

114TH CONGRESS
2D SESSION

S. 2707

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 SENATE OF THE UNITED STATES

MARCH 17, 2016

Mr. SCOTT (for himself and Mr. ALEXANDER) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

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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.

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.

1 (2) The Secretary significantly underestimated
2 the cost of compliance with the July 6, 2015, pro-
3 posed rule. Public comments calculate such rule will
4 impose financial and non-financial costs substan-
5 tially higher than those estimated by the Depart-
6 ment.

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

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

1 (B) reanalyze “the number of small non-
2 profit organizations and small governmental ju-
3 risdictions . . . that are affected by this rule
4 and the economic impact of this rule on these
5 entities”; and

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

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

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

1 (6) The July 6, 2015, proposed rule automati-
2 cally updates the salary threshold on an annual basis
3 for purposes of defining employees subject to the ex-
4 emption under section 13(a)(1) of the Fair Labor
5 Standards Act of 1938 (29 U.S.C. 213(a)(1)) for all
6 subsequent years, contrary to the requirement under
7 such section that the definitions applicable for the
8 exemption shall be “defined and delimited from time
9 to time by regulations of the Secretary”. The Sec-
10 retary does not have the authority to increase the
11 salary threshold on an annual or other basis without
12 conducting notice and comment rulemaking with re-
13 spect to each change in accordance with section 553
14 of title 5, United States Code.

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

20 **SEC. 3. DEFINITIONS.**

21 In this Act:

22 (1) DEPARTMENT.—The term “Department”
23 means the Department of Labor.

24 (2) JULY 6, 2015, PROPOSED RULE.—The term
25 “July 6, 2015, proposed rule” means the proposed

1 rule of the Department of Labor entitled “Defining
2 and Delimiting the Exemptions for Executive, Ad-
3 ministrative, Professional, Outside Sales and Com-
4 puter Employees” (80 Fed. Reg. 38516 (July 6,
5 2015)) or the final rule with respect to such pro-
6 posed rule.

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

15 (4) SECRETARY.—The term “Secretary” means
16 the Secretary of Labor.

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

23 (6) SUBSTANTIALLY SIMILAR RULE.—The term
24 “substantially similar rule” means any rule or pro-
25 posed rule that is a reissuance of the July 6, 2015,

1 proposed rule in substantially the same form as such
2 rule, or is the issuance of a new rule or proposed
3 rule that is substantially the same as the July 6,
4 2015, rule, including any rule that implements the
5 provisions of section 13(a)(1) of the Fair Labor
6 Standards Act of 1938 (29 U.S.C. 213(a)(1)).

7 **SEC. 4. CONDITIONS PRECEDENT FOR SUBSTANTIALLY**
8 **SIMILAR RULES.**

9 (a) ENFORCEMENT.—

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

13 (2) FINAL RULE.—In the case that the July 6,
14 2015, proposed rule is a final rule on the date of en-
15 actment of this Act—

16 (A) the Secretary shall not enforce the
17 final rule based on conduct occurring before
18 such date of enactment;

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

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

1 (D) nothing in this Act shall be construed
2 to create a right of action for an employer
3 against an employee for the recoupment of any
4 payments made to the employee prior to the
5 date of enactment of this Act that were in com-
6 pliance with such final rule.

7 (b) CONDITIONS FOR SUBSTANTIALLY SIMILAR
8 RULES.—

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

13 (2) REQUIREMENTS FOR SUBSTANTIALLY SIMI-
14 LAR RULES.—The actions required under this para-
15 graph are the following:

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

1 tion and Regulatory Affairs in accordance with
2 such section, and that—

3 (i) accurately identifies the number of
4 affected small entities by using specific
5 data points from the most recent publica-
6 tion of the Statistics of U.S. Businesses by
7 the Bureau of the Census;

8 (ii) addresses regional, State, county
9 (if applicable), metropolitan, and non-
10 metropolitan salary and cost of living dif-
11 ferences;

12 (iii) provides an analysis of any sub-
13 stantially similar rule, which shall include
14 the percentile of full-time salaried workers
15 affected, and such analysis shall be
16 disaggregated by—

17 (I) State;

18 (II) industry subsector;

19 (III) small organizations;

20 (IV) small government jurisdic-
21 tions, including further disaggregation
22 by school district;

23 (V) nonprofit organizations;

24 (VI) Medicare or Medicaid de-
25 pendent health care providers; and

1 (VII) small businesses;

2 (iv) provides an analysis of manage-
3 ment and human resource costs for all em-
4 ployers, including costs associated with
5 changing human resource systems, reclas-
6 sifying employees, and extra hours spent
7 scheduling employees;

8 (v) provides an analysis of the impact
9 on lower-wage industries, including by geo-
10 graphic area;

11 (vi) provides an analysis of all non-fi-
12 nancial costs, including impact on employ-
13 ment, workplace flexibility, employee ben-
14 efit structure for exempt and nonexempt
15 workers, career advancement opportunities,
16 new business formation, business termi-
17 nation, and loss of market share to foreign
18 competition; and

19 (vii) includes a complete description of
20 any significant alternative as described in
21 section 603(c) of title 5, United States
22 Code, to the substantially similar rule.

23 (B) The Secretary shall publish not less
24 than one small entity compliance guide under
25 section 212 of the Small Business Regulatory

1 Enforcement Fairness Act of 1996 (5 U.S.C.
2 601 note) to assist small entities in complying
3 with the substantially similar rule.

4 (C) The Secretary shall provide notice of
5 the substantially similar rule in the Unified
6 Agenda of Federal Regulatory and Deregula-
7 tory Actions, compiled by the Regulatory Infor-
8 mation Service Center of the General Services
9 Administration.

10 (D) The Secretary shall ensure that the ef-
11 fective date for any final rule with respect to
12 the substantially similar rule shall not be less
13 than 1 year after the publication of such final
14 rule in the Federal Register.

15 (E) The Secretary shall comply with the
16 notice and comment requirements under section
17 553 of title 5, United States Code, and provide
18 a comment period of not less than 120 days.

19 (3) AUTOMATIC UPDATES.—Any substantially
20 similar rule promulgated by the Secretary shall not
21 contain any automatic updates to the salary thresh-
22 old for purposes of the exemption under section
23 13(a)(1) of the Fair Labor Standards Act of 1938
24 (29 U.S.C. 213(a)(1)), in accordance with section 5.

1 **SEC. 5. RULE OF CONSTRUCTION.**

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

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

12 (2) exclude any rule that would result in
13 changes to any salary threshold under such section
14 for multiple time periods, including through any
15 automatic updating procedure.

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

17 The Secretary may not promulgate any final rule that
18 includes any provision revising any of the duties tests pro-
19 vided in part 541 of title 29, Code of Federal Regulations
20 (or any successor regulation), for exemption under section
21 13(a)(1) of the Fair Labor Standards Act of 1938 (29
22 U.S.C. 213(a)(1)) unless specific regulatory text for the
23 provision was proposed in the proposed rule.

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