To require the Secretary of Labor to nullify the proposed rule regarding defining and delimiting the exemptions for executive, administrative, professional, outside sales, and computer employees, to require the Secretary of Labor to conduct a full and complete economic analysis with improved economic data on small businesses, nonprofit employers, Medicare or Medicaid dependent health care providers, and small governmental jurisdictions, and all other employers, and minimize the impact on such employers, before promulgating any substantially similar rule, and to provide a rule of construction regarding the salary threshold exemption under the Fair Labor Standards Act of 1938, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. Walberg introduced the following bill; which was referred to the Committee on

A BILL

To require the Secretary of Labor to nullify the proposed rule regarding defining and delimiting the exemptions for executive, administrative, professional, outside sales, and computer employees, to require the Secretary of Labor to conduct a full and complete economic analysis with improved economic data on small businesses, nonprofit employers, Medicare or Medicaid dependent health care providers, and small governmental jurisdictions, and all other employers, and minimize the impact on such
employers, before promulgating any substantially similar rule, and to provide a rule of construction regarding the salary threshold exemption under the Fair Labor Standards Act of 1938, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protecting Workplace Advancement and Opportunity Act”.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The proposed rule of the Department of Labor entitled “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” (80 Fed. Reg. 38516 (July 6, 2015)) provides a minimum salary requirement that would be—

(A) a 113 percent increase during the first year after the final rule takes effect from the salary threshold in effect on February 29, 2016; and

(B) an increase that would set the Federal minimum salary threshold 20 percent higher than the minimum salary threshold under any State law effective on the date of enactment of this Act.
(2) The Secretary significantly underestimated the cost of compliance with the July 6, 2015, proposed rule. Public comments calculate such rule will impose financial and non-financial costs substantially higher than those estimated by the Department.

(3) According to the Office of Advocacy of the Small Business Administration, the initial regulatory flexibility analysis of the July 6, 2015, proposed rule required under section 603 of title 5, United States Code, failed to adequately identify the number of small entities affected by such rule and failed to address how such rule would affect regions with lower costs of living and differences in certain industries. On September 4, 2015, the Office of Advocacy of the Small Business Administration submitted comments to the Secretary regarding such rule, including recommendations to—

(A) reanalyze “the economic impact of this rule on small businesses”, to “provide a more accurate estimate of the small entities impacted by this proposal”, and to “include an analysis of industry sub-sectors, regional differences, and revenue sizes”;
(B) reanalyze “the number of small non-profit organizations and small governmental jurisdictions . . . that are affected by this rule and the economic impact of this rule on these entities”; and

(C) provide greater transparency with respect to “compliance cost data” and to “utilize data provided in the comment process to accurately estimate the human resources and financial management costs of this regulation”.

(4) The Secretary did not consider the potential impact of the July 6, 2015, proposed rule on workplace flexibility. Public comments address concerns that employees who are reclassified from exempt to nonexempt employees may no longer be able to participate in workplace flexibility arrangements and programs.

(5) The Secretary did not analyze the potential impact of the July 6, 2015, proposed rule on companies that operate in multiple States with different costs of living and different salary scales, and the costs and unique complications for these employers associated with reclassifying thousands of employees in multiple States.
(6) The July 6, 2015, proposed rule automatically updates the salary threshold on an annual basis for purposes of defining employees subject to the exemption under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)) for all subsequent years, contrary to the requirement under such section that the definitions applicable for the exemption shall be “defined and delimited from time to time by regulations of the Secretary”. The Secretary does not have the authority to increase the salary threshold on an annual or other basis without conducting notice and comment rulemaking with respect to each change in accordance with section 553 of title 5, United States Code.

(7) Although not proposed in the July 6, 2015, proposed rule, the Secretary indicated that changes to the duties tests may be included in the final rule, without providing for notice and comment regarding the specific proposed revisions.

SEC. 3. DEFINITIONS.

In this Act:

(1) DEPARTMENT.—The term “Department” means the Department of Labor.

(2) JULY 6, 2015, PROPOSED RULE.—The term “July 6, 2015, proposed rule” means the proposed
rule of the Department of Labor entitled “Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees” (80 Fed. Reg. 38516 (July 6, 2015)) or the final rule with respect to such proposed rule.

(3) Medicare or Medicaid Dependent Health Care Provider.—The term “Medicare or Medicaid dependent health care provider” means an employer who derives more than 50 percent of its revenue from payments under the Medicare program under title XVIII of the Social Security Act, a State plan under the Medicaid program under title XIX of such Act, or both.

(4) Secretary.—The term “Secretary” means the Secretary of Labor.

(5) Small Business; Small Entity; Small Government Jurisdiction; Small Organization.—The terms “small business”, “small entity”, “small government jurisdiction”, and “small organization” have the meanings given such terms in section 601 of title 5, United States Code.

(6) Substantially Similar Rule.—The term “substantially similar rule” means any rule or proposed rule that is a reissuance of the July 6, 2015,
proposed rule in substantially the same form as such rule, or is the issuance of a new rule or proposed rule that is substantially the same as the July 6, 2015, rule, including any rule that implements the provisions of section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)).

SEC. 4. CONDITIONS PRECEDENT FOR SUBSTANTIALLY SIMILAR RULES.

(a) Enforcement.—

(1) In general.—Beginning on the date of enactment of this Act, the July 6, 2015, proposed rule shall cease to have any force or effect.

(2) Final rule.—In the case that the July 6, 2015, proposed rule is a final rule on the date of enactment of this Act—

(A) the Secretary shall not enforce the final rule based on conduct occurring before such date of enactment;

(B) an employee shall not have any right of action against an employer for the employer’s failure to comply with the final rule at any time prior to such date of enactment;

(C) any regulations that were amended by such final rule shall be restored and revived as if the final rule had never taken effect; and
(D) nothing in this Act shall be construed to create a right of action for an employer against an employee for the recoupment of any payments made to the employee prior to the date of enactment of this Act that were in compliance with such final rule.

(b) CONDITIONS FOR SUBSTANTIALLY SIMILAR RULES.—

(1) IN GENERAL.—The Secretary may promulgate any substantially similar rule, subject to paragraph (3), only if the Secretary has completed each action required under paragraph (2).

(2) REQUIREMENTS FOR SUBSTANTIALLY SIMILAR RULES.—The actions required under this paragraph are the following:

(A) The Secretary shall conduct an analysis of the impact of the substantially similar rule, including an initial regulatory flexibility analysis under section 603 of title 5, United States Code and assessments under clauses (i) through (iii) of section 6(a)(3)(C) of Executive Order 12866 (5 U.S.C. 601 note, relating to regulatory planning and review) to be provided to the Administrator of the Office of Informa-
tion and Regulatory Affairs in accordance with such section, and that—

(i) accurately identifies the number of affected small entities by using specific data points from the most recent publication of the Statistics of U.S. Businesses by the Bureau of the Census;

(ii) addresses regional, State, county (if applicable), metropolitan, and non-metropolitan salary and cost of living differences;

(iii) provides an analysis of any substantially similar rule, which shall include the percentile of full-time salaried workers affected, and such analysis shall be disaggregated by—

(I) State;

(II) industry subsector;

(III) small organizations;

(IV) small government jurisdictions, including further disaggregation by school district;

(V) nonprofit organizations;

(VI) Medicare or Medicaid dependent health care providers;
(VII) small businesses;

(iv) provides an analysis of management and human resource costs for all employers, including costs associated with changing human resource systems, reclassifying employees, and extra hours spent scheduling employees;

(v) provides an analysis of the impact on lower-wage industries, including by geographic area;

(vi) provides an analysis of all non-financial costs, including impact on employment, workplace flexibility, employee benefit structure for exempt and nonexempt workers, career advancement opportunities, new business formation, business termination, and loss of market share to foreign competition; and

(vii) includes a complete description of any significant alternative as described in section 603(c) of title 5, United States Code, to the substantially similar rule.

(B) The Secretary shall publish not less than one small entity compliance guide under section 212 of the Small Business Regulatory
Enforcement Fairness Act of 1996 (5 U.S.C. 601 note) to assist small entities in complying with the substantially similar rule.

(C) The Secretary shall provide notice of the substantially similar rule in the Unified Agenda of Federal Regulatory and Deregulatory Actions, compiled by the Regulatory Information Service Center of the General Services Administration.

(D) The Secretary shall ensure that the effective date for any final rule with respect to the substantially similar rule shall not be less than 1 year after the publication of such final rule in the Federal Register.

(E) The Secretary shall comply with the notice and comment requirements under section 553 of title 5, United States Code, and provide a comment period of not less than 120 days.

(3) AUTOMATIC UPDATES.—Any substantially similar rule promulgated by the Secretary shall not contain any automatic updates to the salary threshold for purposes of the exemption under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)), in accordance with section 5.
SEC. 5. RULE OF CONSTRUCTION.

The requirement under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)) that the definitions applicable for the exemption under such section be “defined and delimited from time to time by regulations of the Secretary” shall be construed to—

(1) require the Secretary to issue a new rule through notice and comment rulemaking in accordance with section 553 of title 5, United States Code, for each change in any salary threshold under such section 13(a)(1) proposed by the Secretary; and

(2) exclude any rule that would result in changes to any salary threshold under such section for multiple time periods, including through any automatic updating procedure.

SEC. 6. REQUIREMENTS FOR DUTIES TESTS.

The Secretary may not promulgate any final rule that includes any provision revising any of the duties tests provided in part 541 of title 29, Code of Federal Regulations (or any successor regulation), for exemption under section 13(a)(1) of the Fair Labor Standards Act of 1938 (29 U.S.C. 213(a)(1)) unless specific regulatory text for the provision was proposed in the proposed rule.