

TESTIMONY BEFORE THE UNITED STATES CONGRESS  
ON BEHALF OF THE  
**NATIONAL FEDERATION OF INDEPENDENT BUSINESS**

**NFIB**  
The Voice of Small Business.®

Statement for the Record of Karen Harned  
Executive Director, NFIB Small Business Legal Center  
Before the  
**U.S. House of Representatives Committee on Small Business**  
**[Hearing on: “Regulation: The Hidden Small Business Tax”](#)**

April 14, 2016

National Federation of Independent Business (NFIB)  
1201 F Street, NW Suite 200  
Washington, DC 20004

Chairman Chabot and Ranking Member Velazquez,

On behalf of the National Federation of Independent Business, I appreciate the opportunity to submit for the record this testimony for the House Small Business Committee's hearing entitled, "Regulation: The Hidden Small Business Tax."

My name is Karen Harned and I serve as the executive director of the NFIB Small Business Legal Center. NFIB is the nation's leading small business advocacy association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents about 325,000 independent business owners who are located throughout the United States.

The NFIB Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses.

### **Impact of Regulation on Small Business**

Overzealous regulation is a perennial concern for small business. The uncertainty caused by future regulation negatively affects a small-business owners' ability to plan for future growth. Since January 2009, "government regulations and red tape" have been listed as among the top-three problems for small business owners, according to the NFIB Research Foundation's monthly Small Business Economic Trends survey.<sup>1</sup> Not surprisingly then, the latest Small Business Economic Trends report analyzing March 2016 data had regulations as the top issue small business owners cite when asked why now is not a good time to expand.<sup>2</sup> Within the small business problem clusters identified by Small Business Problems and Priorities report, "regulations" rank second behind taxes.<sup>3</sup>

Despite the devastating impact of regulation on small business, federal agencies continue to churn out approximately 10 new regulations each day.<sup>4</sup> According to the Administration's fall 2015 regulatory agenda, there are 3,297 federal regulations in the pipeline, waiting for implementation.<sup>5</sup>

When it comes to regulations, small businesses bear a disproportionate amount of the regulatory burden. Regulatory costs are now nearly \$12,000 per employee per year, which is 30 percent higher than the regulatory cost burden larger businesses face.<sup>6</sup>

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<sup>1</sup> NFIB Research Foundation, *Small Business Economic Trends*, at p. 18, March 2016. <http://www.nfib.com/research-foundation/surveys/small-business-economic-trends>

<sup>2</sup> *Id.*

<sup>3</sup> Wade, Holly, *Small Business Problems and Priorities*, at p. 18, August 2012.

<https://www.nfib.com/Portals/0/PDF/AllUsers/research/studies/small-business-problems-priorities-2012-nfib.pdf>

<sup>4</sup> Data generated from [www.regulations.gov](http://www.regulations.gov)

<sup>5</sup> <http://www.reginfo.gov/public/do/eAgendaMain>

<sup>6</sup> Crain, Nicole V. and Crain, W. Mark, *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, September 10, 2014.

This is not surprising, since it's the small business owner, not one of a team of "compliance officers" who is charged with understanding new regulations, filling out required paperwork, and ensuring the business is in compliance with new federal mandates. The small business owner is the compliance officer for her business and every hour that she spends understanding and complying with a federal regulation is one less hour she has to service customers and plan for future growth.

During my fourteen years at NFIB I have heard countless stories from small business owners struggling with a new regulatory requirement. To them, the requirement came out of nowhere and they are frustrated that they had "no say" in its development. That is why early engagement in the regulatory process is key for the small business community. But small business owners are not roaming the halls of administrative agencies, reading the *Federal Register* or even *Inside EPA*. Early engagement in the rulemaking process is not easy for the small manufacturer in White Oak, Texas or Bismarck, North Dakota. As a result, small businesses rely heavily on the notice-and-comment rulemaking process, small business protections in the Regulatory Flexibility Act, and internal government checks like the Office of Advocacy at the Small Business Administration and Office of Information Regulatory Affairs to ensure agencies don't impose costly new mandates on small business when viable and less expensive alternatives to achieve regulatory objectives exist.

As we come to the end of President Obama's administration, small businesses are already wading through a number of new regulatory requirements with more mandates on the horizon.

While new environmental and financial regulations and regulatory proposals have definitely had a negative impact on small business over the last few years, today I want to focus on a category of regulations that doesn't seem to get as much attention from Washington – labor regulations. Small businesses can be found in virtually all industries. Whether you are a manufacturer, baker, or dry cleaner the one thing you have in common with other business owners is employees. And for the small businesses NFIB represents with, on average, ten or fewer employees, these regulations can be some of the most challenging. The small metal fabricator, for example, goes into business knowing how to finish metal products, he has a good sense of where he can get the supplies he needs, and what kind of skills he's looking for in a workforce. What he likely does not know are the best business practices regarding wage and overtime calculation, compliance with various state and federal discrimination laws, and hiring. Moreover, it is unlikely that the small metal fabricator has a human resources compliance manager to help him navigate those different rules.

Therefore, labor laws definitely represent a significant regulatory "tax" on small business that is likely to be much greater than the "tax" faced by bigger businesses with in-house HR departments.

With that as the backdrop, several new and proposed regulations out of the Department

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<http://www.nam.org/Data-and-Reports/Cost-of-Federal-Regulations/Federal-Regulation-Full-Study.pdf>

of Labor have been of particular concern to NFIB and its members.

### **Department of Labor “Overtime” Proposed Rule**

On July 6, 2015, the Department of Labor published in the *Federal Register* a notice of proposed rulemaking regarding “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees.”

The Fair Labor Standards Act (FLSA) generally requires covered employers to pay their employees overtime premium pay of one and one-half times the employee’s regular rate of pay for all hours worked over 40 in a workweek. However, there are a number of exemptions from the FLSA’s minimum wage and overtime requirements. Section 13(a)(1) of the FLSA, codified at 29 U.S.C. 213(a)(1), exempts from both minimum wage and overtime protection “any employee employed in a bona fide executive, administrative, or professional capacity...or in the capacity of outside salesman.” The FLSA does not define the terms “executive,” “administrative,” “professional,” or “outside salesman.”

DOL has consistently used its rulemaking authority to define and clarify the section 13(a)(1) exemptions. Since 1940, the implementing regulations have generally required each of three tests to be met for the exemptions to apply. First, the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the “salary basis test”). Second, the amount of salary paid must meet a minimum specified amount (the “salary level test”). Third, the employee’s job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the “duties test”).

In its proposed rule, DOL proposes changes only to the salary level test. Currently, the minimum salary that a worker must receive is \$455 per week (\$23,660 annually). The proposal seeks to more than double that amount to \$970 per week (\$50,440 annually). In addition, DOL seeks – for the first time – to automatically increase the salary threshold at either the 40th percentile of all salaried wage earners, or at a rate equivalent to the Consumer Price Index for All Urban Consumers (CPI-U). No timeframe for how frequently this increase will take place is proposed, however.

### **Increased labor and regulatory compliance costs**

According to DOL’s initial regulatory flexibility analysis (IRFA), small businesses will face nearly \$750 million in new costs in the first year if the rule is finalized as proposed. These costs are made up of \$186.6 million in costs associated with implementing the rule and \$561.5 million in additional wages that will now be paid to workers.<sup>7</sup> Unfortunately, these estimates simultaneously underestimate the compliance costs to small businesses and overestimate the transfers to employees.

First, the IRFA underestimates compliance costs because it does not take into account business size when estimating the time it takes to read, comprehend and implement the proposed changes. As an example, DOL “estimates that each establishment will spend

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<sup>7</sup> *Federal Register*, Vol. 80, No. 128, July 6. Page 38606.

one hour of time for regulatory familiarization.” This assumption erroneously disregards a basic reality of regulatory compliance – the smaller the business, the longer and more expensive it is to comply. As previously noted, numerous studies have identified that federal regulatory compliance disproportionately affects small businesses, as compared to larger ones. Primarily, this is because small companies typically lack specialized compliance personnel. Typically, the duty of compliance officer falls to the business owner or the primary manager. These individuals are generally not experts in wading through regulatory text, so familiarization time is greater than for large companies. Alternatively, a small business could hire an outside expert to devise a compliance plan, but this cost will also be significantly greater than what a firm with in-house compliance staff would endure.

In this case, complying with the rule requires far more than simply looking at a salaried employee’s weekly wages. This is just one piece of the puzzle. If an employee is currently salaried and makes greater than the current threshold of \$455 per week, but less than the proposed \$970 per week, the small business owner must now spend a considerable amount of time calculating out varying scenarios – none of which is beneficial for anyone involved.

#### One NFIB member’s story

The story of NFIB member, Robert Mayfield, is illustrative of the real and negative effects likely to occur if DOL promulgates a final rule similar to what has been proposed.

Mr. Mayfield owns five Dairy Queens in and around Austin, Texas and is very concerned about the impact that the proposal would have on his businesses and the individuals whom he employs. In his words, the rule would be “bad news” for both employers and employees.

Currently, Mr. Mayfield employs exempt managers at all five locations. These individuals earn, on average, about \$30,000 per year and work between 40-50 hours per week. The managers also receive bonuses, more flexible work arrangements, including paid vacation and sick time, training opportunities, and promotions that Mayfield’s hourly employees do not. Mayfield explained that, in his company, promotion to an exempt management position carries a great deal of status with employees (who upon promotion to a manager position) boast about no longer having to punch time clocks. In Mayfield’s opinion, it would be demeaning to force managers to punch a clock. He also noted that his managers have more flexibility for things like doctors’ appointments and kids’ activities. Since they aren’t punching in and out on a time clock, they are paid a weekly salary even if they’re out for personal activities.

Under DOL’s proposal, Mayfield predicted that he’ll need to move the managers back to hourly positions as there is simply no way he can afford to pay over 10 managers \$50,000 each. As a result, he predicted the skill level of his managers will decrease. Moreover, Mayfield noted that rather than giving managers overtime, he would likely hire a few more part-time employees. What he would not do would be to pay managers overtime; instead he would continue to strictly enforce a no-overtime policy. Overtime costs, he said, could not be passed on to customers nor could the business afford to

absorb added labor costs.

Overall, Mayfield said the effect would be lower-skilled managers and higher turnover, which would impact the quality of service offered at his restaurants.

“I feel most sorry for the many enthusiastic people who work for me who have worked hard to advance into their dream of a salaried management position,” Mayfield said. “They will have their feelings hurt and be insulted to find out that their own government considers them to not be worthy of a salaried position that is eligible for a bonus based on profits that they would have helped to plan. It is a real source of pride and prestige to be on salary and not have to punch a time clock.”

“How can you be a manager and punch a time clock? The idea is to do a job, not keep track of your hours. A manager’s income is based on results and profits, not hours worked. This is the antithesis of building a management mentality or in training someone to be a manager. It would also disrupt the workplace and lead to fewer management opportunities. It would hurt, not help, the people they claim to want to help.”

### DOL Overtime Rule Demonstrates Need for Regulatory Reform

NFIB believes that this proposed rule demonstrates the need to reform the RFA and its amending laws. Currently, agencies are required to perform an IRFA prior to proposing a rule that would have a significant economic impact on a substantial number of small entities – as DOL has confirmed this proposed rule would. While these analyses are helpful for agencies to realize the cost and impact a proposed rule would have on small business, agencies would get additional benefit from convening a Small Business Advocacy Review panel for rules of significant impact.

These panels allow an agency to walk through a potential proposal with small business owners, either in person or via telephone, and receive feedback and other input from those who will be directly impacted by the regulation. These panels are currently required for the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Financial Protection Bureau. NFIB believes all agencies – in particular the entire DOL – would achieve better regulatory outcomes if required to go through such a procedure.

### OSHA Silica Rule

On March 25, 2016 OSHA published in the *Federal Register* its final rule regarding Occupational Exposure to Respirable Crystalline Silica.

Silica is a ubiquitous mineral that is naturally found in many materials that our economy and lives depend on every day. It is prevalent in the construction and manufacturing industries, though it is also found in dozens of other commercial applications. Given the widespread use of materials containing silica, this rule will have a substantial economic impact on small businesses in many sectors. OSHA estimates that about 533,000 businesses – most of which are small businesses – and 2.1 million workers are covered.

With this rule, OSHA is reducing the permissible exposure limit (PEL) for respirable crystalline silica by half for most industries, and by 80 percent for the construction industry. This is despite Centers for Disease Control and Prevention (CDC) data that shows that between 1968 and 2007 silicosis deaths dropped 93 percent – from 1,157 to about 1501.<sup>8</sup> This success comes even though OSHA has been unable to ensure compliance with the current PEL. OSHA’s own compliance data shows that about 30 percent of covered businesses are not in compliance. Yet, rather than focus on helping those businesses attain compliance, OSHA is mandating a substantial reduction of the PEL that will require expensive measures that may be unnecessary – causing even more businesses to be out of compliance.

OSHA also failed to meet its obligations under the RFA and its amending law, the Small Business Regulatory Enforcement Fairness Act. The agency underpinned its legal obligation to conduct a small business impact analysis on a SBAR panel that is more than a decade old. Substantial changes in technology and work practices over the last ten years necessitate a new panel being convened before this proposal moves forward. Even disregarding this clear failure, OSHA ignores major recommendations of the 2003 panel, including a recommendation that OSHA withdraw the rulemaking because it was not clear that the rule would achieve OSHA’s objectives.

Last but not least, NFIB’s Research Foundation used OSHA’s figures to calculate the true economic impact of this rule on the private sector and the broader economy. According to NFIB’s research, OSHA’s estimate of \$637 million in compliance costs for employers will result in an average of \$7.2 billion in lost real output per year.<sup>9</sup> NFIB’s model calculates a net loss of 27,000 jobs over the ten-year analysis window.

NFIB is very concerned about the “small business tax” associated with the unnecessary silica rule with which compliance will be extraordinarily expensive. Moreover, NFIB is troubled by OSHA’s failure to adequately consider the impact of the rule on small businesses and their employees.

### **Other Labor-Related Rules**

Two other DOL rules are of particular concern to small business.

#### **Paid Sick Leave for Federal Contractors**

On February 26, 2016 the agency proposed a rule “Establishing Paid Sick Leave for Federal Contractors.” If promulgated, small businesses that have contracts with the federal government would be required to provide employees up to seven days of paid sick leave a year, including leave taken to care for a family member. Among other things, NFIB is concerned that this proposed rule would be particularly burdensome on small federal contractors in one of two ways. For covered small businesses that do not have a paid sick leave program, they will have to implement one and figure out how they will pay for it. For covered small businesses that already have a paid leave

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<sup>8</sup><http://www2a.cdc.gov/drds/worldreportdata/FigureTableDetails.asp?FigureTableID=2595&GroupRefNumber=F03-01>

<sup>9</sup> Chow, Michael J., *Economic Impact Analysis of a Respirable Crystalline Silica Permissible Exposure Limit of 50 ug/m3 Using the Business Size Insight Module*, NFIB Research Foundation, January 16, 2014.

program, they will have to reconfigure the program to meet the highly prescriptive requirements of the proposed rule.

### “Persuader Rule”

On March 24, 2016 DOL finalized a rule, “Interpreting the ‘Advice’ Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, which will make it more difficult and expensive for small business owners to access labor and employment attorneys. The rule is an expansion of the federal “persuader rule,” in which businesses must publicly disclose whenever they hire consultants and labor counsel to assist with anti-union efforts. Under the new rule, attorneys would also need to disclose the names of clients to whom labor information is provided. If either party (attorney or business) does not file or provides false information, it can mean jail time.

The rule would affect small businesses the most because they typically don’t have in-house lawyers or in-house labor relations experts. Worse, the American Bar Association predicts the “persuader rule” will make it much harder for owners to get legal advice. Because the new rule conflicts with attorney-client confidentiality rules, the ABA forecasts that fewer lawyers will practice labor law.

Among other things, NFIB believes DOL is acting outside its authority under the LMRDA, the rule is in violation of the protections afforded all Americans under the First Amendment, and that the agency failed to properly consider small business impact as required under the RFA. As a result, on March 31, we challenged the rule in a federal district court in Texas.

### **Environmental Regulations of Concern to Small Business**

In addition to the Administration’s labor-related regulatory agenda, NFIB remains concerned about the tremendous costs small businesses face in light of two rules promulgated by EPA last year.

#### Waters of the U.S.

On June 29, 2015, EPA and the Army Corps of Engineers issued the “Waters of the U.S.” rule, which changes the Clean Water Act’s definition for “waters of the United States” to govern not just navigable waterways, as stated in the statute, but every place where water could possibly flow or pool. Under the rule, EPA and the Army Corps may now require homebuilders, farmers, and other property owners to spend tens of thousands of dollars on a permit before they can build or even do simple landscaping around seasonal streams, ponds, ditches, and depressions.

The moment this rule goes into effect small businesses will have to seek a federal permit from EPA to improve or develop any land that includes water no matter how incidental. That includes even the smallest project, like digging a post hole or laying mulch, as long as part of that land is wet. Nearly a decade ago, the average cost of a CWA permit was over \$270,000. Altering land without a permit can lead to fines of up



to \$37,500 per day.

Amazingly, EPA and the Army Corps failed to analyze the small business impact of the rule as required by the RFA. In early 2015, SBA's Office of Advocacy formally urged EPA to withdraw the WOTUS rule because of its potentially huge impact on small businesses. It cited the EPA's own estimate that the rule would cost the economy more than \$100 million.

NFIB, joined by the U.S. Chamber of Commerce, challenged the rule in a federal court in Oklahoma arguing, among other things, that EPA is acting outside of its authority under the Clean Water Act and the rule is an unconstitutional infringement of state rights to regulate intrastate lands and waters.

On October 9, 2015, the 6<sup>th</sup> Circuit Court of Appeals stopped EPA and the Army Corps from moving forward in implementing the rule until the 6<sup>th</sup> Circuit can determine whether or not it is legal.

### Clean Power Plan

On October 23, 2015, EPA issued the Clean Power Plan rule that requires states to reduce carbon emissions by shutting down many coal-fired power plants. The White House has stated that EPA's rule will "aggressively transform ... the domestic energy industry" and sweeps virtually all aspects of electricity production in America under the agency's control.

Under the rule, states are required to find a mix of alternative energy sources, like wind and solar, to make up for the shuttering of coal-fired power plants. Increased reliance on these alternative energy sources is expected to significantly raise the costs of electricity and also threatens its reliability.

Even the Administration expects its Clean Power Plan to drive up the cost of electricity, the impact of which will fall hard on small businesses that depend heavily on affordable energy. NFIB research shows that the cost of electricity is already a top concern among small business owners across the country. Small businesses will be squeezed between higher direct expenses and lower consumer demand resulting from higher home electric bills.

The day the rule was issued NFIB joined the Chamber of Commerce, the National Association of Manufacturers, and other industry groups in suing EPA. We argue that the rule is an unconstitutional infringement of State rights and outside of EPA's statutory authority under the Clean Air Act. On February 9, 2016, the Supreme Court stopped EPA and states from moving forward in implementing the rule until the courts, including the Supreme Court, can determine whether or not it is legal.

Our case is currently in the DC Circuit Court of Appeals. Briefing will occur through the spring. Oral argument is scheduled for June 2.

## **Conclusion**

Small businesses are the engine of our economy. Unfortunately, they also bear a disproportionate weight of government regulation. The effects of overregulation require an enormous expense of money and time to remain in compliance. The effort required to follow these and other regulations prevent small business owners from growing and creating new jobs.

Thank you for holding this important hearing shining a light on the fact that regulations are a hidden “tax” on small businesses. I look forward to working with you on this and other issues important to small business.