June 12, 2019

VIA ELECTRONIC SUBMISSION: http://www.regulations.gov

The Honorable Cheryl Stanton
Administrator
Wage and Hour Division
U.S. Department of Labor
Room S-3502, 200 Constitution Avenue NW
Washington, DC 20210

Re: Regular Rate under the Fair Labor Standards Act; Notice of Proposed Rulemaking (RIN 1235-AA24)

Dear Ms. Stanton:

On behalf of the Associated General Contractors of America (hereinafter "AGC"), thank you for the opportunity to submit the following comments on the U.S. Department of Labor's (hereinafter "DOL" or "Department") Wage and Hour Division's (hereinafter "WHD") notice of proposed rulemaking (hereinafter "NPRM") on the regular rate under the Fair Labor Standards Act (hereinafter "FLSA"). The NPRM was published in the Federal Register on March 29, 2019.

AGC is the leading association for the non-residential construction industry, representing more than 27,000 firms, including over 6,500 of America's leading general contractors and over 8,800 specialty contracting firms. More than 11,500 service providers and suppliers are also associated with AGC, all through a nationwide network of 90 chapters. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property. All of these firms provide employment to workers whose wages are governed by the FLSA.

AGC applauds the Department's efforts to address the regular rate regulations (Part 778) to provide clarity and better reflect the 21st-century workplace. We also appreciate the Department's efforts to review these issues as deregulatory actions under President Trump's Executive Order 13771. Eliminating the regulatory burdens associated with providing otherwise very straightforward benefits is entirely appropriate and consistent with the President's directive. AGC is also a member of The Partnership to Protect Workplace Opportunity (hereinafter "PPWO"), a diverse group of associations, businesses, and other stakeholders representing employers with millions of "white-collar" employees across the country in almost every industry who will be impacted by the proposed changes. The PPWO's members believe that employees and employers alike are best served with a

system that promotes maximum flexibility in structuring employee pay and benefits and clarity for employers when preparing total compensation packages. AGC supports the comments submitted by the PPWO related to the NPRM and encourages the WHD to consider them. The PPWO's recommendations address:

I. Pay for Forgoing Holidays or Leave;
II. Compensation for Bona Fide Meal Periods;
III. Reimbursable Expenses;
IV. "Other Similar Payments";
V. Show-Up Pay, Call-Back Pay, and Payments Similar to Call-Back Pay;
VI. Discretionary Bonuses Under Section 7(e)(3); and
VII. Excludable Benefits Under Section 7(e)(4).

In addition to supporting the previous comments from the PPWO, AGC would like to further address the following specific topic of the proposal by the Department:

III. Reimbursable Expenses

The Department proposes to clarify section 7(e)(2)'s requirement that only "reasonable" and "properly reimbursable" expenses may be excluded from the regular rate when reimbursed. The Department also proposes additional explanation on what is "reasonable"—and thus not "disproportionately large"—by referring to the Federal Travel Regulation. The Department thus proposes to add regulatory text explaining that a payment for an employee traveling on his or her employer's business is per se reasonable if it is at or beneath the maximum amounts reimbursable or allowed for the same type of expense under the Federal Travel Regulation and meets § 778.217's other requirements. The proposed regulatory text also clarifies that a reimbursement for an employee traveling on his or her employer's business exceeding the Federal Travel Regulation limits is not necessarily unreasonable. The Department presumes this is so because a payment may be more than that required "to minimize administrative costs" yet still within the realm of reasonable business and industry norms.

The usage of per diems is a standard and necessary business practice in the commercial construction industry. With the scarcity of skilled workers in any given job location, contractors frequently must bring in labor from outside the given area. AGC has found that in 2018, almost fifty percent of contractors reimburse their craft workers on a per diem basis.[1] And, while AGC members reported on average to offer per diem allowances slightly below the Federal Travel Regulation rates, there is a significant section of the industry that regularly exceed the Federal Travel Regulation rates due to the unique nature of the projects and their locations.[2] Most data shows craft per diem averages across all types of construction, so it tends to be less than certain specific types of construction (e.g., heavy industrial) who's workers may need to travel to distant, unique, and hard to reach project locations or areas around the country where housing is commonly scarce and can come at a premium. Contractors testify that in rural states, such as Texas, Idaho, or Montana for example, per diems are regularly being offered from a regular rate of $140 per day to up to a high of $200 per day. As such, the construction industry can tend to raise per diem rates both in lower cost of living areas

[1] PAS, Inc. (2018). *2018 Merit Shop Wage and Benefit Survey.*
[2] PAS, Inc. (2016). *AGC Living Allowance Survey*.

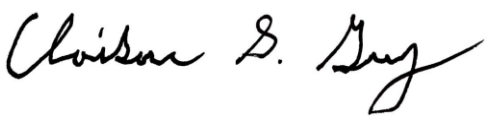
and in higher cost of living areas. Conversely, the Federal Travel Regulation allows a $94 per diem rate for all locations without specified rates and increases the standard where the cost of living increases (i.e., urban areas). Determining that a reimbursement is per se reasonable simply if it is at or beneath the maximum amounts reimbursable or allowed for the same type of expense under the Federal Travel Regulation might not be a proper standard for the operations of many segments of the construction industry.

AGC appreciates the Department's proposed language that reimbursement amounts in excess of the Federal Travel Regulation may nevertheless qualify as reasonable and recommends its inclusion in a final rule at a minimum. Additionally, and considering the common and necessary construction industry practice of providing higher per diem allowances, AGC urges the Department to provide further guidance on how a contractor can easily claim and prove that an amount in excess of the Federal Travel Regulation is not unreasonable. Any future guidance and processes required should be minimally disruptive to business operations and burdensome administratively.

Conclusion

AGC reiterates our appreciation for the Department's efforts modernizing its regular rate regulations and supports new standards that makes sense for today's construction employers nationwide. AGC also appreciates the opportunity to engage in the rulemaking process and looks forward to working with the WHD as it continues to amend regulations that impact construction employers. If we can aid in any way, please do not hesitate to contact me.

Sincerely,



Claiborne S. Guy
Director, Employment Policy & Practices