



**College and University Professional
Association for Human Resources**

U.S. Department of Labor 2018 Listening Sessions on Overtime

The Listening Sessions

On August 27, 2018, the U.S. Department of Labor (DOL)'s Wage and Hour Division (WHD) [announced](#) it will hold five public listening sessions to gather stakeholder views on possible changes to the regulations governing exemptions for executive, administrative and professional (white-collar) employees to the Fair Labor Standards Act (FLSA)'s overtime pay requirements. Specifically, DOL hopes participants in the sessions will provide their thoughts on the following questions:

1. What is the appropriate salary level (or range of salary levels) above which the overtime exemptions may apply?
2. What benefits and costs to employees and employers might accompany an increased salary level?
3. What is the best methodology to determine an updated salary level?
4. Should the department more regularly update the standard salary level and the total annual compensation level for highly compensated employees?

Listening session dates and locations are as follows:

September 7, 2018 – Atlanta

September 11, 2018 – Seattle

September 13, 2018 – Kansas City

September 14, 2018 – Denver

September 24, 2018 – Providence

DOL provides more details on the sessions and an online form for registering to participate [here](#).

Background

Under the current DOL regulations, which have been in place since 2004, individuals must satisfy three criteria to qualify as an executive, administrative or professional 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 duties test).



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On November 22, 2016, a federal court in Texas temporarily enjoined DOL from enforcing a new regulation that would have increased the minimum salary from \$455 per week to \$913 per week (\$47,476 annually).¹ In response, DOL issued a [Request for Information](#) (RFI) on June 26, 2017, seeking comment about how DOL should go about updating the overtime regulations in light of the court's ruling.

On September 25, 2017, CUPA-HR, in partnership with 20 other higher education associations, filed [substantive comments](#) on the RFI. These comments highlighted our belief that an increase to the salary threshold is due and outlined what we believe to be DOL's best course of action moving forward. Our recommendations to DOL were as follows:

- Update the salary threshold by applying the methodology used in 2004 to current salary data;
- Make no changes to the duties test;
- Prorate the salary threshold for part-time employees;
- Allow the cost of employer-provided room and board to count toward the salary threshold; and
- Do not institute automatic updates and instead continue with DOL's past practice of updating the regulations as appropriate through notice-and-comment rulemaking.

CUPA-HR's Response to Listening Session Questions

What is the appropriate salary level (or range of salary levels) above which the overtime exemptions for bona fide executive, administrative or professional employees may apply?

With respect to setting the salary threshold, DOL should follow historical precedent and the guidance provided by Judge Mazzant and set the minimum salary at a level "that tends to screen out only those employees who by virtue of their compensation obviously will not meet the duties tests." The formula used by DOL to set the threshold in 2004 not only meets this criterion, but has been previously field-tested on the U.S. economy — giving it a distinct advantage over other options. This approach also has widespread support among higher education HR leaders, with 84 percent of those responding to a 2017 survey of higher ed chief HR officers indicating that DOL should set a new salary threshold by updating the 2004 level. These results were consistent with a July 2015 survey CUPA-HR conducted of 819 higher education HR professionals, in which 58 percent of respondents supported some sort of update to the 2004 threshold, and 88 percent reporting that any threshold over \$40,352 would be too high.

¹ The court [issued](#) a decision permanently enjoining the rule on September 1, 2017.



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What benefits and costs to employees and employers might accompany an increased salary level?

As stated above, we believe an appropriate adjustment to the salary level is one “that tends to screen out only those employees who by virtue of their compensation obviously will not meet the duties tests.” Such an increase in the threshold would likely reduce litigation and increase pay for lower-compensated white-collar employees without triggering a mass reclassification of employees whose jobs are appropriately classified as exempt and positions are incompatible with an hourly pay structure. We heard from colleges and universities across the country that the prior proposed increase would force them to reclassify from 40 percent to 60 percent their currently exempt workers who meet the duties test, including highly educated scientists, admissions staff, human resources professionals and other professionals, all of whom are relied upon for their skills and who consistently exercise discretion and independent judgment with respect to matters of significance.

What is the best methodology to determine an updated salary level?

We believe that DOL should apply the 2004 methodology rather than use an inflationary adjustment for several reasons. First, DOL has historically avoided using inflationary measures to adjust the salary level and instead has relied on formulas. We see no reason to deviate from that approach now. Second, determining the best inflationary measure further complicates the rulemaking process and unnecessarily invites future disputes and delays to needed threshold updates. Lastly, nationwide inflationary measures may not track changes to salaries in lower-cost regions of the country or lower-cost industries or other benchmarks DOL uses to set the salary level. As a result, relying on an inflationary measure may not accurately reflect salary changes in those industries or regions and could lead to a threshold that is either too high or too low.

Should DOL more regularly update the standard salary level and the total annual compensation level for highly compensated employees?

Over 80 percent of those responding to the 2017 survey of chief HR officers opposed automatic updates because of the potential negative impact on institutions’ budgets and budget planning, ability to provide merit-based increases and employee morale. This is consistent with data from the 2015 survey, which found:

- 86.6 percent (603 of 696 responses) of CUPA-HR members said the automatic increases would cause morale issues as a result of reclassification, wage compression and limit on merit-based increases;



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- 91 percent (644 of 705 responses) said automatic increases would negatively impact their budgets; and
- 63.6 percent (444 of 698 responses) said automatic increases would negatively impact their ability to engage in financial planning.

For these reasons, and because we do not believe DOL has the authority to impose automatic updates, we urge DOL to continue with its past practice of updating the regulations as appropriate through notice-and-comment rulemaking.

When Congress authorized DOL to issue regulations under the FLSA, it did not grant the agency the authority to index the minimum salary level. Rather, Congress tasked DOL with updating the exemptions defining and delimitating the terms “executive,” “administrative” and “professional” employee from “time to time,” by regulation. DOL recognized its lack of authority in this regard in 2004, when it acknowledged that “nothing in the legislative or regulatory history ... would support indexing or automatic increases.”

If DOL decides it must impose some sort of automatic update, however, it should nonetheless conduct notice-and-comment rulemaking for *each* update in order to consider the economic consequence of such a change prior to implementation and adjust accordingly. Recent history illustrates why this is necessary; if DOL had imposed automatic updates on a five-year interval in 2004, the increases would have gone into effect in 2009, when the country was struggling to recover from the 2008 economic crash without any thoughtful review by DOL.

If DOL does impose automatic updates, it should do so in intervals no shorter than five years (with somewhere between five and 10 years being ideal), as automatically updating the salary level too frequently would negatively impact higher education institutions’ and other employers’ budgets and budget planning, ability to provide merit-based increases, and employee morale. For example, the annual increases proposed by DOL in the prior proposal would have created uncertainty year in and year out as to the application of the white-collar exemptions. Once the specific salary threshold is ascertainable for a new year, colleges and universities would need to rapidly assess which exempt employees would be affected and determine the impact and viability of increasing salaries to maintain exemptions versus converting employees to hourly status.