

Statement  
of the  
Independent Electrical Contractors  
Before the  
Committee on Small Business and Entrepreneurship  
United States Senate

Hearing on  
“An Examination of the Administration’s Overtime Rule and the  
Rising Costs of Doing Business”

Washington, DC

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Chairman Vitter, Ranking Member Shaheen and Members of the Committee,

On behalf of the Independent Electrical Contractors (IEC), thank you for holding a hearing titled “An Examination of the Administration’s Overtime Rule and the Rising Costs of Doing Business” that examines the Department of Labor’s (DOL) proposal to change the criteria for the executive, administrative, professional, outside sales, and computer employee exemptions from the overtime requirements under the Fair Labor Standards Act (FLSA). DOL’s proposal to increase the minimum salary to qualify as an exempt employee from the current \$455 per week (or \$23,660 per year) to \$970 per week (\$50,440 per year) next year is an unprecedented increase of over 100%. IEC opposes this massive increase due to the negative impact it would have on IEC member companies, most of which are small businesses, and their employees and urges you to support S. 2707, the Protecting Workplace Advancement and Opportunity Act, which would, among other things, prevent this increase from going into effect.

Established in 1957, IEC is a trade association representing 3,000 members with 50 chapters nationwide. Headquartered in Alexandria, Va., IEC is the nation’s premier trade association representing America’s independent electrical and systems contractors. IEC National aggressively works with the industry to establish a competitive environment for the merit shop – a philosophy that promotes the concept of free enterprise, open competition and economic opportunity for all.

DOL’s proposed salary threshold is higher than minimums set under any state laws—more than \$10,000 higher than that of California and more than \$15,000 higher than that of New York, two of the states with the highest costs of living and the highest salary thresholds. The dramatic increase proposed by DOL will fall disproportionately on workers in cities and states with lower costs of living. For example, white collar workers in West Virginia, Nebraska, Oklahoma and Kentucky may be classified as hourly even though they do the same work as employees classified as exempt in New York and California because of regional differences in pay, which are reflective of regional differences in cost of living.

While hourly pay and nonexempt status is appropriate for certain jobs, it is not appropriate for all jobs; otherwise Congress would not have created any exemptions to the overtime pay requirements. The general public understands this, and in a recent survey conducted by the polling company, inc./WomanTrend, a 65%-majority of adults would increase the salary limit by no more than 50%, or to \$35,490 per year. Only 15% thought the threshold should be increased by over 100%, as DOL is considering.

Many employees classified or reclassified as hourly, nonexempt workers, because of this proposal will lose benefits associated with exempt status. Employers must closely track nonexempt employee’s hours to ensure compliance with overtime pay and other requirements. As a result, nonexempt employees often have less workplace autonomy and fewer opportunities for flexible work arrangements, career training and advancement than their exempt counterparts. In addition, the FLSA’s rigid rules with respect to overtime pay also make it complicated for employers to provide hourly employees with certain incentive pay and bonuses. Thus, the proposal may cause a seismic shift, greatly reducing opportunities to work remotely, work part time, work around doctors’ appointments, handle every day errands, or even carry a smartphone to check emails after work hours—in other words, workplace flexibility would be drastically limited.

Additionally, DOL is planning to increase the minimum salary threshold each year by tying it to either the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly earnings of fulltime salaried employees. Employers would be given only 60-days' notice to adjust to the annual increases. This would also be an unprecedented and unwise change. Automatic updates will require annual reviews of compensation, potential bonuses, and classification of employees. This will be a time- and resource-consuming process. Year after year more employees will be faced with the threat of reclassification to hourly status.

If Congress had wanted automatic updates that fail to take into account changing economic circumstances, it could have done that in the statute, but instead Congress ordered the Department to update the exemptions from "time to time," presumably to take into account changes to the economy. From 1938 to 1975, DOL regularly updated the salary level every five to nine years. During this time, it made various adjustments to salary levels, often imposing different salary requirements for executives, professionals and administrative employees. From 1975 to 2004 the salary level was not updated—likely because of complications in applying outdated provisions of the regulations to modern white collar employees, and in 2004, DOL remedied this by modernizing the duties test.

Presumably since 2004, the current administration did not update the salary level within the historic five-to-nine-year time frame because of the great recession and the associated prolonged and difficult recovery. This was a wise course of action and argues against any "automatic" updates, as automatic increases could exacerbate future difficulties in the economy. Even as we speak, the economy is struggling to get back to pre-recession levels of growth. DOL needs to fulfill its duty and regularly update the threshold through notice-and-comment rulemaking, as it has with every salary increase. The agency has met that requirement before and can do so again in the future without imposing the rigid and costly automatic updates being considered.

DOL has also asked for public input on the current primary duties test. While DOL did not propose any specific regulatory changes, it said in the proposal that it is considering substantial changes to the duties test, including changes resulting in employers having to monitor and track if, and how often exempt employees are performing non-managerial, or nonexempt work. Based on how DOL has presented these questions, the clear indication is that any such changes would be included in the final rule without any opportunity for the public to review or comment on them. Such an approach would, at the very least, violate the spirit of the Administrative Procedure Act (APA), and potentially the letter of the law. The APA exists to make sure interested parties have a meaningful opportunity to comment on regulatory actions that will affect them. Adding new major regulatory text to a final regulation with no opportunity to see it beforehand directly contradicts the goal of the APA. Furthermore, doing so would be at odds with the Administration's promise to increase transparency in its policy setting activities. Before any changes to the primary duties test are finalized, DOL should provide the public an opportunity to review and comment on a specific proposal and related cost estimates.

As for the impact the DOL's proposed rule would have specifically on merit shop electrical contractors, the Committee need only look to the impact it would have on electricians looking to move up within a company. Within most merit shop electrical contractors, young people are hired and enter a four year apprenticeship program where they work during the day and go to school in the evenings. At the end of their training period they are electricians and are still paid on an hourly rate. However, the best and most motivated among them attempt to make the jump from the field to the office and start a career track that leads them toward a management position, normally starting in the office as an estimator.

The job of an estimator is to quantify the labor and materials required to complete a project from drawings provided by owners who are soliciting bids from several contractors. Their work hours can vary widely because the number of owners seeking bids for electrical work does not follow any regular trend. Some weeks there is nothing to estimate while other weeks there are more bid solicitations than can be completed in a typical 40-hour work week.

One of the benefits of making the jump from electrician, where the employee is paid hourly, to that of an estimator, where the employee is paid a salary, is the certainty that comes from knowing how much money will be in their paycheck from week to week. Even though an entry level estimator does not make a lot of money, they never have to worry about a week when they are only paid for 20 hours of work because there wasn't much work to bid.

Another benefit to moving up within the industry as a salaried estimator is becoming eligible for bonuses. The salaried employees in many of our member companies that work to help make their company profitable will often times share in the profits at the end of the year with being rewarded with a bonus. Bonuses are typically rewarded each year commensurate with both the success of the company and the level of commitment of the individual employee, including consideration for extra hours worked. By raising the threshold to an amount that is in the range where many salaried employees are currently paid, contractors will be forced to reclassify many from salary back to hourly. For example, a salaried employee paid \$42,000 per year may occasionally work more than 40 hours in one week. However, at the end of the year this employee might receive a sizeable bonus.

In addition, merit shop electrical contractors will have to adjust schedules and demands on certain employees within the company. For example, when the time arises and extra help is needed, most businesses will request the salaried employees who are paid above the threshold amount to work longer hours, and those who are paid on an hourly bases will be sent home. This removes the ability of the lower paid employee to earn extra money. Not only will overtime pay not be available to them, but the bonuses at year end will go to the salaried employees, which will also lead to a widening of the income gap.

DOL is proposing costly changes that our merit shop electrical contractor members simply cannot absorb and will negatively affect their employees and the economy as a whole. Consequently, IEC urges you to support S. 2707, the Protecting Workplace Advancement and Opportunity Act. This important piece of legislation would nullify the DOL's proposed rule, require the DOL to conduct a comprehensive economic analysis on the impact of mandatory overtime expansion to small businesses, nonprofit organizations and public employers, prohibit automatic increases in the salary threshold and require that any future changes to the duties test must be subject to notice and comment.