



CUPA-HR Washington Update: How the DOL's Proposed Changes to Overtime Rules Could Impact Campus

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Agenda

1. Overview of FLSA & Overtime Regulations
2. Previous Updates to FLSA
3. 2023 Proposed Rulemaking Overview
4. Challenges and Concerns for Campus
5. CUPA-HR's Advocacy Efforts



Overview of the FLSA & Overtime Regulations

Fair Labor Standards Act (FLSA)

- 1938 federal law that establishes federal minimum wage and overtime pay standards
- Employer must track employees' hours and pay premium "overtime rate" of 1.5 times the employees' regular pay rate for hours worked over 40 per workweek

Overview of the FLSA & Overtime Regulations

Fair Labor Standards Act (FLSA)

- FLSA contains various exemptions to overtime pay requirements, including for executive, administrative and professional employees – known as the EAP or “white collar” exemptions
- The FLSA states the Department of Labor will define and delimit by regulation the terms executive, administrative and professional employees from time to time

Overview of the FLSA & Overtime Regulations

Fair Labor Standards Act (FLSA)

- The FLSA sets a federal “floor” and states and localities may impose additional wage and hour requirements
- This includes setting more stringent requirements for overtime pay exemptions

Overview of the FLSA & Overtime Regulations

Federal Overtime Pay Regulations

Three-part test for EAP exemption:

1. Duties test
2. Salary basis test
3. Minimum salary level (set by weekly earnings)

Previous Regulatory Changes

Eight prior updates:

- 1940, 1949, 1958, 1963, 1970, 1975, 2004 and 2019

Other than 1975-2004, updates ranged from 5-15 years and increases in minimum salary ranged from 5-50%

This would be historically short time frame and large increase

Previous Regulatory Changes

The 2004 rules abandonment of long test is DOL's purported justification for setting the threshold dramatically higher

- *The proposed salary level would better identify which employees are employed in a bona fide EAP capacity—particularly by restoring overtime eligibility for individuals who perform substantial amounts of non exempt work and historically would have been protected by the long duties test...*

Previous Regulatory Changes

2004 – Bush final rule

- Overhauls duties test
- Replaces “long” and “short” tests with one test
 - The long test was a lower threshold paired with a requirement employers limit (and therefore track) performance of nonexempt work by employees claiming the EAP exemption
 - The long test had been out of use since 1991 because inflation and minimum wage had made it irrelevant
- Sets threshold at \$455/week (\$23,660) annually

Previous Regulatory Changes

2016 – Obama administration final rule

- Updates salary threshold to \$47,476 (\$913/week)
- Creates automatic increases every 3 years indexed to the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region
- Enjoined by court and rescinded by Trump

2019 – Trump administration final rule

- Updates salary threshold to \$35,568 (\$684/week)
- Does NOT include automatic increases
- Went into effect January 1, 2020

2023 Proposed Rulemaking

- No changes to duties or salary basis test
- Sets minimum salary to 35th percentile of weekly earnings of full-time salaried workers in the lowest-wage Census Region
- Would automatically update salary level every 3 years based on the same formula

2023 Proposed Rulemaking

- This would be an over 50% increase to minimum salary from \$684/week (\$35,568 annually) to **at least \$1,059/week (\$55,068 annually)** for non-exempt employees
- Final rule will reflect most recent wage data – **DOL projects this to be \$1,158/week (\$60,209 annually)**

2023 Proposed Rulemaking

- Increases the highly compensated employee (HCE) salary threshold to the 85th percentile of weekly earnings for full-time salaried workers
- Set to \$143,988 – 34% increase

2023 Proposed Rulemaking

Ties both the minimum salary threshold and HCE to their respective percentiles of weekly earnings with increases set for every three years

- Automatic updates will be issued in Federal Register at least 150 days before going into effect
- Reserves right for DOL to temporarily delay automatic update, but must be done through NPRM

Effective Date of the Regulations

- On August 30, 2023, the DOL announced Notice of Proposed Rule Making and related FAQs
- A final implementation date has not been provided, but could be as early as 60 days after a final rule is published
- The proposed rule was submitted for publication to the Federal Register on September 8, 2023 and the 60-day comment period ends on November 7, 2023.
- The DOL must then review and respond to all substantive comments before publishing a final rule, which will include an implementation date. For reference, the 2019 proposed rule received more than 300,000 comments.

Impact of Proposed Rulemaking

- DOL found that **3.4 million salaried white-collar employees** earn above the current level but below the proposed salary limit of **\$1059/week (\$55,068 annually)**
- These changes continue to apply to both full time and part time employees.

Impact of Proposed Rulemaking

EAP exemption and higher ed specific jobs

- DOL released a higher ed fact sheet for FLSA overtime exemption compliance in 2019
- Addresses exemption status for teachers, coaches, professional/administrative/executive employees, student employees
- It does not appear that these positions will be affected by the proposed rules

Impact of Proposed Rulemaking

Employees most likely to impacted on college and university campuses may be:

- Academic Advisors - Counselors
- Student Admissions Counselors
- Administrative Specialists – Coordinators
- Student Success Professionals
- Student Financial Aid Counselors
- Student Residence Hall Managers
- Athletic Trainers – Physical Therapists

*This analysis is based on CUPA-HR salary data and the proposed salary level. Some of the roles may fall within the academic administrative employees exemption, depending on the duties assigned and reporting structure at individual institutions. Employees that fall within the exemption may be paid below the proposed salary level as long as their salary is at least equal to the entrance salary for teachers at the same institution.

Challenges and Concerns for Campus

Size of increase of the minimum salary threshold

- Reclassification for previously exempt workers
- Costs to avoid wage compression

Impact on remote work

Does not include room & board or tuition credits

Legal Challenges to the Proposed Rules

- Like the Obama Administration rule, it is expected that the proposed Biden Rule will face legal questions.
- This includes questions about the DOL's authority to impose the salary threshold increase, as well as its authority to implement automatic updates to those thresholds.
- The Supreme Court has already begun to chip away at agency authority this past year, and we expect that the rule will be challenged, including under the recently reinvigorated "major questions" doctrine.

CUPA-HR's Advocacy Efforts

Filing an extension request for comment submissions

- Requesting additional 60 days

Comments addressing our concerns will be submitted

- Will raise concerns with threshold proposed, automatic increases, timing with respect to pandemic adjustments/past updates, etc.

Have a Question?



Submit questions to our presenters
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