AAGW APARTMENT ASSOCIATION OF GREATER WICHITA

Legislative News

Balancing Goals and Reality in a Sea of Green

With proposals like the green new deal and discussions of a global environmental crisis swirling, the environment is front of mind for many Americans. It's against this backdrop of climate change that the apartment industry has become a target for environmental regulation – studies show that buildings are responsible for close to 40 percent of U.S. energy consumption, making apartment owners, operators and developers an easy mark.

Policymakers are setting strict energy reduction goals, particularly in the nation's cities, that require owners and operators to track the energy performance of their buildings. Owners and operators are judged against their peers through an arbitrary scoring or grading system and required to drastically reduce their energy consumption. Developers are often required to build according to strict code compliance standards while owners and operators must invest in retrofitting existing structures. As policymakers contemplate legislation, they must balance their interests in sustainable solutions with an analysis of the actual financial and administrative cost burdens to rental housing providers – such legislation could impact housing affordability for renters. Below is a review of pending legislative and regulatory proposals of interest to the industry.

In Congress, lawmakers have brought forward proposals that will take radical steps to cut down energy consumption levels for buildings. First, the *Energy Savings and Industrial Competitiveness Act of 2019* (S. 2137) would, amongst other measures, establish a voluntary federal baseline for energy efficient building codes separate from the codes already established by code development organizations like the International Code Council. While not mandatory, the federal government would encourage states to adopt these standards through federal grants that would assist in the implementation of the codes. These codes would likely establish higher efficiency goals for buildings, while ignoring that the cost of compliance varies widely. In late September, an amendment to the bill was filed that would eliminate the energy codes measure, citing the regional differences that would make a federal building standard inefficient as well as "risking the increased cost of living" for Americans. Size, environmental risks, and access to energy-related financing can vary greatly state-by-state, which conflicts with a federal building standard's one-size-fits-all approach. The amendment has since failed and S. 2137 was reported favorably out of the Committee on Energy and Natural Resources.

S. 2335**,** the *Smart Growth Acceleration Act,* and its companion bill H.R. 2044, will direct the Department of Energy to establish an incubator program to foster best energy efficiency practices for federally owned properties. The Department of Energy will also survey private properties, including multifamily buildings, to determine best practices in the private sector. These bills seek to uncover the major barriers to achieving energy efficiency in buildings and offer recommendations to accelerate the transition to more efficient performance.

Balancing Goals and Reality in a Sea of Green (Cont'd)

The *Energy Savings and Building Efficiency Act of 2019* (H.R. 3586) will define the role of the Department of Energy in the codes development process as well as limit the influence of advocacy groups pushing cost-inefficient proposals. The key component of H.R. 3586 is the stipulation that all energy-efficient technologies utilized as a result of new building codes have a payback period of 10 years or less. This places greater emphasis on adopting policies and technologies that meet both the efficiency goals of lawmakers and the faster realizations of saving desired by property owners.

On the state and local fronts, NAA's affiliates and members should be on the lookout for the growing sustainability trend of reach code adoption. To meet ambitious climate goals, municipalities are establishing reach codes, which function as an expansion to mandatory statewide minimum energy standards. Generally, reach codes must first gain approval from the local government before being considered for full adoption by a state's energy authority. They are intended to help municipalities achieve greater levels of energy efficiency and introduce new concepts and practices to builders that may be adopted as the baseline in a future, state-level codes update. Reach codes may be prescriptive – in other words, dictating the type of material and appliances that can be used in buildings – or sometimes performance-based, stipulating building electrification requirements or net zero energy or carbon policies. Net zero policies dictate that buildings must produce as much energy or carbon as they consume.

In September, San Jose, Ca., became the largest US city to approve energy codes that exceed requirements already established at the state level. Lawmakers in Massachusetts introduced S. 1935, which requires the establishment of an energy code standard and focuses on the development of net zero energy buildings. This bill was reported favorably out of committee and referred to the state Senate's Ways and Means Committee. Consequently, the Massachusetts chapter of the U.S. Green Building Council recently released a report pushing for greater investment in efficiency upgrades for buildings, stating that net zero energy buildings are "possible today with no added upfront costs." This narrative may drive lawmakers at the state or local level to encourage their counterparts to adopt reach codes.

In other news, the coasts continue to champion progressive policies that make their way inward. Berkeley, Ca., became the first city in the United States to ban natural gas infrastructure in all new buildings. California's pledge to transition the state to 100 percent renewable energy by 2045 is making gas infrastructure a risky investment for the building industry due to the gradual phasing out of systems that support this energy source. While new buildings will be electrified, existing structures with gas line hookups face major capital improvement projects that could alter both the aesthetic and affordability of the building in the name of compliance. Berkeley's ordinance has kicked off similar movements towards 100 percent electrification in cities across the country.

Balancing Goals and Reality in a Sea of Green (Cont'd)

In Seattle, a new tax hike on heating oil and deeper regulation of gas-fired heating equipment is poised to force property owners to retire their furnaces in exchange for electric alternatives. Pittsburgh also announced its intention to be generated by 100 percent renewable energy by 2035, joining the ranks of cities like Alexandria, Va., Fayetteville, Ar., Tempe, Ariz., and nearly 219 more. With more than 50 percent of U.S. apartments built before 1980, and more than a quarter of the U.S. living in communities pledging to source 100 percent clean energy, owners and operators of existing properties are uniquely positioned to face the burdensome cost of policy compliance.

NAA continues to monitor the green building and environmental policy and work with its state and local affiliates to protect members' business interests. We encourage lawmakers to consider the affordability of climate goals; they must ensure that financial mechanisms are available and accessible for the multifamily industry to achieve full compliance.

New Overtime Rules Go Into Effect January 1, 2020

The National Law Review

Starting January 1, 2020 the salary threshold for an "exempt" employee under the Fair Labor Standards Act (FLSA) will increase to $648 per week, or $35,568 annually. The Department of Labor recently finalized its new rules to determine whether an employee qualifies as exempt from overtime under the FLSA. The new rules will replace the 2016 proposed rules, which never went into effect.

The 2016 Rules

In 2016, the Department of Labor proposed updating the salary threshold for exempt employees under the executive, administrative, or professional exemption from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). This meant that, in addition to meeting the duties test for one of the three exemptions, an employee would need to be paid at least $47,476 per year in order to be considered exempt from the overtime requirements of the FLSA. Additionally, the 2016 rules raised the threshold for the "Highly Compensated Employee" exemption from $100,000 to $134,004.

The 2016 rules, however, were blocked by a federal District Court for the Eastern District of Texas and never went into effect.

The New 2020 Rules

The new rules for 2020 will raise the salary threshold for the executive, administrative, and professional exemptions, but will not go as far as the ill-fated 2016 rules. Starting on January 1, 2020 the salary threshold for the executive, administrative, and professional exemptions will rise from $455 per week ($23,660 annually) to $684 per week ($35,568 annually). This threshold will also apply to employees who fall under the computer employee exemption. Additionally, the "Highly Compensated Employee" exemption threshold will rise from $100,000 to $107,432 annually.

To assist with meeting the new threshold, the Department of Labor will allow employers to use nondiscretionary bonuses and incentive payments, including commissions, to satisfy up to 10% of the salary threshold for the executive, administrative, and professional exemptions.

New Overtime Rules Go Into Effect January 1, 2020 (Cont'd)

Discretionary bonuses cannot be used toward meeting the salary threshold. exempt under the new 2020 rules. Many employers who took steps in response to the 2016 rules may already be in compliance with the 2020 rules as they set a lower threshold for exemption. The Department of Labor will allow employers to make catch-up payments to employees who do not earn enough in nondiscretionary bonuses or incentive payments in a given 52-week period to retain exempt status, provided that the catch-up payment is made within one pay period of the end of the year.

What Hasn't Changed

The duties tests, which require that employees meet certain duties requirements in order to be exempt from overtime, have not changed. The duties tests will remain the primary method for determining whether an employee is exempt, subject to the higher salary thresholds.

There will also be no automatic updates to the salary threshold, as set in the 2016 rules. The Department of Labor has committed to updating the salary thresholds more often, through traditional rulemaking, but has declined to implement a system where the salary thresholds will update automatically based upon a formula.

What Does This Mean For Employers?

The new rules end a multi-year period of uncertainty for employers. Since the 2016 rules were blocked, employers have been waiting patiently to see how the Department of Labor would respond. The new rules give employers clear guidance on how to determine whether an employee is exempt, at least until the next round of rulemaking from the Department of Labor.

Employers will need to examine their exempt employees and verify that the employees will remain exempt under the new 2020 rules. Many employers who took steps in response to the 2016 rules may already be in compliance with the 2020 rules as they set a lower threshold for exemption.

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