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Mark A. Casso, Esq.
President

Construction Industry Round Table
8115 Old Dominion Drive, Suite 210
McLean, VA 22102
Phone: 202-466-6777
Email: mcasso@cirt.org

September 3, 2015

Ms. Mary Ziegler
Director of the Division
Regulations, Legislation, and Interpretation; Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution Avenue, NW
Washington, DC 20210

ATTN: Department of Labor Rulemaking: RIN 1235-AA11
RE: Defining and Delimiting the Exemption for Executives, Administrative, Professional, Outside Sales, and Computer Employees. [29 CFR Part 541]

Dear Ms. Ziegler:

On behalf of the Construction Industry Round Table (CIRT)¹, we wish to have our *opposition* included in the official record of comments regarding the above captioned proposed rule defining the pay level for otherwise exempt salaried employees under the Fair Labor Standards Act (FLSA). [Hereinafter referred to as the: "Salaried Employee Pay" rule-making proposal].

The rulemaking aforementioned proposes increasing the minimum weekly salary level for exempted individuals to the 40th percentile of earnings for full-time salaried workers nationwide, based on Bureau of Labor Statistic ("BLS") data. In addition, the rule proposes automatically adjusting the minimum salary level on an annual basis, using either a fixed percentile of wages or the Consumer Price Index.

As currently proposed, estimates for the first quarter of 2016 project the new rule will result in a minimum annual salary for an exempt full-time employee would be \$50,440, **more than double the current minimum salary level for exempt employees.**

¹ The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design *and* construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.

CIRT is composed of approximately 115 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing over half a million people.

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While business organizations and associations, such as CIRT, understand the value and need for FLSA regulations/rules to be modernized and streamlined to meet the ever changing workplace – as well as to maintain our competitiveness in a global economy . . . we do not believe simplistic “*one size fits all*” mandates handed down from a federal bureaucracy without proper vetting is the answer.

For this reason, in addition to the fact the rule’s stated goals², are more about imposing solutions than respecting the wants and various needs of a complex and highly diverse work force, **CIRT is opposed to the rulemaking as proposed.** It is NOT for the federal government and its agencies to decide how and where individual Americans should spend their time or whether additional earnings are more important than free time.

Discussion

The design and construction industry – is a highly labor intensive endeavor that provides good paying jobs in communities across the country. Given the work is highly decentralized the firms tend to be small and/or operate in a locale even if they are part of a larger organization.³ As such, the industry provides vital job opportunities in many locations and participates as a critical member of its community.

Just as important as the *direct* employment opportunities created – the design/construction community also plays a vital role in supporting the nation’s ability with respect to global competitiveness, economic activities, and national security, as well as impacting the extraordinary quality of life enjoyed by all Americans.

Therefore, even for the larger firms represented by CIRT, the proposal to double the wage level threshold for employees that are decentralized and located in vastly different economic situations is unworkable and counter-productive to maintaining a firm that can succeed in a highly competitive market.

Analysis

The “Salaried Employees Pay” rule as proposed fails for the following reasons:

(1) *It fails to properly and fully account for the disproportionate adverse effect for employers located in lower-wage regions/locales.*

Even the Federal Government recognizes the impact different regions and locales have on pay scales and standards of living – it is irresponsible for this rulemaking, which dramatically changes the wage level for exempt status, to simply ignore such vitally critical differences.⁴ In terms of the design/construction

² In a statement to the press on June 30, 2015, Secretary of Labor Thomas Perez said that those employees converted from exempt to non-exempt status will benefit from the change, even if they are not permitted to work overtime hours: “Equally precious is the gift of time. It’s not a salary increase, but they will have more time to spend with their families.” Similarly, the NPRM states that “[t]he additional time off may help these workers better balance work-life commitments, thus potentially making them better off.” As the NPRM concedes, however, “not all workers would prefer to work fewer hours, and thus some of these workers might experience an adverse impact.” See ASAE Comment, footnoted at 6.

³ It appears the agency has failed to properly assess the economic impact on small businesses; neglecting to fulfill their obligations under the Regulatory Flexibility Act (RFA).

⁴ The federal government has available to it regional data on average salaries. In fact, the federal government’s own General Schedule (“GS”) pay tables for federal employees include locality adjustments that recognize that certain metropolitan areas have higher costs of living requiring an increase in pay.

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community, the rule fails to appreciate the importance of mid-level professionals taking on vital roles at the job site (which are not only at dispersed and varied locales, but also may require additional attention due to time and budget constraints).

(2) It fails to take into account the disproportionate impacts it has on the career growth and opportunities for mid-level employees.

Extending overtime coverage effectively turns millions of younger professional salaried employees into hourly workers – with the associated FLSA restrictions and requirements. As a result, opportunities and flexibility will likely be sacrificed to impose the higher wage level number proposed. Career development and evolution will lose out to more restrictive workplace rules to address the tracking requirements necessitated to pay overtime [potentially eliminating or undercutting: teleworking, work from home, flex schedules, company travel, etc.] As result, these middle income level employees will be hurt in terms of personal and professional growth.

(3) It fails to achieve its presumed stated goals by ignoring the offsets employers will be forced to adopt to contain cost increases that are not warranted by expanding economic conditions.

While different models exists to attempt to measure and understand the dynamic of hourly/overtime pay vs. salaried wages, empirical research generally supports the “fixed-job” model rather than the “fixed-wage” model.⁵ Thus, most studies find that employers offset all or almost all of the cost of overtime premiums with lower base salaries – consequently, the cost of expanded overtime coverage is ultimately borne by the employees.

(4) It fails to adequately and clearly address the proper application of the changes to part-time employees.

The proposal leaves un-said and undefined how or whether the absolute wage level number applies only to full-time employees. As such, the Department should clarify that the stated minimum salary level amount applies ONLY to full-time exempt employees, and that the salary level may be pro-rated for part-time exempt employees otherwise meeting the “duties test.”

(5) It fails to narrow its scope to only the wage level matter.

Finally, the announcement for the wage increase requirement appears to open the door to discussion and suggestions as they relate to other aspects of the exempt status. This is utterly inappropriate and not a proper way to address extremely complex and long held standard methodologies for such determinations.

⁵ Economists have developed two models to explain how employers respond to changes in overtime laws: the “fixed-wage” and the “fixed-job” models. The “fixed-wage” model holds that employers treat hourly wage rates as a given determined by outside forces, the higher overtime hourly wage cost encourages employers to substitute cheaper alternatives –i.e., hiring new people or capital investments. After these adjustments, employees who work overtime enjoy higher wages.

By contrast, the “fixed-job” model posits that employers and employees negotiate an employment contract covering BOTH wages and hours – hourly wages depend partly on how many hours the employee works, including overtime. Thus, they only care about the TOTAL hours worked and TOTAL pay for that work, not the wages for particular hours. This predicts, and has been borne-out, that employers will pay less for the regular hours to off-set for the expected overtime costs. [See, Heritage Foundation discussion of this matter in “Salaried Overtime Requirements: Employers Will Offset Them with Lower Pay” by James Sherk (July 2, 2015) at: www.heritage.org/research/reports/2015/07/salaried-overtime-requriments-employers.

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As noted in the ASAE comment on this subject, any future changes to the duties test should not be made without issuing another "Notice of Proposed Rulemaking" that specifically addresses suggested revisions to this portion of the regulations.⁶

Conclusion

For all the reasons enumerated above, the Construction Industry Round Table opposes the proposed change to the threshold wage level for exempt employees; and urges that it be reworked.

Moreover, the Round Table is troubled by the apparent attempt by the Department of Labor to use arbitrary changes to complex employment rules to seemingly address failures of policy with respect to economic performance and wage increases in America.

It is well known and widely understood that the anemic economic recovery during the past few years from the sharp downturn of 2008-09, has been the worst in post-World War II history.⁷ Moreover, the average wage earning during this so-called recovery has been abysmal, which may be the sole reason for this capricious rulemaking.⁸

It is difficult to see how, with the underpinning of an expanding, robust, and growing economy why arbitrary rulemakings on wages would be necessary . . . so, it leaves the opposite as an obvious explanation.

Sincerely,



Mark A. Casso, Esq.
President

CIRT • 8115 Old Dominion Drive • Suite 210 • McLean, VA 22102 • Ph: 202.466.6777 • Email: mcasso@cirt.org • www.cirt.org

⁶ See, The American Society of Association Executives (ASAE's) "*Comments on the Department of Labor's Notice of Proposed Rulemaking to Revise FLSA Regulations*" for further in depth discussion of this matter.

⁷ The economy continues that have an uncertain if not inconsistent recovery, with the average GDP growth *during the recovery* at around 2.0 percent, well below par by historic standards in the post-World War II era.

⁸ Clear trends over the past few years of so-called "Recovery" have emerged with respect to employment and wages: (1) For all recoveries since World War II, cumulative job growth has averaged 12.5%. This time, job growth is only about half that. Based on this, we would need millions of more jobs just to reach "average." (2) The labor force participation rate has remained historically low at approximately 62.6% [see latest BLS announcement for July 2015 levels]. (3) A report last year says 1-in-3 workers today is a "freelance" — that means over 50 million workers without a regular job to go to. (4) Much of the improvement in employment is from part-time jobs, thus the number of hours worked and average hourly wages both rose at low rates [barely beating the inflation rate of about 2%]. (5) Finally, data from the Fed show that only the top 10% of American earners have seen their incomes rise during the last few years. See *discussion*, Investor's Business Daily "*These 5 Facts Debunk U.S. Job Recovery Myth*" (09/05/2014) at: news.investors.com/ibd-editorials/090514-716332-american-jobs-recovery-is-stumbling.htm?ntt=Charts%20of%20job%20recovery.