



DOL's Proposed Overtime Rule Higher Education's Comments & Concerns

Summary of comments submitted to DOL by CUPA-HR on behalf of CUPA-HR and 18 other higher ed associations.

Background to the Rule

- In March of 2014, President Obama issued a [memorandum](#) directing the Secretary of Labor to make changes to the regulations governing exemptions to the Fair Labor Standard Act (FLSA)'s overtime pay requirements for executive, administrative, professional, outside sales and computer employees (known as the EAP or "white collar" exemptions).
- On July 6, 2015, the Department of Labor (DOL) issued [proposed rules](#) changing certain aspects of the "white collar" exemptions and invited public comments. The College and University Professional Association for Human Resources (CUPA-HR) and the American Council on Education (ACE), along with 16 other higher education associations, submitted [comments](#) on September 4 outlining their concerns with the proposed rules.

Overview of Proposed Changes

- Under the current regulations, an individual must satisfy three criteria to qualify as a "white collar" employee exempt from federal overtime pay requirements: first, they must be paid on a salaried basis (the salary basis test); second, that salary must be at least \$455/week (\$23,660 annually) (the minimum salary requirement or salary threshold); and third, their "primary duties" must be consistent with executive, professional or administrative positions as defined by DOL (the primary duties test).
- Under the proposed rules, the salary threshold would be increased by over 100% to \$50,440 per year in 2016, meaning that any currently exempt employees governed by this exemption making less than this threshold would no longer be eligible for "exempt" status and would have to be paid on an hourly basis regardless of their job title or duties and would be eligible for overtime pay (note this threshold does not apply to faculty and teachers).
- Furthermore, the proposal would require that the salary threshold be updated annually based on either the Consumer Price Index for All Urban Consumers or by pegging the salary threshold to the 40th percentile for weekly earnings of all full-time non-hourly (i.e., salaried) employees.

Higher Education's Comments & Concerns

- The higher education community believes that an increase to the current minimum salary threshold of \$23,660, which was set in 2004, is due and increasing the threshold will help ensure that the "white collar" exemptions are not abused.
- However, the proposed minimum salary threshold (\$50,440) is simply too high and, if implemented, will force colleges and universities to reclassify employees in white collar jobs that offer and require significant professional autonomy, have always been exempt and are well suited to exempt status. Such a change is not in keeping with the intent of the FLSA and will negatively impact many employees, institutions and students. While



hourly pay and nonexempt status is appropriate for certain jobs, it is not appropriate for all jobs; otherwise Congress would not have created any exemptions to the overtime pay requirements.

Mass Reclassification of Employees

- The proposed minimum salary level is so high that many employees working in occupations that have been traditionally exempt and are well suited to exempt status would need to be reclassified as hourly workers as institutions (which are mostly not for profit and public entities) would not be able to absorb the increased costs associated with higher salaries for exempt status. This is particularly true of employees at institutions with fewer resources and/or in areas with lower costs of living.
 - The following cost analyses on raising all exempt salaries to meet the new threshold illustrate this point:
 - The State University System of Florida (12 universities) – \$62 million annually
 - Iowa Community Colleges costs in first quarter of 2016 – \$12.6 million
 - A university in the south – \$17 million
 - Large private research university – \$14.8 million
 - Impacted employees include those in departments such as academic affairs (librarians, advisers, counselors); student affairs (residence hall managers, admissions counselors, financial aid counselors, student activities officers); institutional affairs (human resources professionals and trainers); fiscal affairs (accountants, head cashiers); auxiliary services (textbook managers, ticket managers); external affairs (alumni relations and fundraising professionals); facilities (head of mail services, farm manager); information technology, research and clinical professionals (including many with advanced degrees and those engaged in advanced training such as post-doctoral trainees and residents); athletic affairs (head coach, assistant coach, physical therapist, trainer); managers in food service, security and building and grounds; and community outreach/educational extension functions (agricultural extension agents, industry extension consultants).
 - Many of these jobs have always been and are well suited to exempt status.
- Mass reclassification would be to the detriment of many employees often resulting in diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement. It also comes with no guarantees of increased compensation and a perceived loss of status.
 - Hourly or nonexempt employees must be paid for each hour worked and at a rate of one and a half times their normal hourly rate for all hours worked over 40 in a given work week (the latter is known as “overtime”). To ensure employees are paid for all hours worked at the proper rate for overtime and that institutions do not incur costly and unanticipated overtime payments, colleges and universities must carefully track the hours nonexempt employees work, which generally requires keeping hourly employees on controlled and often rigid schedules and limiting when and where employees may work.
 - Not all jobs lend themselves to hourly work, and reclassified employees may find it difficult to do traditionally exempt jobs as hourly employees. For example, postdoctoral positions require flexible scheduling practices to



accommodate for the success of specific experiments. Hourly work is also impractical for job positions that require a large amount of travel or irregular hours, such as athletic coaches, admissions recruiters, student affairs and admissions staff.

- Full-time, exempt employees who are paid more than the proposed minimum salary threshold who seek reduced or part-time schedules for personal reasons — and by doing so reduce their salaries below the threshold — may no longer be able to be accommodated, as such a reduction will require problematic reclassification and associated tracking of hours and controlled scheduling.
- Being classified as exempt or nonexempt affects *how* an employee is paid and what hours they may work in a given week, but it does not necessarily affect *how much* they are paid. Employees that are reclassified from exempt to hourly would be *eligible* for overtime pay but in many cases would not receive overtime pay or any increase in compensation.
- Loss of exempt status can be seen as a demotion even if compensation remains constant.

Impact on Higher Education Institutions and Students

- Administrative and labor costs associated with these changes are massive in a time of limited, fixed and shrinking budgets for higher education.
- Institutions would be under pressure to raise tuition, when student debt is at an all-time high, and decrease services to cover the costs of these changes.

Recommendations

- DOL should consider lowering the proposed salary level for all employers. DOL's proposal is far higher than the levels it has considered in the past and fails to account for regional and industry sector differences in pay. DOL's proposal is inconsistent with the purpose and history of the minimum salary level to provide a ready method of screening out the obviously nonexempt employees.
 - We recommend that DOL consider lowering the proposed salary level to one of the levels it contemplated in the proposed rule's preamble, which are more in line with historic trends. Nearly 90% of CUPA-HR members that were surveyed thought DOL should use one of the following instead of the proposed level.
 - \$29,172 represents the current level — which was set in 2004 — as adjusted for inflation.
 - \$30,004 would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and in retail.
 - \$40,352 represents median earnings for all hourly and salaried workers combined (rather than just salaried).
 - If it will not consider a more appropriate level for all employers, DOL should do so for nonprofit and public employers and/or consider expanding the exemption for certain learned professionals from the minimum salary level.
- DOL should phase in the new salary level over time to allow employers and employees enough time to make adjustments and preparations to help mitigate the negative consequences the proposal will impose on colleges and universities, their employees and students.



- DOL should not automatically update the salary levels.
 - Increasing the minimum salary level each calendar year would create uncertainty for employers in their budgeting and planning process and significantly undermine employee morale. As a result, DOL should instead revisit the salary level at regular intervals and each increase should be made through notice and comment rulemaking.
 - If DOL insists on automatic updates they should occur at most every five years based on inflation rather than the 40th percentile and notice should be provided a year in advance.
- DOL should not make changes to the duties test without issuing a separate NPRM containing specific proposed regulatory language.