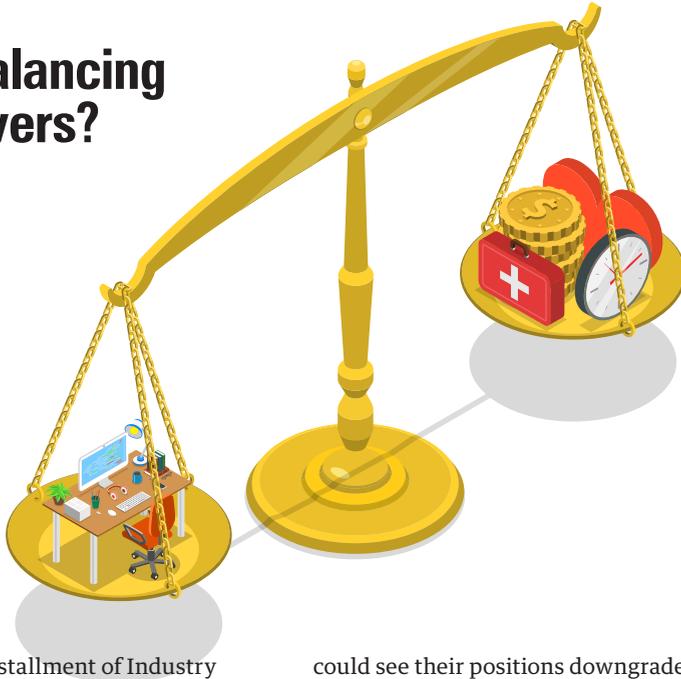




## Industry Watch

By Rich Walker, AAMA President and CEO

# A Rebalancing of Powers?



In the last installment of Industry Watch, we looked at the Department of Labor's move to redefine overtime pay. As readers may recall, the new edict proposed last summer set out to essentially double the salary threshold under which employees would have to be paid overtime for hours worked beyond 40 per week from the current annual level of \$23,660 to \$47,476. If it became effective December 1, 2016, it would also have given DOL the authority to unilaterally adjust (i.e. increase) that threshold every three years.

The American Architectural Manufacturers Association, along with other major associations such as the National Association of Home Builders, National Association of Manufacturers, Associated Builders and Contractors, and the National Association of Wholesale Distributors, pointed out that such a dramatic increase would force employers to decide whether to reclassify an estimated 4.2 million executive, administrative and professional employees to nonexempt status or increase their salaries to keep them exempt. Business owners would either have to find millions of dollars to cover these new costs, or existing salaried employees

could see their positions downgraded (if not eliminated) while benefits and wages were cut.

This proposed rule would not boost employees' income as intended, but instead would likely force employers to reduce newly "protected" employees' flexibility as well as benefits, including substantive bonuses, paid vacation, flex time, paid holidays and health insurance. On top of that, NAM noted, rather than yielding positive results, the outcomes could engender more friction between employers and employees, more litigation, and a large economic deadweight loss without a discernible improvement in the compensation, employment and working conditions for workers. In short, it would actually result in fewer hours for workers.

A motion for injunction filed last fall by 21 states, 15 trade associations of the sort mentioned previously, and various U.S. and state chambers of commerce claimed that DOL exceeded its authority by raising the salary threshold too high and providing the automatic updates without input from the businesses that would be affected.

In response to this motion, a federal judge in the Eastern District of Texas

blocked the overtime rule. U.S. District Judge Amos Mazzant agreed with the coalition that the rule is unlawful.

Although temporary, the injunction appears likely to stand on appeal to the Fifth Circuit Court. The entire issue could quickly become moot under the new administration. As NAM noted, the injunction is a step toward "curbing regulations that have resulted in \$80 billion in compliance costs and more than 25 million hours of paperwork."

### The Administrative State

Perhaps more importantly in the long run, it has also been pointed out that measures such as the DOL salary threshold misadventure represent a burgeoning ascendancy of the "Administrative State," in which agencies legislate through rulemaking. Some of them also adjudicate disputes arising from their own actions, thereby endowing a single institution with legislative, executive and judicial power. Such agencies have effectively absorbed much of the "power of the purse," which is supposed to belong exclusively to Congress, by funding themselves through fees and fines that bypass a congressional budgetary vote. In essence, the Administrative State is increasingly operating beyond the balance-of-powers limitations imposed by our constitutional system.

The ongoing feud between strict constitutionalism and an unfettered Administrative State's autocratic unilateralism, cloaked in alleged concern for the wellbeing of the citizenry, as well as between classic and crony capitalism, is just gathering steam. It will be interesting to watch, especially given the new administration. ☐

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Rich Walker is president and CEO of the American Architectural Manufacturers Association, 847/303-5664, [rwalker@amaanet.org](mailto:rwalker@amaanet.org).