

## An Untested Clause Could Fortify DOL's Overtime Rule


By **Jon Steingart**

Law360 (May 8, 2024, 2:40 PM EDT) -- A novel clause in the U.S. Department of Labor's rule expanding workers' overtime protection could help it hold up if critics challenge it in court, experts told Law360.



The DOL said in its final rule that it included a severability clause in part because it received comments from business and conservative groups after it proposed the rule that suggested they plan to sue to block it. (AP Photo/Patrick Semansky)

The April 26 **rule**, which the department estimated would entitle **4.3 million more workers** to premium pay when they work more than 40 hours in a week, has a severability clause that says if any part of the rule is blocked, the remaining pieces should remain effective. The rule's components include raising the salary threshold, which would entitle more employees to overtime, a separate formula for highly compensated employees and a procedure for automatically updating both groups' coverage every three years beginning in 2027.

The rule is similar to an effort the DOL rolled out in 2016 under former President Barack Obama that would have raised salary thresholds and enacted automatic updates, although that version did not include a severability clause. A Texas federal court **enjoined that rule** just before it was set to take effect, holding that its emphasis on salary thresholds would nullify the significance of a worker's duties, which the Fair Labor Standards Act  said is a factor in determining overtime eligibility.

David Weil, a former DOL Wage and Hour Division administrator who was a principal architect of the 2016 rule, told Law360 that a severability clause is key because the 2024 rule's main components — raising the

salary threshold and providing for automatic updates — are justified by their own separate reasons. Weil is now a professor of social policy and economics at the Heller School for Social Policy and Management at Brandeis University.

"If it does head into court as it's likely to, you'd have to consider the two issues separately," he said. The 2024 rule's severability clause "is important because it does act to detach the two issues."

Increasing the salary threshold can undo the erosion caused by inflation since the last update in 2019, he said. And automatic updates every three years would create a predictable schedule that businesses can prepare for more readily than the intermittent approach the DOL has used in the past, he said.

To raise the salary threshold, the rule uses two formulas: one that results in a cutoff for most employees at \$844 per week as of July 1 and a second that raises it to \$1,128 beginning Jan. 1. Two more formulas raise existing thresholds for highly compensated employees, who will have a stricter overtime eligibility test if they make more than \$133,000 on July 1 and \$151,000 on Jan. 1.

The July 1 increase for most workers uses the 2019 formula the DOL adopted under former President Donald Trump, after litigation stalled the Obama-era rule, that pegs the threshold to the 20th percentile of workers' earnings in the Census region with the lowest incomes. The Jan. 1 increase uses the 35th percentile, which the DOL introduced in the 2024 rule.

For highly compensated employees, both dates' thresholds are linked to nationwide percentiles.

Weil said the overtime rule's critics may argue that the variety of formulas it uses for raising the salary threshold and the system for updates are a lattice that can't be broken up and reviewed in pieces.

For example, U-Haul Holding Co. board Chairman E.J. "Joe" Shoen wrote in a comment letter to the DOL that the automatic updating provision is inseparable from other parts of the rule, saying "just because DOL would like the provision to be severable does not make it so." U-Haul did not respond to Law360's request for comment.

But Weil said the severability clause makes clear that linking the rule's components needlessly folds together distinct concepts.

"In some rules, things are really anchored together, and it might make it more difficult from a policy point of view to sever one piece without undoing everything," he said. "In other cases, and I think this is an example, the pieces do have distinctive characteristics that can be reasonably detached from one another."

The DOL said in its final rule that it included a severability clause in part because it received comments from business and conservative groups after it proposed the rule that suggested they plan to sue to block it.

The agency noted that a group of administrative law professors submitted a **comment letter** pointing out that the Administrative Conference of the United States issued a **recommendation** in 2018 that agencies include severability clauses in their rules. ACUS is a tiny agency that works with experts including law professors and government officials to develop best practices to improve rulemaking.

ACUS issued its recommendation after commissioning a **report** from a pair of law professors who researched strategies agencies could use to prevent or repair defective rules.

One of the authors, E. Donald Elliott of Yale Law School, told Law360 that the DOL addressing severability up front in a rule is a better practice than waiting until someone files a suit and then having government lawyers raise the idea in litigation.

"The arguments of counsel are not really the same as the statement of the agency in the rulemaking," he said. "There's this whole doctrine that the courts don't consider the 'post hoc rationalizations of counsel.'"

Critics may argue that including a severability clause is an acknowledgment that at least some part of a rule is on shaky ground, Elliott said.

Indeed, the Indiana Chamber of Commerce said in a comment on the rule that "the only way to read this is as an admission by USDOL that the automatic escalator clause is vulnerable because the Fair Labor

Standards Act does not give the secretary [of labor] the authority to put the salary threshold on autopilot." The business group didn't respond to Law360's request for comment.

Elliott said a severability clause isn't a confession of vulnerability but rather a pragmatic way to anticipate a suit.

"Everybody knows that this is likely to be challenged in court," he said.

Timothy Taylor, who was a deputy solicitor at the DOL under Trump, said the strategy the rule's critics are likely to employ will be to argue that vacating the entire rule is the best path forward, despite the severability clause. Taylor is now a partner at Holland & Knight LLP who counsels employers.

"If I was a litigant on this rule, I think the argument would be that the automatic updating is in fact inextricably tied up with the thresholds," he said. "If that higher threshold in January is unlawful, then the automatic update is unlawful as well because you can't really carve out one from the other."

When portions of a rule can stand independently, a severability clause is a good idea for an agency to include, Taylor said.

Without a severability clause, courts hearing a challenge are reluctant to make line edits that uphold some parts of a rule and throw out others, he said. Separation of powers means a court has the authority to review an agency's action but shouldn't get into the business of rewriting rules, he said.

"A court wants to fashion relief appropriate to the case before it but neither underpolice the executive nor displace it with overbroad relief," he said.

Judy Conti, government affairs director for the National Employment Law Project, which supports the rule, told Law360 that the severability clause helps ensure that workers will benefit from at least some of the rule, although she's confident no part of it is legally vulnerable, she said.

The threshold increase taking effect July 1 is especially strong because it simply uses the DOL's existing formula and plugs in current earnings data, she said. She acknowledged that the DOL has never done automatic updates before and said while she thinks they are on solid footing as well, litigation should not bog down the rest of the rule.

"Workers should not be denied those updates if a court finds that the most novel aspect of the rule is beyond DOL's authority," she said. "We believe DOL is well within its authority to provide for automatic updates, but should the courts ultimately disagree, workers should not be denied this latest update of the way the salary threshold is calculated."

Michael Reaves, who works as a law clerk for a state court in Nevada, told Law360 that whether severability clauses in agency rulemaking actually provide the armor that they're intended to provide is an open question because they've faced little judicial scrutiny. Reaves spoke in his capacity as an attorney who's published law journal scholarship on how agencies can fortify their rulemaking from an **increasingly suspicious** judicial branch.

Before 2015, most agencies hadn't used a severability clause, he said. Numbers ticked upward after ACUS' recommendation in 2018, but the protection provided by a severability clause remains largely untested in court, he said.

"The Supreme Court has never actually addressed it directly," he said.

--Editing by Aaron Pelc and Emma Brauer.