

President Biden's Overtime Pay Rule Sparks Controversy and Legal Challenges

President Joe Biden's initial presidential term has been characterized by the resurrection of past policy proposals, including an ambitious overtime pay rule reminiscent of the Obama era. The latest proposal from Biden's Department of Labor seeks to significantly increase the salary threshold for overtime pay, potentially making an additional 3.6 million salaried employees eligible for this benefit. This proposal would elevate the income ceiling from \$35,568 to \$55,068, mirroring a rule previously implemented during the Obama administration, only to be overturned in federal court due to legal challenges. The business community and multiple states had contested it as a presidential overreach.

The U.S. Chamber of Commerce had hailed the court decision as a victory for economic freedom, but the Biden administration aims to revive and reimpose the rule. However, questions about its legal standing linger, and experts suggest that history might repeat itself in the courts.

Eli Lehrer, President of the R Street Institute, a Washington, D.C.-based free-market think tank, deems this proposal as unwarranted interference in the private economy, particularly at a time when many employers are grappling with the aftermath of government-mandated lockdowns and the economic repercussions of the COVID-19 pandemic.

While the proposed rule is now open for public comments, it's crucial for employers, especially in retail, hospitality, and manufacturing, to voice their concerns and perspectives.

Legal experts advise employers to proactively prepare for the potential impact of the proposed overtime rule despite its anticipated legal challenges. A comprehensive workplace audit is recommended to evaluate employee classifications and compliance strategies. This includes distinguishing between exempt and nonexempt employees while avoiding business operations or payroll disruptions.

The proposed rule's parallels with the 2016 Obama-era rule raise concerns, as does the suggestion that the final salary threshold may exceed the proposed \$55,068. Legal experts also question the recommended automatic updates to the overtime threshold, which lacks explicit support in the Fair Labor Standards Act (FLSA).

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Furthermore, the absence of a Senate-confirmed Secretary of Labor during the rule's issuance raises potential legal issues. Employers are urged to budget for salary adjustments and overtime expenses carefully and to develop plans for reclassification decisions, which may require training and addressing employee concerns about changes to their salaried status.

Ultimately, the evolving nature of the proposed rule emphasizes the importance of staying informed and adaptable as employers navigate the uncertainty surrounding this significant labor policy proposal.

Anticipating Legal Challenges, Employers Advised to Prepare for Overtime Rule Impact

As the proposed overtime rule is poised for finalization, legal experts urge employers to proactively assess its potential impact on their workplaces, even though it's expected to face legal challenges.

Jeff Ruzal, an attorney with Epstein Becker Green in New York City, cautions against immediate, concrete changes but advises a strategic approach. "A preliminary injunction is likely to follow the rule's finalization," Ruzal notes. However, employers should initiate a comprehensive workplace audit, ensuring they are well-prepared for the rule's potential implementation. This involves scrutinizing employee classifications as exempt or nonexempt and devising strategies to ensure compliance without jeopardizing their business or payroll.

A Sense of Deja Vu

Many business leaders may experience déjà vu as the proposed rule resembles the one offered in 2016, blocked in November. Brett Coburn, an attorney with Alston & Bird in Atlanta, highlights the key feature of this proposed rule: a significant increase in the minimum salary threshold for white-collar exemptions. Specifically, it recommends raising the weekly threshold from \$684 to \$1,059 or the annual point from \$35,568 to \$55,068. While this hike isn't as substantial as the Obama administration's proposed increase in 2016, it remains noteworthy.

Natalie Bare, an attorney with Duane Morris in Philadelphia, contextualizes this figure, explaining that \$1,059 per week aligns with the 35th percentile of weekly earnings among full-time salaried workers in the lowest-wage region according to the U.S. Census Bureau—currently, the South. In contrast, the Trump administration's 2019 overtime rule, which took effect in 2020, set the salary threshold at \$35,568, representing the 20th percentile. Meanwhile, the 2016 Obama-era rule set it at the 40th percentile.

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Challenges on the Horizon

A significant challenge may arise because the proposed rule's commentary suggests the final threshold salary amount might exceed \$55,068, potentially reaching as high as \$60,000. Coburn also points out that some Supreme

Court justices are increasingly scrutinizing administrative rulemaking, as evidenced by Justice Brett Kavanaugh's dissent in the *Helix Energy Solutions Group Inc. v. Hewitt* ruling earlier in the year.

Furthermore, the proposed rule's recommendation of automatic updates to the overtime threshold could be contentious, considering that the Fair Labor Standards Act (FLSA) does not explicitly provide such updates. Robert Boonin, an attorney with Dykema in Ann Arbor, Mich., notes that the significant questions doctrine could also be invoked in challenging the rule's legality.

Challenges Mounting

Adding another layer of complexity, the proposed rule was issued without a Senate-confirmed Secretary of Labor, according to Libby Henninger, an attorney with Littler in Washington, D.C. This could open it up to legal challenges.

Despite the anticipated legal battles, employers are strongly advised to begin preparations for compliance with the new rule. Coburn stresses the importance of caution when implementing changes and preparing for uncertainty. Employers should review exempt employees whose salaries fall between the current and proposed thresholds and decide whether to increase their wages to maintain their exempt status or reclassify them as nonexempt.

Lee Tankle, an attorney with Ogletree Deakins in Philadelphia, recommends conducting a comprehensive review of employee job duties to ensure proper classification as exempt.

Budgeting for salary increases and overtime expenses will be crucial, as will planning for the rollout of reclassification decisions. This includes training reclassified employees on timekeeping requirements and rules against off-the-clock work and addressing any concerns about losing their salaried status.

Moreover, employers should consider a broader assessment of which employees are exempt from overtime protections to address potential issues proactively.

Neal Shah, an attorney with Frost Brown Todd in Cincinnati, emphasizes the need for employers to have a formalized plan before any court rulings.

Finally, it's essential to remember that the proposed rule may change before its final publication, as Christopher Bouriat, an attorney with Reed Smith in Pittsburgh, points out. So, staying informed and adaptable is crucial for employers navigating these uncertain waters.

Don't be a silent ninja! Let us know your thoughts in the comment section below.

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