



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

June 12, 2019

SUBMITTED ELECTRONICALLY VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov
under e-Docket ID number WHD-2019-0002

Ms. Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretations
Wage and Hour Division
U.S. Department of Labor
Room S-3502, 200 Constitution Avenue NW
Washington, DC 20210

**Re: Notice of Proposed Rulemaking; Regular Rate Under the Fair Labor Standards Act
(84 Fed. Reg. 11888, March 29, 2019) (RIN 1235-AA24)**

Dear Ms. Smith:

I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) in response to the above referenced Notice of Proposed Rulemaking (NPRM) issued by the U.S. Department of Labor (DOL). CUPA-HR serves as the voice of human resources in higher education, representing more than 31,000 human resources professionals and other higher education leaders at over 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 58 percent of all bachelor's institutions and over 500 two-year and specialized institutions.

CUPA-HR also joins and fully supports the comments submitted by the Partnership to Protect Workplace Opportunity (PPWO). CUPA-HR submits these additional comments to emphasize concerns specific to higher education.

STATEMENT OF INTEREST

Colleges and universities employ approximately 4 million workers nationwide, and there are institutions of higher education located in all 50 states.¹ Many universities are the largest

¹ See *Enrollment and Employees in Postsecondary Institutions, Fall 2015; and Financial Statistics and Academic Libraries Fiscal Year 2015*, Institute of Educational Services National Center for Educational Sciences (February 2017), at page 4, accessed on September 4, 2017 at <https://nces.ed.gov/pubs2017/2017024.pdf>.

employer in the state in which they operate.² The Fair Labor Standards Act (FLSA) and similar state laws cover all or nearly all higher education employees. As a result, colleges and universities, their employees, and the students they serve would be affected by proposed changes in this NPRM.

We respectfully submit these comments outlining the impact of the NPRM on institutions of higher education and their students and employees and offer suggestions for improving the proposal.

SUMMARY

The FLSA, which was enacted in 1938, requires employers to pay their employees at least a minimum hourly wage, which is set by the statute, and an “overtime” rate of one and one-half times the employee’s regular hourly wage for every hour the employee works over 40 hours in a given week. The regular-rate requirements set forth the forms of payment employers include and exclude when determining a worker’s overtime rates.

The proposal confirms that employers may exclude the following from an employee’s regular rate of pay:

- The cost of providing wellness programs, on-site specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services;
- Payments for unused paid leave, including paid sick leave;
- Reimbursed expenses, even if not incurred “solely” for the employer’s benefit;
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements;
- Discretionary bonuses;
- Benefit plans, including accident, unemployment and legal services; and
- Tuition programs, such as reimbursement programs or repayment of educational debt.

DOL states that the purpose behind updating the regular rate is to “promote compliance with the FLSA; provide appropriate and updated guidance in an area of evolving law and practice; and encourage employers to provide additional and innovative benefits to workers without fear of costly litigation.”

CUPA-HR thanks DOL for proposing updates to the existing regular-rate regulations. As compensation practices have changed significantly in the 50 years since DOL last revised the regulations, it may be unclear to some employers as to whether newer employer-provided benefits such as fitness classes or weight-loss programs must be included in the calculation of an employee's regular rate of pay. Clarifying what is and what is not part of the regular rate is

² See <http://www.marketwatch.com/story/these-are-the-largest-employers-in-the-us-state-by-state-2017-01-26>.

especially critical for institutions of higher education, as employees working in higher education often trade lower pay for better quality of life or other benefits.³

As noted above, CUPA-HR joins the comments filed by the PPWO. We file these supplemental comments to emphasize the importance of DOL treating room and board consistently across FLSA regulations dealing with overtime pay and to request the Department include language clarifying that the room and board provided to student employees, which is not dependent on any work relationship, should not be included in the regular rate. We provide more details on both these points below.

I. DOL should treat the cost of employer-provided room and board consistently across the various FLSA overtime regulations.

Compared to other employers, higher education institutions disproportionately provide employees with room and board as part of their compensation. Yet, employers cannot count the cost of this benefit, which is worth many thousands of dollars, as salary for the purposes of meeting the minimum salary threshold under part 541. At the same time, employers must include the cost of room and board as compensation when calculating a worker's regular rate. We believe that it is inconsistent for DOL to require employers to count room and board as compensation for the purposes of calculating overtime costs for nonexempt employees while at the same time requiring they disregard that very cost when determining whether an employee meets the standard salary threshold of the white collar exemptions. As such, we ask that the Department align the part 541 regulations with part 778 regulations so that room and board can be calculated as compensation for purposes of meeting the standard salary threshold.

II. DOL should clarify that regular rate does not include "meals, dormitory rooms, and tuition" furnished by a college or university to students which is not dependent on any employment relationship that student may have with the school.

Currently, the Department includes in regular rate of pay "meals, dormitory rooms, and tuition" furnished by a college or university to its student employees. The Department does not intend to change this provision, though it has proposed excluding tuition benefits for non-student employees on campuses. Forty-two percent of CUPA-HR members surveyed said that current provisions are difficult to implement, and 85 percent said DOL should provide specific language clarifying that regular rate does not include "meals, dormitory rooms, and tuition" furnished by a college or university to students as part of a scholarship or other funding which is not dependent on any employment relationship that student may have with the school.

CONCLUSION

CUPA-HR respectfully requests DOL to consider our suggested changes and thanks the agency for the opportunity to comment.

³ See <http://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-board-time>.

Respectfully Submitted,



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