College and University Professional Association for Human Resources

November 7, 2023

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-3502
Washington, DC 20210

Re: Notice of Proposed Rulemaking, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees" (RIN 1235-AA39)

Dear Ms. DeBisschop:

I write on behalf of the College and University Professional Association for Human Resources (CUPA-HR) and the undersigned higher education associations in response to the above-referenced Notice of Proposed Rulemaking (NPRM). CUPA-HR serves as the voice of human resources in higher education, representing more than 34,000 human resources professionals and other higher education leaders at over 1,800 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 74 percent of all master's institutions, 51 percent of all bachelor's institutions and over 500 two-year and specialized institutions.

Colleges and universities employ approximately 3.9 million workers nationwide, and there are institutions of higher education located in all 50 states.[1] Of those 3.9 million workers, approximately 2.5 million are employed full-time and 1.4 million part-time.[2]

[1] See the Institute of Education Sciences National Center for Education Statistics, "Enrollment and Employees in Postsecondary Institutions, Fall 2021," https://nces.ed.gov/ipeds/SummaryTables/report/400?templateId=4000&year=2021&expand_by=0&tt=aggregate&instType=1&sid=082e180d-db19-40fa-89a9-6b1553d1bc82.
[2] *Id.*

The Fair Labor Standards Act (FLSA) and similar state laws cover all or nearly all of these employees. Many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the regulations that the U.S. Department of Labor (DOL or department) seeks to modify with this rulemaking. As a result, colleges and universities, their employees, and the students they serve would be affected by the proposed changes in this NPRM.

The following higher education associations 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. Collectively, these associations represent approximately 4,300 two- and four-year public and private nonprofit colleges and universities and the professionals that work at those institutions.

National Organizations
American Association of Colleges of Osteopathic Medicine
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Association of Veterinary Medical Colleges
American Council on Education
Association of American Medical Colleges (AAMC)
Association of American Universities
Association of Catholic Colleges and Universities
Association of College Unions International
Association of Community College Trustees (ACCT)
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Association of Schools and Programs of Public Health
Career Education Colleges and Universities
Coalition of Urban and Metropolitan Universities
College and University Professional Association for Human Resources
Council for Advancement and Support of Education
Council for Christian Colleges & Universities (CCCU)
Council for Opportunity in Education
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Collegiate Athletic Association
UPCEA

Work Colleges Consortium

State and U.S. Territory Organizations
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges and Universities in Pennsylvania
Association of Independent Colleges and Universities of Ohio
Association of Independent Colleges and Universities of Rhode Island
Association of Private Colleges and Universities of Puerto Rico / Asociación de Colegios y Universidades Privadas de Puerto Rico (ACUP)
Community Colleges for Iowa
Connecticut Conference of Independent Colleges
Consortium of Universities of the Washington Metropolitan Area
Council of Independent Colleges in Virginia
Georgia Independent College Association
Independent Colleges and Universities of Florida
Independent Colleges and Universities of Missouri
Independent Colleges and Universities of Texas
Kansas Independent College Association
Maryland Independent College and University Association
Minnesota Private College Council
North Carolina Independent Colleges and Universities
Oregon Alliance of Independent Colleges and Universities
Tennessee Independent Colleges and Universities Association
Wisconsin Association of Independent Colleges and Universities

Summary

The FLSA requires employers to pay their employees at least a minimum hourly wage, which is set by the statute, and an "overtime" rate of 1.5 times the employee's regular hourly wage for every hour the employee works over 40 hours in a given week. The statute exempts certain categories of employees from these requirements, including executive, administrative, and professional employees (sometimes referred to as the "EAP" or "white collar" exemption). The FLSA tasks DOL with defining executive, administrative, and professional employees by regulation and requires the department to revisit these definitions from "time to time."

Under the 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 meet a minimum set by DOL (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). Employees who do not meet all three requirements or fail to qualify for another exemption must be treated as "hourly" or "nonexempt" employees and must be paid for each hour worked and, for all hours worked over 40 in a given workweek, at a rate of one and a half times employee's normal hourly pay (this premium pay rate is known as "overtime pay"). To ensure employees are paid for all hours worked and at the proper rate for overtime, employers must carefully track the hours nonexempt employees work.

Recent Related Rulemakings

On March 13, 2014, President Barack Obama issued a memorandum directing the Secretary of Labor to make changes to the regulations governing the overtime pay exemptions. In 2015, DOL responded to the President's memorandum by proposing to increase the then salary threshold of $455 per week ($23,660 annually) by 113 percent to $970 per week (or $50,440 per year), which the agency estimated to be the 40th percentile of earnings for all full-time salaried workers in 2016. DOL also proposed automatic annual increases to the salary threshold by tying it to one of two indexes – the Consumer Price Index for All Urban Consumers or the 40th percentile of earnings for all full-time salaried workers.

On May 23, 2016, DOL issued a final rule (the 2016 rule) doubling the minimum salary threshold from the 2004 rulemaking and increasing it to $913 per week (or $47,476 per year). Additionally, DOL attempted to impose automatic updates to the threshold every three years. DOL set both the salary threshold and the automatic updates to the threshold so it would exclude from the exemption the bottom 40% of salaried workers in the lowest-cost Census Region. As we noted during the notice and comment leading up to the release of the 2016 rule, this type of dramatic increase to the salary threshold would require mass reclassification of professionals in thousands of positions at institutions of higher education that clearly meet the duties test for exemptions but are paid less than $47,476 per year. We also noted that automatic increases without notice and comment are unlawful.

On November 22, 2016, a federal court temporarily enjoined DOL from enforcing the 2016 rule and issued a decision permanently enjoining the rule on September 1, 2017, on the grounds that the rule's high salary threshold created a "de facto salary-only test," and that "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption."[3] In light of the court's ruling, DOL issued a Request for Information (RFI) in June 2017, seeking comment about how DOL should go about updating the overtime regulations, and a NPRM in March 2019, proposing to increase the minimum salary threshold to $679 per week ($35,308 per year). DOL finalized the 2019 NPRM in September 2019, and the final rule went into effect on January 1, 2020, setting the salary threshold to $684 per week ($35,568 per year).

Current Notice of Proposed Rulemaking

DOL proposes several changes to the white-collar exemptions, including increasing the current salary threshold of $684 per week ($35,568 annually) by nearly 70% to $1,158 per week (or $60,209 per year), which the agency estimates will be the 35th percentile of earnings for all

[3] *State of Nevada v. United States Department of Labor* (November 22, 2016) at p. 14 http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20.pdf.

full-time salaried workers in the lowest-wage Census Region at the time the final rule is published.[4] DOL also proposes automatic increases to the salary threshold every three years to reflect current earnings data for the 35th percentile for weekly earnings of full-time non-hourly employees in the lowest-wage Census Region. DOL proposes publishing a notice with the new earning levels for the triennial updates in the Federal Register at least 150 days before the new salary threshold becomes effective.

Given the most recent update to the minimum salary threshold, which took effect in January 2020, we do not believe DOL should increase the salary threshold at this time. From 1938 to 1975, DOL revisited the salary level through the notice and comment rulemaking process at regular intervals – typically every five to nine years. As such, CUPA-HR has historically advocated for DOL to update the salary threshold using five-to-nine-year intervals, and 91% of CUPA-HR survey respondents agree with this position.[5]

Instead, CUPA-HR believes DOL should wait to update the salary threshold until inflationary pressures have cooled off and employers have a better understanding of the post-pandemic economic challenges and realities they face. Rapidly rising inflation has impacted nearly everyone in the U.S., and employers have not been immune to the challenges and increased costs that come with that trend. Similarly, the workforce has transitioned in the post-pandemic world to an increased use of remote, hybrid, and flexible work arrangements that employers and employees are still working to figure out. We believe DOL would be best suited to withdraw the current proposal and revisit an update in several years when inflationary pressure has abated and employers and employees have a better sense of how to manage increased demand for remote, hybrid, and flexible work arrangements and other workforce changes arising from the pandemic.

CUPA-HR and its members also believe DOL has proposed a minimum salary level that is far too high. While 63% of respondents to our CUPA-HR survey on the 2023 overtime proposal said they could manage some increase to the salary threshold, a vast majority of respondents (95%) indicated that they could only manage an increase if it is lower than the $1,158 per week ($60,209 per year) level that has been proposed in the current NPRM.

As with the 2016 proposal, colleges and universities would increase salaries for a few individuals whose current pay is closest to the new threshold, but would need to reclassify the vast

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[4] See Footnote #3 in *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*; 88 FR 62152; https://www.federalregister.gov/d/2023-19032/p-19 (September 9, 2023). DOL fails to propose a precise salary threshold and instead provides various estimates of what the salary threshold would be based on projected data, including $60,209 for projected data for the first quarter 2024. We have chosen to comment on this estimate as it is unlikely DOL will require implementation before the end of first quarter 2024.

[5] From October 17 to 24, CUPA-HR surveyed Chief Human Resources Officers (CHROs) and other human resources staff on campuses across the country to gather input from institutions on the anticipated impacts of the proposed changes. Results from the survey, which will be referred to as the "CUPA-HR survey" throughout this comment letter, helped us finalize our positions and will be included throughout these comments.

majority of impacted employees to hourly status. While in some cases these changes would be appropriate and would keep with the intent of the FLSA, in too many instances colleges and universities would be forced to reclassify employees that work in jobs that have always been exempt and are well-suited to exempt status. This mass reclassification would be to the detriment of employees, institutions, and students. Employees would face diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development, and advancement with no guarantee of increased compensation. As nonprofits and public entities, institutions would not be able to absorb the increased costs that come with higher salaries for exempt employees, expanded overtime payments, and other labor and administrative costs associated with transitioning traditionally exempt employees into nonexempt status. In the face of these costs and challenges, institutions would need to both reduce services and raise tuition, to the detriment of students.

In addition, the undersigned do not believe DOL has the authority to impose automatic updates, and even if it did, the agency should not automatically update the salary level, as doing so will also negatively impact institutions' budgets and budget planning, their ability to provide merit-based increases, and employee morale. Again, we believe that DOL should instead revisit the salary level at regular intervals, as it did from 1938 to 1975, when the agency updated the salary level every five to nine years, and each salary increase should be made through notice and comment rulemaking that complies with the Administrative Procedure Act.

Comments

1) DOL Should Not Update the Salary Threshold at This Time

As discussed above, DOL most recently updated the minimum salary threshold in 2020. CUPA-HR welcomed updates at the time, given the minimum threshold had not been successfully updated since 2004 and the level proposed in 2019 was appropriate at the time. Given the most recent update in 2020, we believe it is too soon for DOL to move forward with another update to the minimum salary threshold.

a) <u>DOL Should Wait Until Inflationary Pressures Have Cooled Off and the Effects of the Pandemic are Better Understood</u>

Before issuing a final rule to increase the salary threshold for overtime exemptions, CUPA-HR and the undersigned associations believe DOL should consider both the high inflation rates the country has faced since the beginning of 2020, as well as the rise in remote, hybrid, and flexible work resulting from workforce shifts the necessarily came about during the COVID-19 pandemic.[6] [7]

Inflationary pressures make adjusting to any increase in the threshold at this time particularly challenging. Institutions of higher education continue to grapple with increases in operational costs resulting from repeated spikes in the price of conducting everyday business as well as market-driven increases to employee compensation on campus.[8] [9] This drumbeat of escalating operational expenses has left colleges and universities with little wiggle room to increase spending. This is particularly the case when costs are imposed mid-fiscal year as DOL is proposing, given colleges and universities annually set fixed budgets.

Rather than moving forward with an increase at this time, DOL should wait until these inflationary pressures have cooled so that institutions are better positioned to absorb adjustments.

Additionally, remote and hybrid work have become increasingly important for higher education employees since its ubiquitous deployment at the start of the pandemic. Institutions have tended to continue their remote and hybrid work policies, even with the pandemic declared over, as employees have indicated that having such flexibility is important to them.[10] [11] Employers have seen higher employee retention and morale as a result of offering flexible work arrangements, which became increasingly important over the past few years as the job market remained tight.[12] Importantly, however, the nature and control over one's work for exempt

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[6] See the Wall Street Journal, "*Workers Keep Getting Big Raises. That's an Issue for the Fed,"* https://www.wsj.com/economy/jobs/workers-keep-getting-big-raises-thats-a-problem-for-the-fed-94a20f56?mod=djemCapitalJournalDaybreak (October 31, 2023)

[7] See ABC News, "*US wages rose at a solid pace this summer, posing challenge for Fed's inflation fight*," https://abcnews.go.com/US/wireStory/us-wages-rose-solid-pace-summer-posing-challenge-104507943#:~:text=Fed%20Chair%20Jerome%20Powell%20has,the%20form%20 of%20 higher%20prices (October 31, 2023)

[8] See Higher Ed Dive, "*Inflation will continue to batter colleges through fiscal 2024, Moody's predicts*," https://www.highereddive.com/news/inflation-batter-colleges-through-fiscal-2024-moodys/686573/#:~:text=Colleges'%20operating%20costs%20increased%205.2,9.1%25%20over%20that%20same%20period (July 12, 2023).

[9] See CUPA-HR report, "*Workforce Pay Increases*," https://www.cupahr.org/surveys/workforce-data/workforce-pay-increases/.

[10] See CUPA-HR report, "*CUPA-HR 2023 Higher Education Employee Retention Survey*," https://www.cupahr.org/surveys/research-briefs/higher-ed-employee-retention-survey-findings-september-2023/ (September 2023).

[11] See Inside Higher Ed, "*Limited Remote Work Options a Big Driver of Staff Turnover,"* https://www.insidehighered.com/news/workplace/remote-flexible-work/2023/09/14/limited-remote-work-options-contributing-higher-ed (September 14, 2023).

[12] See CUPA-HR report, "*Providing Remote Work Opportunities Will Aid Your Retention Efforts*," https://www.cupahr.org/surveys/research-briefs/2021-11-remote-work-opportunities-aid-retention-efforts/ (November 2021).

status often lends itself better to remote and flexible work arrangements as compared to that for nonexempt status.[13] [14] [15] [16]

If the proposed rule with the higher salary threshold is finalized, institutions may be forced to end remote and flexible work arrangements for many employees who are reclassified as nonexempt. Under the FLSA, employers must carefully track hours for all nonexempt employees and provide them with premium pay for overtime hours. As a result, employers will necessarily avoid situations where tracking nonexempt employees' hours is difficult or impossible. This means employers often restrict hourly employees' access to smart devices and other technology that can be used remotely or limit opportunities for remote work altogether. Flexible work arrangements and work travel also become extremely cumbersome, if not impossible, to manage. For context, according to the CUPA-HR survey, 39% of respondents (107 out of 274) envision eliminating or limiting remote work opportunities for employees that may be reclassified from exempt to nonexempt status as a result of the increased minimum salary threshold.

Taking away flexible and remote work arrangements may be deemed as a loss of benefits and could result in employees leaving institutions for other work that grants them such flexibility. As a small private institution in the Midwest Census Region indicated in the CUPA-HR survey:

> Flexible work schedules will have to be eliminated in order to limit the chance for overtime. Remote/hybrid options will also be eliminated in order to remove the risk of overtime. All of the above situations are deemed as benefits to our employees. The employees will be losing benefits.

b) <u>DOL Should Update the Minimum Salary Threshold every 5-9 years</u>

As discussed above, CUPA-HR has historically advocated that DOL increase the minimum salary threshold every five to nine years. Our belief is in accordance with the FLSA's statutory language, which requires DOL to update the EAP definition from time to time by regulation, and

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[13] See Reuters, "*Legal considerations for managing remote employees*," https://www.reuters.com/legal/legalindustry/legal-considerations-managing-remote-employees-2021-12-20/ (December 20, 2021).

[14] See Society for Human Resource Management (SHRM), "*Remote Workers Pose Wage and Hour Challenges,*" https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/remote-workers-raise-wage-and-hour-concerns.aspx (June 21, 2022).

[15] CUPA-HR survey respondents indicated that, on average, 21% of their remote/hybrid workforce are nonexempt. The median of their responses was 10%, showing that most responding institutions allow remote and hybrid work arrangements for relatively few nonexempt employees. This could be due to the requirement for employers to closely track nonexempt employees' hours to ensure compliance with overtime pay and other requirements, which can be difficult to do when employees work off site or in a flexible capacity.

[16] DOL's own guidance on telework highlights the liability and complications associated with hourly employees working remotely. See the Wage and Hour Division's Field Assistance Bulletin No. 2020-5, "Employers' obligation to exercise reasonable diligence in tracking teleworking employees' hours of work." https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fab_2020_5.pdf (August 24, 2020).

precedent at the agency; from 1938 to 1975, DOL revisited the salary level every five to nine years through the notice and comment rulemaking process. When DOL proposed to increase the salary threshold in 2016, CUPA-HR agreed that an update was past due and needed at the time, but that the proposed level was too high for institutions to implement effectively. This proposed update comes only 3 years after DOL last updated the salary threshold, so to follow both historical trends and CUPA-HR's previous positions, we believe DOL should revisit the FLSA overtime regulations again in a few years through the notice and comment rulemaking process.

2) DOL Should Lower the Proposed Minimum Salary Threshold and Account for Room and Board

When DOL decides to move forward with changing the FLSA overtime regulations, CUPA-HR and the undersigned associations believe that DOL should consider a lower proposed minimum salary threshold. We also urge DOL to include room and board as part of an employee's total salary when considering if such employees meet the minimum salary threshold.

Simply put, we believe that the proposed minimum salary threshold is too high. Updating the salary level from $684 per week ($35,568 per year) to $1,158 per week ($60,209 per year) leads to a nearly 70% increase, which will result in a large number of employees being reclassified to nonexempt status.

As mentioned above, 63% of CUPA-HR survey respondents indicated that they could manage some increase to the salary threshold at this time. That being said, 95% of survey respondents indicated that they could only manage an increase if it is lower than the proposed $1,158 per week. Additionally, 83% of the overall respondents said they could manage an increase of $822 per week ($42,744 per year) or less. When we look more closely at the responses, it becomes clear that institutions in lower-cost regions are particularly concerned with the threshold. Notably, 90% of respondents (82 out of 91) with institutions in the South Census Region said that they could only manage an increase of $822 per week ($42,744 per year) or less.

The $42,744 per year salary level chosen by these members is equivalent to the level if using the same methodology from the 2004 final rule with the most recent data. This shows continued support among our survey respondents to keep the methodology for calculating the salary level the same at this time, rather than changing the methodology to the proposed 35th percentile of full-time salaried workers in the lowest-wage Census Region.

Many employees on campuses that are exempt pursuant to the regulations that the DOL proposes to modify earn less than the NPRM's proposed minimum salary level of $1,158 per week (or $60,209 per year). According to our survey, employees that are currently exempt but earn less than the NPRM's proposed minimum salary level include those in academic affairs (advisors and counselors); student affairs (residence hall managers, admissions counselors, financial aid counselors, and student activities officers); information technology, research, and clinical professionals (including many with advanced degrees and those engaged in advanced training such as postdoctoral trainees and residents); athletic affairs (physical therapists and trainers), and other positions relying on grants (research, medical, etc.).

To comply with the proposed change, colleges and universities would increase salaries for a few, but due to budgetary constraints, they would need to reclassify the vast majority of impacted employees to hourly status and/or restructure these jobs or the method for staffing the impacted departments.[17] While in some cases these reclassifications may be appropriate and keep with the intent of the FLSA, in too many instances colleges and universities would be forced to reclassify employees that work in jobs that have always been and are intended to be exempt to the detriment of the employee, the institution, and students.

a) Impact of Proposed Minimum Salary Level on Higher Education Employees

(1) The Proposed Minimum Salary Level Will Trigger Mass Reclassification of Traditionally White-Collar Employees, Particularly at Institutions with Fewer Resources and/or in Areas with Lower Cost of Living

As noted above, if DOL were to implement its proposal, colleges and universities would need to reclassify many currently exempt employees to hourly status, as institutions simply cannot afford to raise those employees' salaries to the proposed 2023 minimum of $60,209 per year. This will particularly be the case if DOL imposes an increase without sufficient notice for adjustment in the budget cycle. In higher education, budget cycles typically follow the fiscal year, which for most colleges and universities is July 1 to June 30, with approvals of the planned budget occurring months, and sometimes a year or more, in advance.

An example was provided by a small university in the South Census Region, which informed CUPA-HR that it estimates that the institution would need to pay an additional $646,617 per year if they were to increase all professional staff salaries up to the new minimum proposed salary threshold. Unable to absorb these costs in the current budget, the institution will likely need to reclassify many of the employees falling between the current and new salary levels even though many of those employees may work in jobs that have always been and are well suited by the nature of the duties to be exempt.

Data suggests this will be the case for the vast majority of our member institutions. In fact, in our 2023 CUPA-HR survey, 84% of respondents (264 out of 312) indicated they would need to reclassify previously exempt employees to nonexempt, as they would not be able to adjust salaries upward to maintain exemptions for those employees. Additionally, most respondents said they would choose to convert currently exempt employees to nonexempt status if they earn $49,999 and below. Less than half (48%) intend to increase salaries for those making between $50,000-$54,999, and only a bare majority (51%) indicated they plan to increase salaries to the proposed level for those making from $55,000-$59,999.

[17] As we mentioned previously, this is particularly the case if DOL pushes through the increase now given budgets are already strained from inflation and if DOL forces this adjustment during the middle of a budget year.

The number and type of employees reclassified at any given college or university, however, would depend largely on the institution's resources, location, and workforce. In many cases, those with fewer resources and/or in areas with lower cost of living would be the most impacted by the proposal. According to the CUPA-HR survey, 95% of respondents (87 out of 91) representing institutions in the South Census Region indicated that they would need to reclassify exempt employees to nonexempt status as a result of the proposed increase, compared to 84% of all respondents (264 out of 312). Similarly, 90% of respondents representing two-year institutions (38 out of 42) indicated that they would need to reclassify employees as a result of the proposed rule, again compared to 84% of all respondents.

That said, employees at smaller institutions and those in lower-cost areas of the country are not the only ones that would be impacted by the proposal — almost all colleges and universities would be impacted. Because pay in higher education and the nonprofit and public sectors is frequently lower than nationwide averages, colleges and universities would need to reclassify a disproportionately larger percentage of their workforce than those in many other industries.[18] Employees working in higher education often trade lower pay for better quality of life or job satisfaction — such as the unique opportunity for professionals to pursue research — or other benefits unique to the higher education setting that make it attractive to employees, such as room and board or tuition reduction. The value of these benefits, however, may not be counted towards meeting the minimum salary level.

(2) While Hourly Pay and Nonexempt Status is Appropriate for Certain Jobs, It is Not Appropriate for All Jobs

CUPA-HR believes DOL must update the salary levels and overtime regulations from time to time to ensure the exemptions are not abused. That said, 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. Moreover, while the FLSA protects hourly employees against excessive work hours, nonexempt employees often face diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development, and advancement. As we discussed earlier, employers must closely track nonexempt employees' hours to ensure compliance with overtime pay and other requirements, and they often limit employees' work hours to avoid costly overtime pay. That is why it's so

[18] According to the 2023 CUPA-HR Employee Retention Survey (ERS), 86% of respondents cite pay and salary increases as a reason for seeking other employment. The report also shows that 61% of respondents who are likely to seek other employment within the next year would seek employment in the private sector, and 44% said they would seek employment at a non-profit organization outside of higher education. Comparing the ERS results to other surveys, it appears that seeking higher pay in future employment is more important to those working in higher education compared to other industries and that higher education employees may be inclined to seek higher pay outside of higher education. According to an April 2023 report from The Muse, 67% of respondents cite compensation as an important factor when evaluating a new job opportunity. Additionally, a Pew Research Center study found that 63% of workers cite low pay as a top reason for leaving their job in 2021. Higher education employees are much more likely to seek higher pay at a new job, which may indicate that they are paid less than employees working outside of higher education.

important that regulations strike the appropriate balance between protecting employees from abuse and allowing white-collar employees autonomy and flexibility.

For example, institutions have expressed concerns about how the proposed changes to the salary threshold will impact research and postdoctoral professionals.[19] Oftentimes, such professionals are funded on fixed grants from the federal government, which are unlikely to adjust as a result of this proposed rulemaking. If such professionals fall into nonexempt status as a result of this rulemaking, they may be unable to effectively pursue their research and work under the grant dollars provided to them. One survey respondent representing a large public university in the West Census Region explained their concerns:

> This change impacts our PhD researchers funded from grants. These employees consider themselves to be independent salaried professionals and a change in status to non-exempt is not in sync with the level of work they perform or how they view that work.

Another respondent added that “postdoctoral researchers would have a difficult time getting their research done in 40 hours per week” and that raising these professionals' salaries to keep them exempt under the proposed salary threshold would result in “less opportunity as these are typically grant funded with finite pools for salary.”

Another position of concern for campuses is live-in resident directors (RDs). Many RDs are exempt from overtime requirements, and the ability to complete their work effectively and efficiently depends on their exempt status, which allows them to be “on-call.” A survey respondent representing a community college in the Midwest Census Region explained why the work of RDs requires such professionals to be exempt from overtime requirements:

> Campus housing staff are sometimes on call to deal with issues when they happen. Currently a college employee who has to help a student in the middle of the night or on a weekend puts the student first and deals with adjusting hours later. [Reclassifying these employees as nonexempt] could require the housing employee to reach out to a supervisor to see if they are approved to work overtime or not based on the level of student need. That’s not good for students or employee morale.

Many CUPA-HR members worry that raising the salary threshold to the level proposed would result in mass reclassification of RDs to nonexempt status. To avoid this, CUPA-HR has asked DOL in the past to consider total compensation, including room and board, in the salary threshold amount. RDs and other campus housing staff are often compensated with free room and board

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[19] The National Institutes of Health (NIH) established stipend levels for National Research Service Awards (NRSA awards) for postdoctoral fellows in FY 2023 at: https://grants.nih.gov/grants/guide/notice-files/NOT-OD-23-076.html. If DOL finalizes the salary threshold at $60,209 per year, postdoctoral professionals with 0-3 years of experience will fall under the salary threshold and will be considered nonexempt under the FLSA overtime regulations.

in addition to their salary. When room and board are factored into the total compensation package, RDs receive a total compensation that may be higher than the proposed salary threshold, yet DOL does not recognize room and board when considering the salary threshold needed to be exempt from the overtime requirements.

A small private university in the South Census Region explained this dilemma when responding to the CUPA-HR survey:

> Since we cannot factor in the room and board as part of the compensation package, having to bring resident directors up to the $60k range would put their compensation package above departmental directors. RDs have to live on campus, I can't imagine that they would take the job if they had to pay rent for their apartment, but there is no way to have them be non-exempt. With 168 hours in a week, it would take four employees to cover one dorm for a week or have the dorm be without staff intervention. There does not seem to be a viable solution.

If room and board were to be considered, RDs may be able to keep their exempt status when the salary threshold is increased, meaning they can continue to do their work with the flexibility necessary to complete it. CUPA-HR therefore again requests that DOL consider room and board as part of an employee’s total salary when considering if such employees meet the minimum salary threshold.

(3) Reclassification Will Adversely Impact Employee Flexibility, Career Advancement, and Morale

If the proposed changes to the salary threshold are implemented, CUPA-HR believes there will also be an adverse impact on employee flexibility and career advancement. According to the CUPA-HR survey, 46% of respondents (127 out of 274) indicated that they envision eliminating or limiting career development opportunities, such as attending conferences or educational sessions. Additionally, 59% of respondents (161 out of 274) envision eliminating or limiting work-related travel for employees reclassified from exempt to nonexempt as a result of the increased salary threshold.

Loss of autonomy, loss of flexibility, and loss of career advancement opportunities contribute to a negative impact on employee morale. Many CUPA-HR members are concerned that DOL has not given sufficient acknowledgment to the reality that many higher education professionals view their exempt status as a reflection and recognition of their advanced education, academic success, and professional prestige. Loss of exempt status may be seen as a demotion in perceived status, even if their overall compensation remains stable. One survey respondent who works for a small private institution in the South Census Region provided the following concerns on employee morale:

> There is no way we could nearly double the wage base for employees to bring them up to the exempt basis and would have to move them to non-exempt and limit their hours to 40. Not only do employees who are reclassified consider having to clock time as a demotion, this would also add to the burden of getting the job done. Having to remain within the 40-hour confines may mean that during busy weeks, things may fall behind, go undone, or fall to already overburdened supervisors.

Given the example above, it is also important to keep in mind that 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. For employees that are reclassified from exempt to hourly, this would mean eligibility for overtime pay, but not necessarily any increase in pay as institutions may choose to limit newly nonexempt employees' hours to 40 per week. It also does not mean that – to avoid overtime pay – higher education employers would alternatively add additional employees. Since colleges and universities are under constant pressure — including from the federal government itself — to keep the costs of higher education as affordable as possible, none of the alternatives are financially viable. Institutions cannot raise salaries, they cannot start paying new overtime, and they cannot hire additional employees. As discussed in more detail below, the only likely result is less service and support for students, fewer employees to perform more work, and longer wait times for service recipients.

(4) The Proposed Minimum Salary Level Will Also Trigger Mass Job and Department Restructuring, Which Will Ultimately Result in Layoffs

In the CUPA-HR overtime survey, respondents indicated that institutions will look to comply with the proposed changes in ways other than increasing salaries and reclassifying employees, including job and department restructuring. According to the survey, about 41% of respondents (127 out of 312) anticipate needing to restructure jobs as a result of the proposed increase to the threshold. Additionally, of the 61 respondents who said they would need to restructure departments as a result of the proposed changes, 61% (37 out of 61) said that their institution anticipates reductions in workforce as part of restructuring their departments if the salary threshold is raised to the level proposed in the NPRM.

Again, given the budgetary constraints of an institution, colleges and universities cannot always increase the salaries of employees, and many currently exempt positions require work that is better suited for exempt status. Given these realities, institutions will likely need to lay off employees that now fall under nonexempt status under the proposed salary threshold as institutions will be unable to adjust their duties in a way that can be limited to 40 hours per week or pay them overtime for hours worked over 40 per week. Instead, the work of those employees will be given to others who are still exempt, which will contribute to lower employee morale and turnover as those with the increased workload will be overburdened and feel less valued.

b) Impact of Proposed Minimum Salary Level on Higher Education Institutions and Students

For colleges and universities, the administrative and labor costs associated with these changes would be significant in a time of limited and sometimes shrinking budgets for higher education. For example, a private religious university in the South Census Region estimates that raising the minimum salary threshold to $60,000 would result in a $1.4 million budget adjustment and a staff reduction of about 40 salaried staff members earning at or near the current salary level.[20]

Many estimates from institutions are low as they do not account for additional costs employers would need to incur to avoid wage compression,[21] corresponding benefits-cost impacts, and administrative costs related to implementing and administering the rule. While institutions may be able to compensate for some of the salary increases driven by the proposal by eliminating certain positions and avoid other increases by reclassifying employees, both these options would cause a reduction in services. In short, in the face of these costs, institutions would be under pressure to both reduce services and raise tuition to cover costs.

Increased labor costs have been cited as a main driver in increased college costs.[22] As such, the impact of this proposal on students is obviously tangible and would be felt directly and substantially in the form of higher tuition costs. Many higher education institutions' primary source of revenue is derived through tuition and fees. As nonprofits and public entities, colleges and universities would not be able to absorb the increased costs that come with higher salaries for exempt employees or expanded overtime payments. The NPRM states that the increased salary threshold will result in "higher earnings in the form of transfers of income from employers to employees." However, since there are no profits to transfer to employees, additional costs, whether due to increased salaries, overtime payments, or related administrative costs, would need to come from tuition increases, placing additional burdens directly on the shoulders of students.

The negative potential impact that this proposal could have on students does not stop with greater financial burdens but is also exacerbated by the potential for crucial student services to be cut as well. Many of the intrinsic benefits of higher education, such as the ability for students to receive "extra help" or "guidance" in their studies and personal lives, may be greatly diminished as institutions accommodate budgetary stresses by reducing hours of operations and services generally. As discussed above, institutions would also be required to cut certain positions, resulting in layoffs for employees and diminished resources for students.

[20] See: https://www.regulations.gov/comment/WHD-2023-0001-8244.

[21] Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed and to avoid wage compression. Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $900 per week and their supervisors earn $1,200 per week, the decision to raise the employees' salary to $1,158 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.

[22] See the American Council on Education (ACE) report, "*Putting College Costs Into Context*" (pg. 5).

3) DOL Should Not Implement Automatic Updates to the Salary Threshold

Under the NPRM, DOL proposes to automatically increase the minimum salary threshold every three years henceforth using the most current data for the 35th percentile of weekly earnings of full-time salaried employees in the lowest-wage Census Region. The NPRM states that DOL would issue a notice via the Federal Register 150 days prior to the effective date of the increases.

CUPA-HR and the undersigned do not believe DOL should automatically update the salary level. Notably, 91% of CUPA-HR survey respondents (243 out of 267) agreed that they do not believe DOL should automatically update the salary threshold. We believe that automatically updating the salary level would negatively impact institutions' budgets and budget planning, ability to provide merit-based increases, and employee morale. Moreover, we do not believe DOL has the authority to impose automatic updates. Instead, as we have discussed above, we believe DOL should revisit the salary level every five to nine years, as it did from 1938 to 1975, and it should increase the salary level through notice and comment rulemaking that complies with the Administrative Procedures Act.

a) DOL Lacks the Authority to Impose Automatic Updates

DOL lacks the authority to impose automatic updates to the salary level and must engage in notice and comment rulemaking each time it wishes to make an increase. 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 delimiting 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."[23]

Congress could have expressly provided authority to impose automatic updates as it has expressly permitted indexing in other statutes, including the Social Security Act and the Patient Protection and Affordable Care Act, but it did not. Moreover, when Congress has amended the FLSA to increase the minimum wage, it similarly has not indexed that amount. Congress's actions — or, more precisely, lack of action — on this front demonstrate a clear intent that the salary level be revisited as conditions warrant, allowing DOL and the regulated community the opportunity to provide input into the appropriate level.

b) Regardless of Authority, DOL Should Only Increase the Salary Level Via Notice and Comment Rulemaking

[23] 69 Fed. Reg. 22171

Regardless of whether it has authority or not to impose automatic updates, DOL should only increase the salary level via notice and comment rulemaking. To date, every time DOL has increased the salary test, it has done so via Administrative Procedure Act rulemaking by proposing a new salary level and allowing the public to comment on the proposal. This process not only forces thoughtful examination of the exemptions and public participation, but it also requires DOL to follow the Regulatory Flexibility Act and to undertake a detailed economic and cost analysis, which is an important part of assessing the impact of any increase to the salary level. It also allows the agency to tailor any changes to the salary level and other regulatory requirements so the exemptions better meet their statutory purpose in the face of changing workforces and changing economies.

The history of changes to the exemptions exemplifies this point. Over the years, DOL rulemakings have made various adjustments to salary levels. Each time, the duration between updates and the rates of increase have varied (generally within a range), and in many cases, DOL has imposed different salary levels for executives, professionals, and administrative employees and different salary levels for different duties tests. Each time, DOL engaged in thoughtful rulemaking that resulted in tailored changes aimed at helping to ensure that the exemptions remained true to their purpose in the face of changing workforces and changing economic circumstances.

In the current rulemaking, however, DOL proposes to announce a new salary level every three years in the Federal Register without notice and comment, without a Regulatory Flexibility Act analysis, and without input from stakeholders. Each of those regulatory requirements is intended to force the agency and the public to consider the consequences of its proposed actions. Something as important as the FLSA overtime exemptions, which impact millions of employees and employers,[24] warrants this type of due diligence.

DOL needs to fulfill its duty and regularly update the threshold through notice and comment rulemaking, as it has with every past salary increase. Obviously, the agency has met that requirement before and can do so again in the future without imposing the rigid and costly automatic updates being considered.

c) <u>Automatically Updating the Salary Level Would Negatively Impact Institutions’ Budgets and Budget Planning, Ability to Provide Merit-Based Increases, and Employee Morale</u>

Automatically updating the salary level would negatively impact institutions’ budgets and budget planning, ability to provide merit-based increases and employee morale. The triennial increases proposed by DOL would create uncertainty 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

[24] In the 2023 NPRM, DOL estimates that 3.4 million employees will be impacted by the proposed changes to the salary threshold in the first year alone. See *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*; 88 FR 62152; https://www.federalregister.gov/d/2023-19032/p-38 (September 9, 2023).

determine the impact and viability of increasing salaries to maintain exemptions versus converting employees to hourly status.

The financial impact of conducting such analysis every three years is significant, but the cost of triennial salary adjustments and reclassifications would be far more. In fact, 95% (254 of 266 responses) of survey respondents answering a survey question on this point said automatic increases would negatively impact their budgets, and 92% (240 of 263 responses) said it would negatively impact their ability to engage in financial planning.

Automatic updates would also interfere with operational and human resource functions as forced wage increases resulting from the changed threshold and related wage compression will make it hard for institutions to provide merit-based pay increases. Out of those responding to the survey question on this topic, 87% (227 of 260 responses) said automatic updates would negatively impact their institution's ability to provide merit-based increases to all employees.

Beyond such financial and operational impacts, transitioning employees from exempt to nonexempt status often triggers morale issues. If automatic updating goes into effect, employers would need to reclassify employees on a triennial basis, which would likely cause long-term morale issues. The morale issues would be exacerbated by two other unintended consequences resulting from the automatic increases — wage compression and deterioration in institutions' ability to provide merit-based increases. A massive 95% (251 of 265 responses) of respondents said the automatic increases would cause morale issues as a result of reclassification, wage compression, and limits on merit-based increases.

In short, increasing the minimum salary threshold every three years would create uncertainty for employers in their budgeting and planning process and significantly undermine employee morale.

4) DOL Should Extend the Effective Date of Any Final Rule Implementing a Higher Salary Threshold

Under the NPRM, DOL proposes that the final rule will become effective 60 days after its publication. It is simply not reasonable to expect employers to assess the impact, plan, and implement appropriate and affordable changes to employees exempt status, salaries, and job structures all within the time frames DOL has provided, especially when DOL estimates that 3.4 million employees nationwide will be impacted by the nearly 70% increase to the minimum salary threshold. Moreover, organizations will not have funds budgeted for 2024 to conduct this analysis or make any needed salary adjustments. As we stated earlier, higher education budget cycles typically follow the fiscal year, which for most colleges and universities is July 1 to June 30, with approvals of the planned budget occurring months, and sometimes a year or more, in advance.

When asked what a reasonable timeframe would be for compliance to any final rule, 89% of our survey respondents (235 out of 265) indicated that a reasonable timeframe for compliance would be 180 days or longer. Additionally, 85% of respondents (223 out of 265) believe that it would be "Difficult" or "Very Difficult" for their institution to alter operations in light of reclassifications resulting from the proposed changes. These results clearly show that 60 days is not doable for many institutions of higher education and that DOL should consider extending the effective date of any final rule implementing a higher salary threshold. Given these results, we believe DOL should provide at least 180 days for employers to comply with the final rule once it is published.

Conclusion

CUPA-HR and the undersigned respectfully request DOL to consider our suggested changes. We thank the agency for the opportunity to comment.

Respectfully,

Bailey Graves

Bailey Graves
Government Relations Team
College and University Professional Association for Human Resources
bgraves@cupahr.org

On behalf of the following undersigned organizations:

National Organizations

American Association of Colleges of Osteopathic Medicine
American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Association of Veterinary Medical Colleges
American Council on Education
Association of American Medical Colleges (AAMC)
Association of American Universities
Association of Catholic Colleges and Universities
Association of College Unions International
Association of Community College Trustees (ACCT)
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
Association of Schools and Programs of Public Health

Career Education Colleges and Universities
Coalition of Urban and Metropolitan Universities
College and University Professional Association for Human Resources
Council for Advancement and Support of Education
Council for Christian Colleges & Universities (CCCU)
Council for Opportunity in Education
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Collegiate Athletic Association
UPCEA
Work Colleges Consortium

State and U.S. Territory Organizations
Association of Independent Colleges & Universities in Massachusetts
Association of Independent Colleges and Universities in Pennsylvania
Association of Independent Colleges and Universities of Ohio
Association of Independent Colleges and Universities of Rhode Island
Association of Private Colleges and Universities of Puerto Rico / Asociación de Colegios y Universidades Privadas de Puerto Rico (ACUP)
Community Colleges for Iowa
Connecticut Conference of Independent Colleges
Consortium of Universities of the Washington Metropolitan Area
Council of Independent Colleges in Virginia
Georgia Independent College Association
Independent Colleges and Universities of Florida
Independent Colleges and Universities of Missouri
Independent Colleges and Universities of Texas
Kansas Independent College Association
Maryland Independent College and University Association
Minnesota Private College Council
North Carolina Independent Colleges and Universities
Oregon Alliance of Independent Colleges and Universities
Tennessee Independent Colleges and Universities Association
Wisconsin Association of Independent Colleges and Universities