Testimony

Of

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On

The Impact of Executive Order 13658 on Public Land Guides and Outfitters

Committee on Oversight and Government Reform Subcommittee on the Interior

United State House of Representatives

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Madam Chairman and members of the Subcommittee thank you so much for the opportunity to offer America Outdoors Association's support for H.R. 2215. I am also testifying to explain why the Department of Labor rule implementing Executive Order 13658 threatens the viability of many outfitter and guide companies operating on public lands.

America Outdoors Association and our partners in the Outfitter and Guide Outdoor Recreation Coalition represent 1,100 outfitting business operating throughout the United States serving approximately 3 million Americans each year.

As Representative Stewart observed in his press release announcing introduction of H.R. 2215, the United States is blessed with richly diverse, high-quality recreational experiences made available to the general public through thousands of small outfitting and guiding businesses. By nature these are seasonal businesses for which the seasonal recreational establishment exemption in the Fair Labor Standards Act (FLSA) was designed to cover. For reasons that are not clear, that exemption was modified by an amendment to the FLSA in 1977 for many recreation businesses on public lands and reduced to a partial exemption.

If a seasonal recreational establishment operates on private land and meets the three part test, the exemption from the FLSA applies. There is no requirement to comply with wage and hour laws or the overburden of regulation and increased costs associated with the Department of Labor rule increasing the minimum wage to $10.10. If on the other hand, a business operates a river rafting, hiking, fishing or hunting service on public lands managed by the USDA Forest Service, National Park Service, BLM or the Fish and Wildlife Service, they would be subject to provisions and regulations associated with E.O. 13658.

The Department of Labor rule implementing E.O. 13658 will have a devastating and disproportionately negative impact on rural economies in states and areas where public lands are predominant. Many of these states are in the West or in rural areas in the Midwest and East which need the employment opportunities provided by thousands of outfitting and guiding businesses

Let me explain why the Rule and the evolving case law has created a threat to many of these businesses and to the economies which are dependent upon them.

When new permits and contracts are issued, federal land managing agencies are required to include the Department of Labor Standard Contract clause in those authorizations. Over 5,000 Forest Service outfitter and guide special use permits and an estimated 3,000 BLM permits will ultimately be impacted. National Park Service commercial use authorizations (CUA's) are issued for terms no longer than two years, so several thousands of those authorizations will soon come under the rule's requirements and regulatory burdens. NPS concession contracts for outfitting services and U.S. Fish and Wildlife Service permits will also be required to include the DOL standard contract clause. The magnitude of this issue is significant, especially in western states where thousands of businesses in rural areas are effected.

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The new DOL requirements and costs are difficult for seasonal businesses to absorb. The immediate net impact of the rule will be to reduce employment. Over the long term many companies will likely be forced out of business by higher labor costs and the regulatory burdens associated with the rule.

Please allow me to offer some examples.

- One company in the Southeast found the rule would require them to raise their prices by 18% in one year to cover the increased labor costs. So, they reduced seasonal payroll and cut hours for employees. Some companies are decreasing the number of guides by increasing the number of guests per guide. When the rule takes effect, many companies will be forced to hold down labor costs by shortening their trips. These strategies may help them manage their operation costs, but they will negatively impact the quality of services. Still the increased labor costs are driving up prices for their trips on federal lands which makes them less competitive when a consumer compares their offerings to trips in areas managed by states or conducted on private lands.
- Some outfitters are reducing hours for employees and hiring more part-time workers as the impacts of the ever-changing recreational establishment exemption in the FLSA calls into question which overtime standard applies to their operation. Since the DOL rule makes compliance with these wage and hour laws a criteria for qualification for permits, many small businesses find themselves at risk and struggling to understand the complex nexus of law, rules and recent court rulings. Indeed, as my testimony points out, even the legal community is struggling to understand some of these issues.
- The increase in the minimum wage results in higher wages throughout a company because the increased labor costs ripple throughout the organization. There is pressure to raise wages for experienced employees so they are paid a higher wage than entry level employees.
- For multi-day trip outfitters, the record-keeping requirements for backcountry guides under the FLSA are significant. Guides in the backcountry for several days, have to keep logs of sleep time and any interruptions. The value of meals they eat has to be calculated and added to hourly computation for overtime wages.
- If an employee spends part of their work week on public lands and part on private lands on uncovered activities, under the DOL rule an outfitter would have to keep scrupulous records to determine what percentage of the work week is covered by the rule. An employee's time spent on work "in connection with" a covered contract, such as answering customer inquiries or packing lunches for a trip counts toward the 20% threshold that requires payment of the minimum wage for covered contracts. Logs would have to be kept to determine if an employee has exceeded the threshold. Once the 20% of hours worked threshold is met during a work week, then the DOL rule and specified minimum wage kicks in and employees' wages would have to be adjusted to comply with the E.O. Outfitters with covered contracts and employees' work which is not covered will likely not be able to keep this documentation or manage two different wage scales for employees. In effect they will have to absorb the costs of compliance with the E.O. across the board.
- Perhaps, the most onerous part of the DOL rule is the requirement for permit holders to enforce the increased minimum wage requirement and related wage and hour laws on their subcontractors. If subcontractors do not pay the specified minimum wage for covered contracts, the DOL rule requires the outfitter to make up the difference to the subcontractors'

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employees even though the subcontractor may not hold a covered contract. The DOL refused to clarify who qualified as a subcontractor under the rule, making it next to impossible for a family-run business to figure out. For example, would a laundry service utilized by a guest ranch operating under a covered contract in Wyoming or Colorado be covered by the DOL rule? Can you imagine the operators of the guest ranch calling up the laundry service and demanding that it meet this complex DOL rule and its minimum wage requirements?

- In the final rule the Department of Labor suggested the Service Contract Act applied to Forest Service and other agency permits. The Service Contract Act may require prevailing wages, which would likely exceed the minimum wage requirement in the Executive Order. How are small businesses to know which standard applies?

A larger problem exists for many businesses who have to determine if they qualify as "recreational establishments" under the FLSA to determine which overtime standard they must comply with. Certain types of businesses clearly qualify for an exemption or the partial exemption because they are identified as being exempt from the wage and hour laws under the FLSA. For others the determination is so fact specific, it will be impossible for most family-run business to ascertain.

FLSA Section 13(a)(3) (29 U.S.C. § 213(a)(3)) provides an exemption for specific non-profit entities, camps and seasonal recreational establishments except for those operating on public lands.

"any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if:
(A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per cent of its average receipts for the other six months of such year," qualifies for the exemption.

except that the exemption . . . . does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture."

This amendment to the FLSA from 1977 specifies a 56-hour overtime threshold for recreational establishments under contract (or permit) with the cited land managing agencies. The catch-22 is how to determine if an outfitting business qualifies as a recreational establishment, which is then eligible for this overtime standard. Department of Labor opinion letters and the Courts are inconsistent in their interpretations of the law.

To amplify how complex the determination can be and why it is unfathomable for most small businesses, I turn to a citation in a document America Outdoors Association had prepared by labor lawyers to help outfitters comply with wage and hour laws.

"The recreational exemption applies only to 'establishments.' An 'establishment' refers to 'a distinct physical place of business rather than integrated business enterprise.' See 29 C.F.R. §§779.23, 779.203. Two physical locations (e.g., facilities/warehouses) can be considered one 'establishment' so long as the physical separation between the locations is not 'substantial.'

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Some courts have found that to be one "establishment" the locations should be no more than 6 to 9 miles apart. In determining whether two or more locations are considered an 'establishment,' it does not matter that the two locations operate under the same central management and share employees, marketing, and strategic plans. Under this analysis, an employee working in an administrative office over 9 miles away from a recreational area would likely not be exempt from federal minimum wage and overtime requirements."[1]

The same document explains why traveling camps are not eligible for the recreational establishment partial exemption.

"A recent decision from a federal district court in California determined that a 'trip-and-travel camp' for teenagers was not an "amusement/recreational establishment" or "organized camp" falling under the exemption. In that case, the employer had an administrative office but provided customers with offsite camping. Specifically, the employer organized and led trips to wilderness areas and foreign countries during which teenagers engaged in recreational activities.

The court in that case found that the recreational exemption did not apply because the employer was a 'travel camp,' whose recreational activities were conducted outside of its premises, i.e. the administrative office. Based on this case, to qualify for the exemption, an employer must operate a distinct physical place of business where the recreation or amusement activities take place on its establishment or premises. If the recreation takes place off the premises, the exemption likely will not apply. Although this particular issue has not been widely examined by the DOL or the courts, employers who conduct recreational services off-site from their offices or premises risk not falling within this exemption. Similarly, outfitters who provide camping services, but who do not have an office, facility, or a location that could otherwise be defined as an 'establishment,' would likely not fall under this exemption.[2]"

The conundrum most outfitting businesses find themselves in on public lands is described succinctly in a subsequent legal memorandum which AOA had prepared. It concludes the following:

"Although most courts and the Department of Labor consider the same issues when determining whether a company is a 'seasonal recreational establishment,' there is very little consensus regarding how to analyze those questions, much less the outcome of the review. Therefore, the analysis of each company is extremely fact-specific, and companies should always receive individualized advice before assuming they are a seasonal recreational establishment."[3]

While the Department of Labor rule implementing Executive Order 13658 rule cannot be blamed for all the complications of wage and hour compliance besetting outfitting businesses, it has definitely contributed to the confusion for outfitters on public lands. For that reason, we appreciate this subcommittee's attention to this issue and respectfully urge members to support passage of H.R. 2215.

[1] Federal Wage and Hour Guidelines for Employers, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, February 2015, page 12 -13.
[2] Ibid, page 13.
[3] Memorandum, Seasonal Recreational Establishments and the Fair Labor Standards Act, March 25, 2015.

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