every three years.
- Raise the "highly compensated employee" threshold — above which only a minimal showing is needed to demonstrate an employee is not eligible for overtime — from \$100,000 to \$134,004.

The Obama administration claims that these changes will "Raise Americans' wages by an estimated \$12 billion over the next 10 years, with an average increase of \$1.2 billion annually," but that assertion does not take into consideration the wages lost because businesses that cannot afford to pay more in wages will be forced to lay off some employees or reduce the hours of others.

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Some business groups have maintained that the changes will force many businesses to convert salaried workers to hourly ones in order to more closely monitor employees' hours to comply with the new rules. This will effectively result in a demotion for many, they claim.

"With the stroke of a pen, the Labor Department is demoting millions of workers," an AP report quoted David French, a senior vice president for the National Retail Federation. "Most of the people impacted by this change will not see any additional pay."

That report also quotes a statement from Judy Conti, federal advocacy coordinator for the National



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Employment Law Project, who said: “This in essence is a minimum wage increase for the middle class.” In response to predictions that some employers may reduce employee hours to offset the increase in overtime pay, Vice President Joe Biden said in a conference call with reporters on May 17: “Either way, the worker wins.”

Biden apparently thinks that an employee who works 40 hours at “straight time” will fare better than one who works 45 hours at the same rate.

One factor the new rules fail to take into account is that salaried employees who are exempt from overtime are often allowed time off without being “docked” for that time. Tammy McCutchen, a former Labor Department official during the George W. Bush administration, who is now in a private law practice representing employers in labor cases, said in congressional testimony last week that the new rules could deny some employees such flexible schedules because employees eligible for overtime are paid only for the hours they work.

In her testimony, reported the AP, McCutchen provided the example of an hourly worker “who takes an afternoon off to attend a parent-teacher conference will not be paid for that time, but an employee [who is exempt from overtime] will be paid her full guaranteed salary.”

As is usually the case, when government intervenes in the free economic relationship between employers and employees, rigid “rules” take the place of flexibly negotiated arrangements.

Labor Secretary Tom Perez firmly defended the new rules in a statement to reporters quoted by MSNBC:

The overtime rule is about making sure middle-class jobs pay middle-class wages. Some will see more money in their pockets.... Some will get more time with their family ... and everybody will receive clarity on where they stand, so that they can stand up for their rights.

While the new Labor Department policies can be challenged on purely economic grounds, an even greater issue is the manner in which these changes were brought about, as is the issue of whether or not the Constitution delegates the power to establish the regulation of employee compensation to any branch of the federal government.

While the federal government has often usurped powers not delegated to it via the legislative path, in this case, Congress did not pass any legislation expanding the conditions under which employers would be required to pay overtime to their employees. The new rule was created by the Labor Department following a memorandum from President Obama directing it to do so. In this case, therefore, instead of executing a law passed by Congress, the president effectively legislated by executive memorandum. He took this action despite the fact that the Constitution mandates that all legislative power be vested in the Congress.

But the usurpation is even larger than that. In the 10th Amendment, we read: “The powers not delegated to the United States [i.e., the federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

We can read the Constitution from beginning to end and find no language that even remotely suggests a grant of power to any branch of the federal government to regulate salaries or any other part of the relationship between employers and employees. Therefore, since such powers are reserved to the states or to the people, it would be constitutional for states to set wage policies at the state level. Even better, under a free market economy, would be to leave such matters to employers and employees (both of



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whom fall under the category of “the people”). Under a competitive free market, employers who want to attract good employees will pay attractive salaries, and employees who want to get hired and receive good salaries will develop valuable skills and become productive workers.

The last thing our struggling economy needs at this stage, however, is more presidential directives telling bureaucrats in the Department of Labor to regulate overtime pay.

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