



441 G St. N.W.
Washington, DC 20548

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June 23, 2020

The Honorable Lamar Alexander
Chairman
The Honorable Patty Murray
Ranking Member
Committee on Health, Education, Labor, and Pensions
United States Senate

The Honorable Robert C. "Bobby" Scott
Chairman
The Honorable Virginia Foxx
Ranking Member
Committee on Education and Labor
House of Representatives

Subject: *Department of Labor, Wage and Hour Division: Fluctuating Workweek Method of Computing Overtime*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Labor, Wage and Hour Division (the Department) entitled "Fluctuating Workweek Method of Computing Overtime" (RIN: 1235-AA31). We received the rule on June 8, 2020. It was published in the *Federal Register* as a final rule on June 8, 2020. 85 Fed. Reg. 34970. The effective date of the rule is August 7, 2020.

According to the Department, the final rule revises the regulations for computing overtime compensation of salaried nonexempt employees who work hours that vary each week (fluctuating workweek) under the Fair Labor Standards Act, as amended, Act of June 25, 1938, ch. 676, 52 Stat. 1060, classified at 29 U.S.C. §§ 201–219. The Department stated the final rule clarifies that payments, in addition to the fixed salary, are compatible with the use of the fluctuating workweek method of compensation and that such payments must be included in the calculation of the regular rate as appropriate. According to the Department, the final rule also adds examples and makes minor revisions to make the rule easier to understand.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The final rule was published on June 8, 2020. 85 Fed. Reg. 34610. However, the *Congressional Record* does not indicate that either House of Congress received the rule. The agency indicated to us the rule was delivered on June 9, 2020. Email from Wage and Hour Division, Department of Labor, to GAO. The rule has a stated effective date of August 7, 2020. Therefore, the final rule does not have the required 60-day delay in effective date.

Enclosed is our assessment of the Department's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Robert Waterman
Compliance Specialist
Wage and Hour Division
Department of Labor

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF LABOR,
WAGE AND HOUR DIVISION
ENTITLED
“FLUCTUATING WORKWEEK METHOD OF COMPUTING OVERTIME”
(RIN: 1235-AA31)

(i) Cost-benefit analysis

The Department of Labor (Department) estimated the final rule will impose a one-time rule familiarization cost of \$32,828,582. The Department further estimated the rule would lead to annual costs of \$3.7 million at the 3 percent discount rate and \$4.4 million at the 7 percent discount rate over the next 10 years.

The Department also stated it believes the final rule could reduce avoidable disputes and litigation regarding the compatibility between supplemental pay and the fluctuating workweek method. The Department further stated it believes that the final rule will allow employers and employees to better utilize flexible work schedules.

The Department also stated the final rule may cause transfer payments to flow from some employers to their employees and also may cause transfer payments to flow from employees to some employers; however, the incidence, magnitude, and ultimate beneficiaries of such transfers is unknown.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609

The Department certified the final rule will not have a significant economic impact on a substantial number of small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

While this rulemaking would affect employers in the private sector, the Department stated the final rule is not expected to result in expenditures greater than \$100 million in any one year.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On November 5, 2019, the Department published a proposed rule. 84 Fed. Reg. 59590. The Department received approximately 36 comments from individual employees, employer and industry associations, employee advocacy groups, non-profit organizations, law firms, professional associations, and other interested members of the public. The Department addressed the comments in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

The Department determined the final rule does not require a collection of information subject to approval by the Office of Management and Budget (OMB) under the Act, or affect any existing collections of information.

Statutory authorization for the rule

The Department promulgated the final rule pursuant to sections 201 *et seq.* of title 29, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

The Department stated the final rule is economically significant and that it was reviewed by OMB.

Executive Order No. 13,132 (Federalism)

The Department determined the final rule would have no federalism implications. According to the Department, the final rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.