Testimony of Ed Brady

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2015 First Vice Chairman, National Association of Home Builders

Hearing on

"The Consequences of DOL's One-Size-Fits-All Overtime Rule for Small Businesses and their Employees."

Before the

Subcommittee on Investigations, Oversight, and Regulations of the

House Committee on Small Business

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Introduction

I appreciate the opportunity to participate in today's hearing on the U.S. Department of Labor's (DOL) overtime proposal. My name is Ed Brady. I am a home builder and developer from Bloomington, Illinois, and currently serve as the National Association of Home Builders' (NAHB) 2015 First Vice Chairman of the Board.

I have nearly 30 years of experience in the housing industry. Like many in this industry, mine is a family business. My father, William Brady Sr., founded the company in 1962. I have served as the President of Brady Homes for the past 15 years. We primarily build single-family homes, but we have also constructed several light commercial projects. In addition to the home building company, I own two Re/Max franchises and a property management company.

I also serve on the board of directors of the Federal Home Loan Bank of Chicago and am a member of the Bipartisan Policy Center Housing Commission, which was formed in the wake of the housing crisis to examine the nation's housing policies and help further the reform debate. In 2016, I will become chairman of NAHB's Board of Directors.

I am greatly concerned that DOL's proposed overtime regulation could have negative repercussions for my own business and the industry at large. DOL's "one-size-fits-all" approach to the overtime rules will result in a substantial financial impact on the home building industry. I appreciate the committee's consideration of how the rule will affect small businesses.

The Proposed Salary Level Is Unprecedented

The Fair Labor Standards Act (FLSA) requires covered employers to pay non-exempt employees overtime pay at time and one-half the regular rate of pay for all hours over 40 hours in a workweek. However, the FLSA does provide a number of exemptions. Section 13(a)(1) of the FLSA provides an exemption from overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees (i.e., white collar employees). To qualify for the exemption, employees generally must:

1. Be salaried, meaning that employees are paid a predetermined fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (i.e., the "salary basis test");
2. Be paid more than the specified threshold, which currently requires employees be paid on a salary basis at not less than $455 per week or the equivalent of $23,660 annually for full-time employees. (i.e., the "salary level test"); and
3. Primarily perform executive, administrative, or professional duties, as defined by the DOL's implementing regulations at 29 CFR Part 541 (i.e., the "duties test").

The salary level requirements have been updated seven times since 1938. DOL's most recent overtime proposal updates the salary and compensation levels to the salary threshold of $970 per week ($50,440 per year for a full-year worker as of 2016), which will cover the 40th percentile of earnings for all full-time salaried workers.

DOL's proposal to raise the standard salary level from $455 per week to $970 per week, an increase of $515 per week over the current level, represents an unprecedented jump of over 102%. This massive increase will not only negatively impact home builders and their employees and operations, but such a significant change is unprecedented in the 77-year history of FLSA. In 1958, for example, DOL set the threshold at a level that included the lowest 10th percentile of employees. If this method was applied today, the resulting minimum salary would be $657 per week or $34,167 annually. Further, DOL provides no rationale for selecting the 40th percentile. There is insufficient support in the overtime proposal to economically justify the proposed salary level increase.

The Proposal Does Not Take Into Account Regional Wage Differences

By setting a high universal standard pay threshold, the DOL proposal will inappropriately result in a larger impact in areas with lower wages and cost of living. NAHB conducted an analysis that shows, in total, approximately 116,000 construction supervisors would be affected in some way by the proposal.[1] More than 31% of total employment for this occupation class sector would no longer be eligible for the exemption.

The total count of construction supervisors affected varies with state size. However, as a percent of workers in that state, it is clear that lower cost-of-living states, namely in the South, are particularly affected. The state with the largest number of supervisors affected is Texas, followed by Florida, North Carolina and California. However, on a percentage of employment basis, the states with the largest scope of impacts are Arkansas, Mississippi, New Mexico and Tennessee. In each of these four states, the DOL proposal will affect approximately 50% or more of supervisors who are currently employed. This geographic distribution is due to the fact that the DOL overtime proposal uses a nationwide 40th percentile threshold, but wage amounts vary state to state.

The DOL overtime proposal is a "one-size-fits-all" standard. Given the potential broad impact of the proposed rule, an obvious issue is that wage amounts vary greatly from location to location, as well as among business sectors. As the analysis above shows, construction wages are very regional. What one construction supervisor makes in Tennessee is different than what one earns in California—sometimes significantly.

The Proposal Will Harm Employees and Housing Affordability

In an effort to better identify and quantify the challenges the proposal creates, NAHB recently included in its monthly industry Housing Market Index (HMI) survey a set of questions that focused on overtime issues with regard to construction supervisors.[2] According to the data, 64% of the respondents reported having a construction supervisor on payroll. The respondents also

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[1] *See* attachment, "Occupation of First-Line Supervisors of Construction Trades and Extraction Workers," National Association of Home Builders, Housing Economics and Policy Group (July 2015).

[2] Responses were collected from 373 builder-members in August 2015. *See* Housing Market Index: Special questions on DOL's Proposed Overtime Rule, National Association of Home Builders, Economics and Housing Policy Group (August 2015).

reported that 86% of construction supervisors were paid with a salary, in contrast to an hourly wage.

For those firms reporting a change in policy would occur should the proposal as currently written become law, 56% of respondents indicated that they would take steps to minimize overtime, such as cut workers' hours. Additionally, 55% reported they would reduce or eliminate bonuses. Thirty-three percent indicated they would reduce or eliminate other benefits; 27% indicated they would raise the salary above the $50,440 threshold; 19% stated they would reduce or eliminate health insurance; 13% said they would reduce salary to compensate; and 13% said they would switch from a salary to an hourly wage.

Broadening the examination of impacts, 44% of builders noted that the change in the proposed overtime rules would result in higher home prices. A further 25% indicated that the proposed DOL change would make some projects unprofitable, and 19% reported that the change would cause their business to turn down some projects.

None of these are acceptable outcomes. Currently salaried employees converted to hourly workers will view their new "non-exempt" status as a demotion, and perhaps even make less money than previously. These employees will lose the workplace flexibility that comes with being a salaried employee. It is also of the utmost importance that the federal government refrain from implementing policies that will be damaging to the marketplace and housing affordability.

I am also concerned about what the DOL proposal means to my own business. I currently employ one construction supervisor who would become non-exempt under the new salary threshold. My supervisor currently receives a competitive salary and benefits, including a car allowance. However, I am already considering whether the company will need to take steps to minimize paying overtime to the supervisor should the DOL proposal become law. Another issue with the rule is that it doesn't consider the total compensation package a worker receives. Even if the worker's salary is increased, his or her benefits could go away.

Construction supervisors are, by their very nature, schedulers. An average of 22 specialty trades are needed to build a home, and it is the supervisor's main responsibility to ensure the trades complete their work efficiently and to the customer's specifications.

My own supervisor generally arrives directly to the jobsite from his home in the morning. Because homes are constructed outside, flexibility is needed to account for inclement weather, especially during the winter. The supervisor frequently works non-traditional hours and whenever the weather is favorable. Sometimes he is needed on the weekends if it has rained and a project's deadline is impending. It is also common for him to respond to phone calls or e-mails from myself or the trades on evenings or weekends. Because scheduling changes frequently occur, it is of the utmost importance he has the flexibility necessary to ensure projects stay on track.

Under the DOL proposal, I would find it very challenging to track my supervisor's hours if I wanted to minimize his overtime eligibility. It is especially important for my business to accurately predict costs so I know how to price our homes and limit unforeseen costs. To me, it seems DOL's intent is to turn back the clock and bring back the manufacturing economy of the past, where workers use punch cards to track their hours on one specific jobsite. This type of business model no longer takes into account the reality of the economy today and certainly not the needs of the housing industry. If DOL's proposal is written into law, I would genuinely explore whether the role of our construction supervisor would need to be performed by a contracting company in order to accurately predict our costs.

Conclusion

The dramatic surge in the salary threshold that has been proposed by DOL is unlikely to result in an increase in workers' take home pay. Rather, it would force business owners to restructure their workforce to compensate by scaling back on pay and benefits, as well as taking other steps such as cutting workers hours to avoid the overtime requirements. The impacts are not confined to just construction supervisors; other residential construction occupations in executive, administrative, and professional positions will be affected as well.

Although DOL contends that this rule will ensure that the FLSA's overtime protections are appropriately applied, the agency has taken an overly broad approach that will result in problems and unintended consequences that have not even been explored. NAHB strongly opposes the overtime proposal in its current form. DOL must closely examine the financial impact of this rule on home builders and other small businesses and revise this proposal accordingly. Thank you again for the opportunity to testify today.