

Is the overtime rule vulnerable?

Opponents may focus lawsuit on mathematical soft spot

It's been a quiet summer since the Labor Department released its controversial new rule to alter the Fair Labor Standards Act's overtime provisions in May. But that's all about to change, as opponents have started gearing up to stop the rule—either by litigation or by legislation—before it takes effect Dec. 1.



What part of the DOL rule will be the most vulnerable to court scrutiny? It will likely focus on an added-on provision called “automatic indexing.”



What is automatic indexing?

Automatic indexing means that the new salary threshold will not stay at its new mark (\$47,476 per year) forever. It will be adjusted for the rate of inflation every three years. What's more, these mathematical adjustments—all almost certainly upward—will happen automatically, without any human involvement necessary.



Opponents feel that automatic indexing would take away lawmakers' hands-on ability to keep the salary threshold in check. Supporters counter that this is ultimately a good thing, because it won't require lawmakers to keep going back to the drawing board to recalculate the threshold.

From a legal standpoint, the crucial question is whether the Labor Department had the authority to add an automatic indexing component to the rule at all.

“Critics of the new rule say automatic indexing isn't what Congress had in mind when it empowered the DOL to update the exemption ‘from time to time,’” according to a Bloomberg BNA article. There are some laws that explicitly call for automatic indexing, they argue—and the FLSA isn't one of them.



DOL has acknowledged that the FLSA doesn't reference automatic indexing. But it added that the law doesn't mention the salary threshold itself either, suggesting that such specificity is not needed to administer the law.



Meanwhile, on the legislative side, the action has already begun. Several bills introduced by Republicans in Congress before the summer recess are now lining up to be heard, including an appropriations rider to block it. Even a small group of Democrats in the House have filed a bill that would phase in the rule over three years and do away with automatic indexing.

But there are two main forces working against these efforts: an election-shortened final session that leaves little time for distracted politicians to push through any substantive legislation, and a president who will almost certainly veto any measure that would limit the scope of the rule.

That leaves it up to the courts to determine whether the rule will make it to Dec. 1 unscathed, or whether it will be sidetracked or undercut by challenges to its automatic indexing provision.

