

114TH CONGRESS
2D SESSION

H. R. 4773

To require the Secretary of Labor to nullify the proposed rule regarding defining and delimiting the exemptions for executive, administrative, professional, outside sales, and computer employees, to require the Secretary of Labor to conduct a full and complete economic analysis with improved economic data on small businesses, nonprofit employers, Medicare or Medicaid dependent health care providers, and small governmental jurisdictions, and all other employers, and minimize the impact on such employers, before promulgating any substantially similar rule, and to provide a rule of construction regarding the salary threshold exemption under the Fair Labor Standards Act of 1938, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 2016

Mr. WALBERG (for himself and Mr. KLINE) introduced the following bill;
which was referred to the Committee on Education and the Workforce

A BILL

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the salary threshold exemption under the Fair Labor Standards Act of 1938, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protecting Workplace
5 Advancement and Opportunity Act”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) The proposed rule of the Department of
9 Labor entitled “Defining and Delimiting the Exemp-
10 tions for Executive, Administrative, Professional,
11 Outside Sales and Computer Employees” (80 Fed.
12 Reg. 38516 (July 6, 2015)) provides a minimum sal-
13 ary requirement that would be—

14 (A) a 113-percent increase during the first
15 year after the final rule takes effect from the
16 salary threshold in effect on February 29,
17 2016; and

18 (B) an increase that would set the Federal
19 minimum salary threshold 20-percent higher
20 than the minimum salary threshold under any
21 State law effective on the date of enactment of
22 this Act.

23 (2) The Secretary significantly underestimated
24 the cost of compliance with the July 6, 2015, pro-

1 posed rule. Public comments calculate such rule will
2 impose financial and nonfinancial costs substantially
3 higher than those estimated by the Department.

4 (3) According to the Office of Advocacy of the
5 Small Business Administration, the initial regulatory
6 flexibility analysis of the July 6, 2015, proposed rule
7 required under section 603 of title 5, United States
8 Code, failed to adequately identify the number of
9 small entities affected by such rule and failed to ad-
10 dress how such rule would affect regions with lower
11 costs of living and differences in certain industries.
12 On September 4, 2015, the Office of Advocacy of
13 the Small Business Administration submitted com-
14 ments to the Secretary regarding such rule, includ-
15 ing recommendations to—

16 (A) reanalyze “the economic impact of this
17 rule on small businesses”, to “provide a more
18 accurate estimate of the small entities impacted
19 by this proposal”, and to “include an analysis
20 of industry sub-sectors, regional differences,
21 and revenue sizes”;

22 (B) reanalyze “the number of small non-
23 profit organizations and small governmental ju-
24 risdictions . . . that are affected by this rule

1 and the economic impact of this rule on these
2 entities”; and

3 (C) provide greater transparency with re-
4 spect to “compliance cost data” and to “utilize
5 data provided in the comment process to accu-
6 rately estimate the human resources and finan-
7 cial management costs of this regulation”.

8 (4) The Secretary did not consider the potential
9 impact of the July 6, 2015, proposed rule on work-
10 place flexibility. Public comments address concerns
11 that employees who are reclassified from exempt to
12 nonexempt employees may no longer be able to par-
13 ticipate in workplace flexibility arrangements and
14 programs.

15 (5) The Secretary did not analyze the potential
16 impact of the July 6, 2015, proposed rule on compa-
17 nies that operate in multiple States with different
18 costs of living and different salary scales, and the
19 costs and unique complications for these employers
20 associated with reclassifying thousands of employees
21 in multiple States.

22 (6) The July 6, 2015, proposed rule automati-
23 cally updates the salary threshold on an annual basis
24 for purposes of defining employees subject to the ex-
25 emption under section 13(a)(1) of the Fair Labor

1 Standards Act of 1938 (29 U.S.C. 213(a)(1)) for all
2 subsequent years, contrary to the requirement under
3 such section that the definitions applicable for the
4 exemption shall be “defined and delimited from time
5 to time by regulations of the Secretary”. The Sec-
6 retary does not have the authority to increase the
7 salary threshold on an annual or other basis without
8 conducting notice and comment rulemaking with re-
9 spect to each change in accordance with section 553
10 of title 5, United States Code.

11 (7) Although not proposed in the July 6, 2015,
12 proposed rule, the Secretary indicated that changes
13 to the duties tests may be included in the final rule,
14 without providing for notice and comment regarding
15 the specific proposed revisions.

16 **SEC. 3. DEFINITIONS.**

17 In this Act:

18 (1) DEPARTMENT.—The term “Department”
19 means the Department of Labor.

20 (2) JULY 6, 2015, PROPOSED RULE.—The term
21 “July 6, 2015, proposed rule” means the proposed
22 rule of the Department of Labor entitled “Defining
23 and Delimiting the Exemptions for Executive, Ad-
24 ministrative, Professional, Outside Sales and Com-
25 puter Employees” (80 Fed. Reg. 38516 (July 6,

1 2015)) or the final rule with respect to such pro-
2 posed rule.

3 (3) MEDICARE OR MEDICAID DEPENDENT
4 HEALTH CARE PROVIDER.—The term “Medicare or
5 Medicaid dependent health care provider” means an
6 employer who derives more than 50 percent of its
7 revenue from payments under the Medicare program
8 under title XVIII of the Social Security Act, a State
9 plan under the Medicaid program under title XIX of
10 such Act, or both.

11 (4) SECRETARY.—The term “Secretary” means
12 the Secretary of Labor.

13 (5) SMALL BUSINESS; SMALL ENTITY; SMALL
14 GOVERNMENT JURISDICTION; SMALL ORGANIZA-
15 TION.—The terms “small business”, “small entity”,
16 “small government jurisdiction”, and “small organi-
17 zation” have the meanings given such terms in sec-
18 tion 601 of title 5, United States Code.

19 (6) SUBSTANTIALLY SIMILAR RULE.—The term
20 “substantially similar rule” means any rule or pro-
21 posed rule that is a reissuance of the July 6, 2015,
22 proposed rule in substantially the same form as such
23 rule, or is the issuance of a new rule or proposed
24 rule that is substantially the same as the July 6,
25 2015, rule, including any rule that implements the

1 provisions of section 13(a)(1) of the Fair Labor
2 Standards Act of 1938 (29 U.S.C. 213(a)(1)).

3 **SEC. 4. CONDITIONS PRECEDENT FOR SUBSTANTIALLY**
4 **SIMILAR RULES.**

5 (a) ENFORCEMENT.—

6 (1) IN GENERAL.—Beginning on the date of en-
7 actment of this Act, the July 6, 2015, proposed rule
8 shall cease to have any force or effect.

9 (2) FINAL RULE.—In the case that the July 6,
10 2015, proposed rule is a final rule on the date of en-
11 actment of this Act—

12 (A) the Secretary shall not enforce the
13 final rule based on conduct occurring before
14 such date of enactment;

15 (B) an employee shall not have any right
16 of action against an employer for the employ-
17 er's failure to comply with the final rule at any
18 time prior to such date of enactment;

19 (C) any regulations that were amended by
20 such final rule shall be restored and revived as
21 if the final rule had never taken effect; and

22 (D) nothing in this Act shall be construed
23 to create a right of action for an employer
24 against an employee for the recoupment of any
25 payments made to the employee prior to the

1 date of enactment of this Act that were in com-
2 pliance with such final rule.

3 (b) CONDITIONS FOR SUBSTANTIALLY SIMILAR
4 RULES.—

5 (1) IN GENERAL.—The Secretary may promul-
6 gate any substantially similar rule, subject to para-
7 graph (3), only if the Secretary has completed each
8 action required under paragraph (2).

9 (2) REQUIREMENTS FOR SUBSTANTIALLY SIMI-
10 LAR RULES.—The actions required under this para-
11 graph are the following:

12 (A) The Secretary shall conduct an anal-
13 ysis of the impact of the substantially similar
14 rule, including an initial regulatory flexibility
15 analysis under section 603 of title 5, United
16 States Code, and assessments under clauses (i)
17 through (iii) of section 6(a)(3)(C) of Executive
18 Order 12866 (5 U.S.C. 601 note, relating to
19 regulatory planning and review) to be provided
20 to the Administrator of the Office of Informa-
21 tion and Regulatory Affairs in accordance with
22 such section, and that—

23 (i) accurately identifies the number of
24 affected small entities by using specific
25 data points from the most recent publica-

1 tion of the Statistics of U.S. Businesses by
2 the Bureau of the Census;

3 (ii) addresses regional, State, county
4 (if applicable), metropolitan, and non-
5 metropolitan salary and cost-of-living dif-
6 ferences;

7 (iii) provides an analysis of any sub-
8 stantially similar rule, which shall include
9 the percentile of full-time salaried workers
10 affected, and such analysis shall be
11 disaggregated by—

12 (I) State;

13 (II) industry subsector;

14 (III) small organizations;

15 (IV) small government jurisdic-
16 tions, including further disaggregation
17 by school district;

18 (V) nonprofit organizations;

19 (VI) Medicare or Medicaid de-
20 pendent health care providers; and

21 (VII) small businesses;

22 (iv) provides an analysis of manage-
23 ment and human resource costs for all em-
24 ployers, including costs associated with
25 changing human resource systems, reclas-

1 sifying employees, and extra hours spent
2 scheduling employees;

3 (v) provides an analysis of the impact
4 on lower-wage industries, including by geo-
5 graphic area;

6 (vi) provides an analysis of all non-
7 financial costs, including impact on em-
8 ployment, workplace flexibility, employee
9 benefit structure for exempt and non-
10 exempt workers, career advancement op-
11 portunities, new business formation, busi-
12 ness termination, and loss of market share
13 to foreign competition; and

14 (vii) includes a complete description of
15 any significant alternative as described in
16 section 603(c) of title 5, United States
17 Code, to the substantially similar rule.

18 (B) The Secretary shall publish not less
19 than one small entity compliance guide under
20 section 212 of the Small Business Regulatory
21 Enforcement Fairness Act of 1996 (5 U.S.C.
22 601 note) to assist small entities in complying
23 with the substantially similar rule.

24 (C) The Secretary shall provide notice of
25 the substantially similar rule in the Unified

1 Agenda of Federal Regulatory and Deregula-
2 tory Actions, compiled by the Regulatory Infor-
3 mation Service Center of the General Services
4 Administration.

5 (D) The Secretary shall ensure that the ef-
6 fective date for any final rule with respect to
7 the substantially similar rule shall not be less
8 than 1 year after the publication of such final
9 rule in the Federal Register.

10 (E) The Secretary shall comply with the
11 notice and comment requirements under section
12 553 of title 5, United States Code, and provide
13 a comment period of not less than 120 days.

14 (3) **AUTOMATIC UPDATES.**—Any substantially
15 similar rule promulgated by the Secretary shall not
16 contain any automatic updates to the salary thresh-
17 old for purposes of the exemption under section
18 13(a)(1) of the Fair Labor Standards Act of 1938
19 (29 U.S.C. 213(a)(1)), in accordance with section 5.

20 **SEC. 5. RULE OF CONSTRUCTION.**

21 The requirement under section 13(a)(1) of the Fair
22 Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)) that
23 the definitions applicable for the exemption under such
24 section be “defined and delimited from time to time by
25 regulations of the Secretary” shall be construed to—

1 (1) require the Secretary to issue a new rule
2 through notice and comment rulemaking in accord-
3 ance with section 553 of title 5, United States Code,
4 for each change in any salary threshold under such
5 section 13(a)(1) proposed by the Secretary; and

6 (2) exclude any rule that would result in
7 changes to any salary threshold under such section
8 for multiple time periods, including through any
9 automatic updating procedure.

10 **SEC. 6. REQUIREMENTS FOR DUTIES TESTS.**

11 The Secretary may not promulgate any final rule that
12 includes any provision revising any of the duties tests pro-
13 vided in part 541 of title 29, Code of Federal Regulations
14 (or any successor regulation), for exemption under section
15 13(a)(1) of the Fair Labor Standards Act of 1938 (29
16 U.S.C. 213(a)(1)) unless specific regulatory text for the
17 provision was proposed in the proposed rule.

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