MERCATUS CENTER
George Mason University
Bridging the gap between academic ideas and real-world problems

POLICY BRIEF

DOES THE DOL'S OVERTIME REGULATION MAKE SENSE IN AN INFORMATION ECONOMY?

Liya Palagashvili

The Department of Labor has not done the analysis necessary to identify and understand the implications of overtime regulation within industrial sectors and across the economy as a whole. It instead ignores the ways employers and employees are likely to respond to incentives created by the regulation and how the regulation will likely prevent employers and employees from entering into certain types of employment arrangements that are becoming common in the information economy and are beneficial to both parties. It also does not provide an analysis of how the overtime regulations will impact our most dynamic sector, the tech start-up industry.

The Department of Labor included many exemptions for this regulation, presumably because it recognizes that in professions such as academia it is difficult and improbable to pay by the hour. This recognition, however, is quite limited. In the current information economy, more and more jobs fit the work model of academia rather than the by-the-hour model of traditional manufacturing. In an information economy it is difficult to measure what counts as "work." If employees check email outside business hours to monitor correspondence with a client or colleague, does that count as work? If it does, an employer could legally comply with the rule by cutting off email service between 5 p.m. and 9 a.m., but such an option would disrupt the flow of information that employees need to be efficient and effective. The Department of Labor issued a statement indicating that the "email" question or the "telecommuting" question is out of its purview. This response is surely deficient. The Department of Labor bears the responsibility to analyze these significant and foreseeable implications that its rule will have, not simply the most direct requirements of the rule.

In a letter to the editor in the *Wall Street Journal* on April 17, 2016, David Weil of the Department of Labor asserts that the new overtime regulation does not require employers to make their employees hourly. He therefore concludes that the rule will not create hourly workers. This statement from the administrator of the Wage and Labor Division focuses narrowly on the legal structure of the rule and effectively dismisses its economic effects. In light of long-standing regulatory analysis standards for federal agencies, Weil's disregard for how the rule produces foreseeable economic effects is rather disturbing. The historical evidence is clear that employers have switched employees to hourly pay in response to overtime regulation. Why is this economic reality deemed irrelevant in this case? Failure to perform analysis that examines these known economic effects fails to adhere to basic regulatory analysis practices.

Moreover, in its regulatory impact analysis, the Department of Labor cites studies and conclusions based on the manufacturing economy of the mid-to-late 20th century. Requiring employers to pay by the hour and to pay overtime could more effectively align with how work was performed in a manufacturing economy. But the structure and function of the US economy today is not like that of the manufacturing economy; the economy has evolved into an information economy. The Department of Labor appears to have made little or no effort to estimate how employers in an information economy will respond to the rule. In particular, the department has no analysis on how the rule could affect entrepreneurial sectors such as tech start-ups.

To understand what the real outcomes are, the Department of Labor needs to analyze how this regulation could impact the way in which work is performed and compensated across the diversity of industries in today's economy. One suggestion is to survey at least 500 employers across various industries, with an emphasis on informative-intensive and tech start-up–oriented industries. The survey should include questions that focus on understanding both how work is compensated in an information economy and the changes employers would make to comply with the rule. For example,

1. "If you had to track how many hours your employees worked, how would you do it?"

2. "Do you currently monitor the hours of your employees who telecommute? If so, how do you monitor those hours?"

3. "If you had to track how many hours your employees worked and had to pay time-and-a-half for each hour worked after 40 hours, how would this change your approach to employee telecommuting?"

4. "Do you consider reading and responding to work emails from home 'working'?"

The survey questions should be tailored specifically to understanding the implications of this rule in an information economy. We need a survey because jobs in an information economy are fundamentally different, and there are no studies available on the implications of the rule in the 21st century on factors that policymakers, scholars, employees, and employers care about (e.g., telecommuting, tracking hours, worker flexibility).

Regulators and policymakers should aim to learn the following from the survey: Will employers cut the base pay of their workers in response to the rule? Will they prohibit email checks after work hours? Will they replace their junior roles with a smaller number of more senior roles? If employees are paid performance bonuses, will they see their bonuses diminish? Will employers offer fewer flexible work hours and prohibit workers from telecommuting?

Our review of the Department of Labor's proposed rule indicates that it may well fail to achieve its stated objectives and impose more harm than benefit on a number of workers throughout the economy. The department has the means and responsibility to perform the analysis necessary to set economically sound policy rather than stand by a symbolic and potentially harmful policy.

ABOUT THE AUTHOR

Liya Palagashvili is the coauthor, with Donald J. Boudreaux, of "An Economic Analysis of Overtime Pay Regulations" (Working Paper, Mercatus Center at George Mason University, Arlington, VA, April 2016). She is an assistant professor of economics at SUNY-Purchase College. Palagashvili earned her PhD in economics from George Mason University in 2015. She was recently named one of *Forbes* magazine's 2016 "30 under 30" in law and policy.