Labor & Employment Law/ Immigration

Employment and Labor Compliance Challenges for Construction Contractors

Practitioners of construction law and businesses in the construction industry often overlook the role that labor and employment law plays in the industry. While construction law frequently involves contract disputes over payment failures and quality of construction work, the construction industry, like every other, is also subject to government regulation and prosecution for alleged violations. This regulation includes wage and hour laws and prevailing wage laws, among others, which are enforced by agencies at both the federal and state levels. When violated (even unintentionally), these laws and regulations can subject construction contractors to substantial penalties, including payments of back wages to employees, as well as additional fines and even ineligibility for some contracts.

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Judging from the trend in prosecutions, inattention to labor and employment law compliance has presented problems to the construction industry. According to Simon Worsfold of TSheets, the construction industry has been frequently prosecuted by the U.S. Department of Labor for wage and hour violations: more than 11,000 prosecutions have targeted construction firms since 1985, with penalties paid by construction firms exceeding $154 million or $14,000 per case on average. In New York alone, there have been 438 prosecutions, which have cost construction firms more than $5.5 million in back wages and $170,000 in fines.[1]

Just this past August, a Massachusetts construction company was forced to pay $2.4 million in back wages and $262,900 in fines for improperly classifying employees as independent contractors and using cash payments and falsified records to avoid paying overtime.[2] Given the substantial penalties that may be imposed, it is essential for construction firms to be aware of the regulations at both the federal and state levels and to comply with them.

Construction firms are, of course, subject to general wage and overtime laws and regulations. State Labor Law prescribes the minimum wage (currently $9.00, but rising to $9.70 to $11.00 depending upon location within the state effective December 31, 2016).[3] Meanwhile, the federal Fair Labor Standards Act (FLSA) prescribes the minimum wage (currently $7.25) at the federal level and requires that employees be paid time and a half for hours worked in excess of 40.[4] The FLSA's minimum wage and overtime provisions do not apply to executive, administrative, and professional employees, as defined by Department of Labor regulations.[5]

As of December 1, 2016, new Department of Labor regulations alter the criteria for determining whether an employee is executive, administrative, or professional, and therefore exempt from the FLSA's minimum wage and overtime requirements, by increasing the salary requirements which must be met to invoke the exemption. Under the previous regulations, the exemption applied where employees' job duties met certain qualifications (such as, in the case of executive employees, having management duties and authority to hire, fire, and promote other employees) *and* where employees were paid at least $455 per week on a salaried basis.[6] Under the new regulations, assuming they withstand pending court challenges, the wage and overtime regulations undergo the following changes:

- The minimum weekly salary for executive, administrative, or professional employees to be exempt is now $913 per week, or $767 per week with respect to non-government employees in American Samoa.[7]
- The annual salary requirement for highly compensated employees is now $134,004, which must include compensation on a salary basis at $913 per week (or $767 per week with respect to non-government employees in American Samoa). Employers may still make additional payments to make up any shortfall in the annual amount.[8]
- These amounts are to be updated by the Secretary of Labor every three years beginning January 1, 2020, and published in the Federal Register and on the Department of Labor, Wage and Hour Division's web site.[9]
- The employer may pay the employee additional compensation, such as commission, without losing the exemption as long as the employee is guaranteed at least the minimum required weekly salary (currently $913 for most employees).[10]

The final rule, including the full text of the amendments, can be retrieved from the U.S. Publishing Office at https://goo.gl/dooIpF.

In contrast to the national application of FLSA, construction contractors are also subject to varying additional

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state or local labor requirements from project location to project location, such as prevailing wage laws. These laws effectively establish respective minimum wages for differing types of labor on a construction project, which will also vary based upon the physical location of the project. For example, a carpenter and an electrician would each be paid a different hourly rate in Nassau County, and the hourly rate for carpenters and electricians would also differ in Onondaga County from that prevailing in Nassau County.

At the federal level, the Davis-Bacon Act, among other similar laws, requires laborers and mechanics on contracts with the federal government or District of Columbia with contract sums exceeding $2,000 to receive the prevailing wage paid to corresponding laborers and mechanics on similar projects, as determined by the Secretary of Labor.[11] Federal regulations require that the contracting agencies obtain prevailing wages rates from the Department of Labor and incorporate those prevailing wage rates into their bid solicitations and contracts.[12] Contractors who violate the Davis-Bacon Act's prevailing wage requirements may be terminated from covered projects and added to debarment lists, circulated to all federal departments, making them ineligible for awards of federal contracts for a period of three years.[13]

In New York, contractors on public works must pay their laborers, workmen, and mechanics the prevailing rate for a day's work in the same trade or occupation in the project's geographic area.[14] As under the federal regulations, the bid specifications and contract for a project under New York's prevailing wage law must incorporate the prevailing wages as determined by the industrial commissioner.[15] Contractors who willfully underpay their laborers, workmen, and mechanics may be guilty of a misdemeanor or felony, depending on the amount of the underpayment, and, in the case of a second conviction in five years, will forfeit payment under the contract.[16]

In addition to paying prevailing wages, construction firms must also be chary of improperly classifying workers as independent contractors. In addition to federal prosecutions discussed above, the misclassification of workers by construction contractors has been targeted by New York State with its passage of the Construction Industry Fair Play Act (CIFPA).[17] Under CIFPA, individuals performing services for a contractor are presumed to be employees, and must be treated as such, unless the following criteria are all met:

- The contractor does not control or direct the individual's work;
- The service is performed outside the usual course of business; and
- The individual customarily performs similar services in an established trade, occupation, profession, or business.[18]

CIFPA requires contractors to post notices of the responsibility of independent contractors to pay certain state and federal taxes and of the rights of employees, and provides for fines up to $5,000 for multiple violations of the posting requirement within a five-year period.[19] In addition to criminal penalties including imprisonment for up to 60 days and fines of up to $50,000, contractors who willfully misclassify employees as independent contractors face civil penalties of $2,500 to $5,000 per employee, as well as becoming ineligible to bid upon or be awarded public works projects for the state, municipalities, public benefit corporations, public authorities, or public bodies for as long as five years in cases of repeated violations.[20] In the case of corporate contractors, these penalties may also apply individually to officers and certain shareholders who knowingly permit the corporation to willfully violate CIFPA, as well as to affiliated entities substantially owned by the offending contractor.[21]

If the pattern of prosecutions discussed above is any indication, compliance with labor and employment laws has already presented consternation to the construction industry, and newer laws such as the amendments to the federal wage and overtime regulations and CIFPA are bound to exacerbate this problem if construction firms proceed with business as usual rather than proactively making their practices compliant. Although construction firms may have previously been concerned with the construction work itself, to the neglect of their employment practices, it behooves legal counsel for construction firms to make their clients aware of the changing face of employment law and the dangers of noncompliance so that those clients can avoid costly penalties and the loss of projects.

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1. TSheets. *FLSA Wages and Hour Lawsuits Are Up 456%, available at* https://www.tsheets.com/flsa-research-tool (last visited Oct. 1, 2016).
2. Healy, B. *Labor Department wins $2.4m wage settlement with Mass. construction firms, available at* https://goo.gl/0TawwP (last visited Oct. 1, 2016).
3. Lab. Law § 652.
4. 29 USC §§ 206, 207.
5. 29 USC § 213(a)(1).
6. *See, e.g.*, 29 CFR § 541.0(a); 29 CFR § 541.100(a)(1).
7. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391, 32549-50 (May 23, 2016) (amending 29 CFR §§ 541.100, 541.200, 541.300, 541.600).
8. *Id.* at 32550 (amending 29 CFR § 541.601).
9. *Id.* at 32551-52 (amending 29 CFR § 541.607).
10. *Id.* at 32551 (amending 29 CFR § 541.604).
11. 40 USC § 3142.
12. 29 CFR §§ 1.5 and 1.6(b).
13. 40 USC §§ 3143-44.
14. Lab. Law § 220(3)(a).
15. Lab. Law § 220-d.
16. Lab. Law § 220(3)(d).
17. Lab. Law § 861-a.
18. Lab. Law § 861-c(1).
19. Lab. Law § 861-d.
20. Lab. Law § 861-d.
21. Lab. Law §§ 861-e(5) and (8).

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Technology, especially cloud computing, is revolutionizing the way law firms work. Less and less hardware is needed to operate a law firm today. The future belongs to the lean and mobile law firm.

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The private plaintiffs, led by more than 50 Texas and national business groups including the U.S. Chamber of Commerce, National Association of Manufacturers, and the National Retail Federation, have argued that the justifications offered by the DOL for the new salary threshold do not constitute a permissible construction of the FLSA. Business trade groups have argued that losing the overtime exemption for "frontline executives, administrative professionals" would cost employers the ability to effectively and flexibly manage their workforces. Their argument is that millions of employees across the country would have to be reclassified from salaried to hourly workers, a move that would impose restrictions on their work hours "that will deny them opportunities for advancement and hinder performance of their jobs–to the detriment of their employers, their customers and their own careers."

On November 22, 2016, U.S. District Court Judge Mazzant issued a nationwide injunction blocking the DOL from implementing the Final Rule stating the measure improperly created a salary-level test for determining which workers fall under the FLSA's "white collar" exemption. The court determined that the states were able to show a likelihood of success in their challenge of the rule as well as irreparable harm if it went into effect, and that the DOL failed to show it would be harmed if the rule were delayed.

The primary challenge in the suit was to the DOL's rule-making authority—in this instance, questioning the DOL's interpretation of the applicability of the white collar exemption. Judge Mazzant concluded that the DOL, although it enjoyed "significant leeway" to establish the types of duties that might qualify an employee for the white collar exemption, was not entitled to deference in creating the rule because Congress intended the exemption to apply based on the tasks an employee actually performs and did not include a minimum salary level.

Judge Mazzant held that "[w]ith the final rule, the Department exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it supplants the duties test."

Employers' Options

There is no question that much uncertainty exists as to whether the Final Rule will ever be implemented. Yet, to be forewarned is to be forearmed. Thus, there is no reason for the employer to avoid preparing for all contingencies. The first step for an employer facing the possible application of this new regulation is to assess its workforce and determine how many employees would previously not be entitled to overtime but now will under the new rule. The employer may increase the salary of an employee who would otherwise be exempt to retain that employee's exempt status. This is not without consequences. Putting aside the increase in costs associated with these higher salaries, this could create upward pressure on the salaries of other employee who are now more closely aligned salary wise.

The employer may also eventually agree to pay employees who were previously deemed exempt as hourly wage employees and pay overtime, if necessary. Now an employer will have additional record keeping duties that did not exist before because, under the law, an employer is required to maintain records of hours worked and wages paid for overtime eligible employees or invite liability. Such employees may be disillusioned by what might seem as demotion. Employees who may once have experienced flexibility in terms of their work hours, now, essentially, "punch a clock." Moreover, work that they performed before that took more than 40 hours to perform will either continue to be performed by such employee at the overtime rate or may be distributed to those who were kept as exempt keeping overtime costs down but forcing a restructuring of the workplace. Finally, the employer may decide to reduce the amount of pay allocated through base salary (provided that the employee still earns at least the applicable hourly minimum wage) and add pay to account for overtime hours worked over 40 hours per week to hold the total weekly pay constant-also an undesirable move from an employee morale standpoint.

In light of the fast moving political and legal developments, it is anyone's guess how this will all play out. Nevertheless, contingencies should be prepared despite the murky wage and hour environment.

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