



The Voice of Small Business®

September 13, 2016

The Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Dear Mr. Secretary:

RE: Petition for Change of Effective Date of the Final Rule titled “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” (81 *Fed. Reg.* 32391) (May 23, 2016) (commonly called the “Overtime Rule”)

The National Federation of Independent Business (NFIB) hereby petitions the U.S. Department of Labor to change from December 1, 2016, to June 1, 2017, the effective date of the Final Rule titled “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” published in the *Federal Register* on May 23, 2016 (81 *Fed. Reg.* 32391). As you know, the Final Rule substantially expands business costs for overtime by doubling, from \$23,660 to \$47,476, the employee salary threshold used in the determination of whether the Fair Labor Standards Act exempts the employee from overtime. The Final Rule has a substantial impact on small businesses, including the members of the NFIB. Achieving compliance with the Final Rule across the universe of small businesses takes substantial time. The Department issued its Final Rule on May 23, 2016, with an effective date of December 1, 2016, leaving a mere 25 weeks for America’s small businesses to ready themselves for compliance with the Final Rule.

NFIB is an incorporated association and the leading advocate for America’s small businesses, including the more than three hundred thousand members of NFIB. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. The NFIB files this petition for rulemaking in the exercise of the constitutional right to petition the government for the redress of grievances and the right to petition for issuance, amendment, or repeal of rules granted by section 553(e) of title 5, United States Code.

The NFIB continues to oppose the rule, including for the reasons stated in its comments on the proposed rule filed on September 3, 2015, and the Department should not construe NFIB’s

submission of this petition seeking a change in the effective date of the rule as NFIB support for or acquiescence in the rule. Also, the NFIB continues to seek legislative relief for small businesses from the Final Rule (see, e.g., H.R. 5813 of the One Hundred Fourteenth Congress).

Large corporations with legal, financial, and personnel departments that have lawyers, accountants, and human resources (HR) specialists who routinely read the Federal Register and the Code of Federal Regulations, and who command substantial resources for analyzing the legal status of employees and making adjustments to timekeeping and payroll systems, may prove able to cope with the new Final Rule in a 25 week window of time. But the Department cannot reasonably expect America's small businesses to match them. The Department of Labor should take greater account of the word "small" as it modifies the term "business"-- the "small" is really quite small.

According to the 2014 Annual Survey of Entrepreneurs by the U.S. Bureau of the Census, in the table on *Statistics for U.S. Employer Firms by Sector, Gender, Ethnicity, Race, Veteran Status, and Employment Size of Firm for the U.S., States, and Top 50 MSAs: 2014* (available through the Bureau's American Fact Finder website's advanced search as table name SE1400CSA01), the U.S. has 5,437,782 businesses with paid employees. Over half of those businesses (2,768,756) have only one to four employees. Adding in another 950,224 businesses that have 5 to 9 employees, over 68% of America's businesses (3,718,980) have fewer than 10 employees. A business that can afford fewer than 10 employees would rarely include among them a lawyer, an accountant, or an HR specialist (except, of course, for the little law firms and little accounting firms) adept at absorbing the 161-page Final Rule document in the Federal Register.

As for business revenue, the 2014 Annual Survey of Entrepreneurs, in the table on *Statistics for U.S. Employer Firms by Sector, Gender, Ethnicity, Race, Veteran Status, and Receipts Size of Firm for the U.S., States, and Top 50 MSAs: 2014* (table name SE1400CSA03) shows that, of the 5,437,782 U.S. businesses with paid employees, those with annual receipts (receipts, not profits) of less than \$10,000 number 106,438; those with receipts of \$10,000 to \$49,999 number 386,293; those with receipts of \$50,000 to \$99,999 number 508,679, and those with receipts of \$100,000 to \$249,999 number 1,114,716. Thus, of the 5,437,782 U.S. businesses with paid employees, a total of 2,116,126 (39%) have receipts of less than \$250,000. A business with receipts (again receipts, not profits) of less than \$250,000 -- and certainly the 492,731 firms with receipts of less than \$50,000 -- are not likely (again setting aside the little law firms and little accounting firms) to include among their employees a lawyer, accountant, or HR specialist, nor to be able to afford an outside lawyer, accountant, or HR specialist.

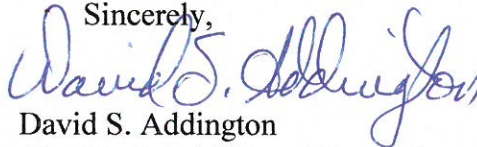
As the NFIB and the National Small Business Association made clear in their filings on the rule before it became final, small companies typically lack specialized compliance personnel and sophisticated timekeeping and payroll systems (81 *Fed. Reg.* 32527). Moreover, as the Wisconsin Agri-Business Association and the Small Business Legislative Council made clear in their filings, small businesses operate on narrow margins (81 *Fed. Reg.* at 32526). Thus, small business owners and managers lack the internal resources needed to effect prompt compliance with the Final Rule and they lack the wherewithal to hire outside resources such as lawyers and accountants to substitute for the lack of internal resources. For many small businesses, the only solution is for the owner or manager unaided, diverting time and attention from the business of

which the owner or manager is an integral, day-to-day part, to spend the substantial amount of time necessary to find, comprehend, and implement the Final Rule.

The Department of Labor is asking more of America's small businesses than is reasonable (or perhaps is even possible) when it asks the 68% of America's businesses that have fewer than 10 employees, or the 39% of America's businesses with annual receipts of less than \$250,000, to first become aware of (a process that is informal and often word-of-mouth for many small businesses, involving a time lag), and then find, read, comprehend, and implement, the Final Rule in the 25 week period from May 23 to December 1, 2016.

America's small businesses deserve and will need more time to prepare for implementation of the Final Rule. For the foregoing reasons, the National Federation of Independent Business petitions the U.S. Department of Labor to change from December 1, 2016, to June 1, 2017, the effective date of the Final Rule titled "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees" published in the *Federal Register* on May 23, 2016 (81 *Fed. Reg.* 32391).

Sincerely,

A handwritten signature in blue ink, reading "David S. Addington". The signature is fluid and cursive, with the first name "David" being the most prominent.

David S. Addington
Senior Vice President and General Counsel