Construction Industry Round Table

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

RE: Request for Information on Changes to the Overtime Regulations / Regulatory Information Number (RIN) 1235-AA20

Dear Ms. Smith:

On behalf of the design and construction firms that comprise the Construction Industry Round Table (CIRT)[1], we wish to submit comments in response to the U.S. Department of Labor's July 26, 2017 Request for Information seeking public input prior to issuing proposed changes to the salary level test of 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").

The Department of Labor (DOL) 2016 rule (which was invalidated by the court),[2] 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 current minimum salary level for exempt employees.* This is an arbitrary, capricious, and untenable leap, prompting the court to conclude that the DOL had exceeded its authority. As such, the unjustified and warrantless rule needs to be redressed.

[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 approximately 115-120 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.

[2] 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).

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.

Even for the larger firms represented by CIRT, the former rule that doubles the wage level threshold for employees which are decentralized and located in vastly different economic situations is unworkable and counter-productive for a firm to succeed in a highly competitive global market.

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 . . . we do not believe simplistic "*one size fits all*" mandates handed down from a federal bureaucracy without proper vetting is the answer.

Converting "salaried" employees to non-exempt would 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 tight budget 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;
- 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; or
- Require the remaining exempt employees to absorb some of the duties of the newly non-exempt employees – which would be viewed as an unfair burden by the remaining exempt employees and restrict the newly non-exempt employees from career growth.

Proposal

To avoid the *obviously* negative consequences of the earlier rule, the Department should consider the following as a path forward with respect to "salary threshold" for exempt employees:

(1) Set a lower salary level (then proposed in the 2016 rule), applicable to all employers. The new salary number could potentially be determined by adjusting the $23,660 level by the rate of inflation over the past 12-13 years.
[CON: This approach presumes and requires every employer in the *entire nation* to have experienced the same growth or upward costs that an arbitrary inflation factor would systematically impose];

(2) Set the minimum salary level at a lower percentile of the national average for certain types of employees (e.g., nonprofit and/or small businesses).

[3] It appears in 2016 DOL failed to properly assess the economic impact on small businesses; neglecting to fulfill their obligations under the Regulatory Flexibility Act (RFA).

[CON: This becomes very complex and possibly untenable given the size standard for defining a small business varies greatly from industry to industry and may not reflect regional differences].

(3) **Use a combination of inflationary and regional basis for adjusting the salary threshold**. To address the above-mentioned shortcomings, the Department should consider the following:

(a) Adjust for inflation to catch-up between 2004-2017 BUT at only *two-thirds* of the total (thus allowing for more depressed areas and industries). [For example: if the cumulative inflation is 15.0% over the time-period, use 15.0 x .67 = 10.05% round down to the nearest full percent, or 10.0%; thus, $23,660 would increase to $26,026 (or $23,660 x 1.10), then round to the nearest 100, or $26,000 for 2018-2022].

(b) Thereafter, inflation adjustments should occur using the same formula only once every five years (or in 2023), etc. This would smooth out cycles;

(c) Apply a regional factor in addition to the inflationary one described, with possible use of the CPI found in the FED districts or regions as the base multiplier.

(d) Finally, the Department may wish to consider fine tuning the above process by applying the federal government's factors for its own General Schedule ("GS") pay tables for federal employees that includes *locality adjustments* that recognize that certain metropolitan areas have higher costs of living levels that may require a slightly higher "salary" threshold.

Conclusion

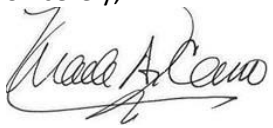
Taken together CIRT's proposed process would: (i) maintain a system that adjusts the salary threshold on a periodic, predictable, and manageable level for businesses to plan; while providing for (ii) depressed areas or industries by use of a two-thirds factor, (iii) regional accommodations, and (iv) possible urban or locality exceptions if necessary.

More importantly, CIRT's approach keeps in the mind . . **this 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.

Beyond the means of addressing the exempt salary threshold, CIRT would join others in requesting that the Department 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 meeting the "exempt" duties and salary basis requirements.

Thank you for this opportunity to provide our views.

Sincerely,



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