

CONSTRUCTION INDUSTRY ROUND TABLE

8115 OLD DOMINION DR. SUITE 210, MCLEAN, VA 22066

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation Wage and Hour
U.S. Department of Labor
200 Constitution Avenue, N.W., Room S-3502
Washington, DC 20210

RE: Proposed Rule Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales, and Computer Employees RIN 1235-AA39

Dear Ms. DeBisschop:

On behalf of the Construction Industry Round Table (CIRT)¹, we wish to submit these comments *opposing* the Department of Labor (“DOL” or “the Department”)’s proposal to raise the salary threshold for the executive, administrative, professional, outside sales, and computer employee exemptions (the “EAP exemption”) from the overtime requirements of the Fair Labor Standards Act (“FLSA”) (the “Proposed Rule”).

This is a *particularly inopportune* time to suggest a major across the board hike in the salary threshold – particularly given the recent substantial increase a few years ago (which DOL has failed to show any reason to renew), and the potential to continue or fuel an inflationary spiral that higher wages may ignite or prolong in the U.S. economy. But, maybe the most important reason NOT to adopt this proposal is what appears to be the intended Wage & Hour Division purpose i.e., to “*ensure that middle class jobs pay middle class wages [by] extending important overtime pay protections to millions of workers and raising their pay.*” [Which is wholly beyond the Wage & Hour Division’s authority].

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. The Round Table is composed of 130 CEOs from the leading architectural, engineering, construction, and specialty firms in the United States. 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.

Discussion

CIRT is composed of leading construction and design firms doing business across the United States and the world. The firms operate in many jurisdictions with various sizes, cost structures, and expense levels. As a result, the community's business model is decentralized with strong local ties, which require substantial numbers/layers of lower and middle managers to deliver diverse construction aspects on complex projects. In addition, this work includes interaction with owners, government officials, permitting requirements, and a variety of other parties, which must apply and interpret complex design blueprints created by licensed professionals (often entry level or new to their careers).

In sum, the industry is composed of many *vital* lower-level exempt employees that meet all the normal/traditional standard indicators or various tests imposed over decades, along with salary levels, for a determination as to their exempt status when it comes to salary vs. hourly/overtime requirements. [I.e., the Fair Labor Standards Act ("FLSA") regulations implementing the exemption from minimum wage and overtime pay for executive, administrative, and professional employees (i.e., "salary threshold")].

Even for the larger firms represented by CIRT, that typically operate out of small local offices,² the rule significantly increasing if not *nearly* doubling the wage level threshold for employees is unworkable and counter-productive for a firm to succeed. This is due to several critical factors:

- (1) the decentralized local nature of workers located in vastly different economic situations,
- (2) vast number of young professionals at the project delivery level, and
- (3) flexible hours, remote work, temporary assignments, etc.

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 everchanging workplace – as well as to maintain our competitiveness in a global economy . . . this need was met just a few years ago with a substantial upward adjustment to the salary threshold. There is no need for further adjustments in such a short time.

² It is important to properly assess the economic impact on small businesses; in accordance with agency obligations under the Regulatory Flexibility Act (RFA).

Background/Legal History

It should be noted, the first attempt at this matter was encapsulated in the Department of Labor (DOL) 2016 rule (invalidated by the court).³ This earlier rule would have forced many employers to convert exempt employees to non-exempt status once the DOL minimum salary level for them was increased to \$47,476, *double the “then” minimum salary level for exempt employees.*

The current proposal appears to revive some of the 2016 approach by floating a potentially massive increase to the salary level – as if it is the “ONLY” measure or determinative factor for professional exempt status. Again, this is alarming given it appears the DOL is prepared to impose an arbitrary, capricious, and untenable leap, (nearly identical to what prompted the court to conclude that the DOL had exceeded its authority in 2016). Such an unjustified and warrantless rule would again need to be redressed and modified through the courts.

Salaried/Exempt Status

Converting “salaried” employees to non-exempt will likely have a significant adverse effect on CIRT companies and on their employees’ development and experiences. Design and construction firms must maximize the time and efforts of their staff to meet safety requirements, tight budgets, and delivery dates on projects. Arbitrary increases in payroll cannot be simply spread-out over millions of consumer products or transactions but must be borne by a handful of yearly clients/projects. Accordingly, many firms would be faced with unpalatable choices:

- Reduce their service levels to avoid overtime – which would undermine their effectiveness and possibly safety protocols.
- Convert the affected employees to non-exempt status at a lower hourly rate, so that payment of overtime does not increase their overall annual compensation – which would harm morale and be perceived as a demotion.
- Cut positions to fund the additional overtime obligation – which would hurt the terminated employees and the firms by diminishing and hampering their ability to seek out new projects; or
- Require the remaining exempt employees to absorb some of the duties of the newly non-exempt employees – which would be

³ On November 22, 2016, U.S. District Court for the Eastern District of Texas (*State of Nevada, et al. v. United States Department of Labor, et al.*, No. 4:16-CV-00731) granted an Emergency Motion for Preliminary Injunction which enjoined the DOL from implementing and enforcing the Overtime Final Rule on (12/01/2016). The Department of Labor filed a notice to appeal the preliminary injunction to the U.S. Court of Appeals for the Fifth Circuit.

On August 31, 2017, U.S. District Court Judge Amos Mazzant granted summary judgment against the Department in consolidated cases challenging the Overtime Final Rule published on May 23, 2016. **The court held that the Final Rule’s salary level exceeded the Department’s authority and concluded that the Final Rule is invalid.** (*State of Nevada, et al. v. United States Department of Labor, et al.*, No. 4:16-CV-00731).

viewed as an unfair burden by the remaining exempt employees who are at or near capacity already, while restricting the newly non-exempt employees from career growth.

Conclusion

CIRT recommends a process that would: maintain the current system that adjusts the salary threshold on a periodic, predictable, and manageable level for businesses to plan, while providing ample time for earlier “threshold” levels to become obsolete or in need of adjustment.

This would AVOID the apparent driving force behind this rule being promulgated -- regardless of economic conditions, markets, locale differences, recent substantial salary threshold change, and the potential to fuel inflation – **that is the DOL’s desire to take it upon itself to set “middle class wages” by government fiat.**

CIRT contends and wishes to emphasize the “salary” portion of the exemption test **is a THRESHOLD salary level, NOT an attempt to set what “should” be the salary for employees** by the Department. . . That rightfully and appropriately belongs to the private sector companies to determine given market, economic, regional, industry, company, and competitive norms.

Thank you for this opportunity to provide our views.

Mark A. Casso, Esq. NAC
President
Construction Industry Round Table

Comment Submitted via www.regulations.gov