September 25, 2017

SUBMITTED ELECTRONICALLY VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov
under e-Docket ID number WHD-2017-0002-0001

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

Re: Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees (82 Fed. Reg. 34616, July 26, 2017) (RIN 1235-AA20)

Dear Ms. Smith:

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 Request for Information (RFI). CUPA-HR serves as the voice of human resources in higher education, representing more than 23,000 human resources professionals and other campus leaders at over 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 78 percent of all master's institutions, 53 percent of all bachelor's institutions and 500 two-year and specialized institutions.

The below higher education associations members' listed include approximately 4,300 two- and four-year public and private nonprofit colleges and universities and the professionals that work at those institutions.

The following associations join CUPA-HR in these comments:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education

American Indian Higher Education Consortium
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities (HACU)
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NIRSA: Leaders in Collegiate Recreation

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 employer in the state in which they operate.[2] Of those 4 million workers, approximately 2.6 million are employed full time and 1.4 million part time.[3]

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) attempted to modify in its rule dated May 23, 2016 (hereinafter the 2016 Rule) and earn less than that rule's minimum salary level of $913 per week (or $47,476 per year).[4] As a result, colleges and universities, their employees, and the students they serve would be significantly affected by the changes in the 2016 Rule and have an interest in responding to the RFI and encouraging DOL to apply the exemptions in a manner that protects employees and workplace fairness, while also ensuring the exemptions function as intended.

---

[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*.

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

[3] *Id.*

[4] According to the National Center for Education Statistics, 2.9 million (approximately 75%) of the 3.9 million workers in higher education are "professional staff," including at least 1 million employees that do not have teaching as their primary duty. See http://nces.ed.gov/programs/digest/d13/tables/dt13_314.20.asp. Median salary for exempt employees in higher education are detailed in CUPA-HR's salary survey and this related article http://chronicle.com/article/Median-Salaries-of/228735?cid=megamenu#rp.

BACKGROUND

On March 13, 2014, President Barack Obama issued a memorandum directing the Secretary of Labor to make changes to the regulations governing exemptions to the FLSA's overtime pay requirements for executive, administrative and professional employees (known as the EAP or white collar exemptions).

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 duties test). Employees who do not meet these three requirements or fail to qualify for another specific exemption as outlined in the FLSA and its regulations must be treated as "hourly" or "nonexempt" employees and 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 and at the proper rate for overtime, employers must carefully track the hours nonexempt employees work.

In response to the president's memorandum, DOL published on July 6, 2015, a Notice of Proposed Rulemaking or NPRM, in which the agency proposed a 113% increase to the minimum salary threshold and automatic annual increases to the salary threshold moving forward. DOL did not propose any changes to the duties test in the NPRM.

CUPA-HR and 18 other higher education associations filed extensive comments on the NPRM on September 4, 2015 (2015 Comments). We have attached the 2015 Comments as Exhibit A. Our primary point in those comments was that while we agree that an increase to the minimum salary threshold is due and that DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused, the proposed minimum salary threshold was simply too high. Our 2015 Comments were informed by a survey of CUPA-HR membership, in which 88 percent of the 796 CUPA-HR members responding stated that DOL should take a more measured approach to raising the salary level.

The essence of our argument against the threshold proposed in the NPRM was as follows:

> To comply with the proposed change, 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 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 may need to both reduce services *and* raise tuition, to the detriment of students. The changes would also increase the costs of and thus inhibit important research done by universities and their employees.

We also stated in the 2015 Comments that we do not believe DOL has the authority to impose automatic updates. We also noted that even if the agency did have such authority, it 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. Our opinion at that time and now is 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. We also stated that if DOL does choose to move forward with automatic updates, the updates should occur at most every five years, and the agency should provide the public with notice of the new level and the opportunity to comment at least one year prior to implementation.

Finally, our 2015 Comments stated that DOL should not change the duties tests at this time, an opinion which we continue to hold.

In addition to filing comments with DOL on NPRM, many of the undersigned organizations, their members and others concerned with the rule's impact on the higher education community had meetings and sent letters to the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA). In fact, 25 percent of all stakeholder meetings conducted and nearly 50 percent of letters submitted to the OIRA docket were on behalf of either individual institutions or higher education associations. In addition, numerous members of Congress from both sides of the aisle urged DOL and OIRA to carefully consider the impact the proposal would have on higher education before proceeding with the rule.[5]

Despite these efforts, on May 23, 2016, DOL issued a final rule which doubled the minimum salary threshold, increasing it to $913 per week (or $47,476 per year), and imposed 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. It did not make any changes to the duties test.

[5] We assume DOL has access to the OIRA record on this rulemaking. If for some reason that is not the case, we have records of meetings held and letters filed with OIRA and are happy to provide them to the Department.

A group of business organizations and state attorneys general challenged the 2016 Rule in court in September 2016 in the United States District Court for the Eastern District of Texas, Sherman Division. On November 22, 2016, Judge Amos Mazzant of that court preliminarily enjoined the 2016 Rule 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."[6]

At a February 16, 2017 hearing by the U.S. House Subcommittee on Workforce Protections, CUPA-HR's President and CEO Andy Brantley testified and shared higher education's concerns with the final rule. Brantley also highlighted some of the challenges CUPA-HR members encountered in preparing to comply with the 2016 Rule prior to the court's injunction. We have attached that testimony (2017 Congressional Testimony) as Exhibit B.

On July 26, 2017, DOL issued an RFI, where it noted "it has decided not to advocate for the specific salary level ($913 per week) set in the [2016 Rule] at this time and intends to undertake further rulemaking to determine what the salary level should be." DOL stated that it has nonetheless appealed the injunction over concerns that the court's reasoning "called into question the Department's authority to utilize a salary level test" generally.

A little over a month later, on August 31, 2017, Judge Mazzant granted the motion for summary judgement filed by the plaintiff business organizations and in doing so struck down the 2016 Rule.[7] The court found that by setting the salary level so high, "the Department effectively eliminates a consideration of whether the employee performs 'bona fide executive, administrative, or professional capacity' duties" as Congress required. The court went on to say that nothing in the FLSA authorized DOL "to make salary rather than an employee's duties determinative of whether [an employee] should be exempt from overtime pay." The court specifically clarified, however, that DOL could rely on a salary threshold as part of the exemption test, but that "a permissible salary level would need to be set somewhere near the lower end of the range of prevailing salaries for these employees," (quoting Harry Weiss, *Report and Recommendations on Proposed Revisions of the Regulations, Part 541* at 7-8 (1949)) and DOL should use the threshold to "screen out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary" (again quoting the Weiss report, this time at 11-12). The judge also suggested that adjusting the salary threshold DOL set in 2004 for inflation would be permissible.

<u>RESPONSE TO RFI</u>

Below we provide answers to the RFI questions relevant to our collective membership. Our answers are informed by data we have collected as part of the 2015 Comments, letters and meetings with OIRA, plans for implementation, the 2017 Congressional Testimony and an

[6] *State of Nevada v. United States Department of Labor* (November 22, 2016) at 14, found on September 4, 2017 at http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20.pdf.

[7] *State of Nevada v. United States Department of Labor* (August 31, 2017), found on September 11, 2017 at http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20%20Dated%208-31-2017.pdf.

August 2017 survey by CUPA-HR of 334 chief human resource officers at both public and private institutions of higher education (2017 CUPA-HR CHRO Survey), which CUPA-HR conducted in response to the RFI.

Question 1:

> In 2004, the Department set the standard salary level at $455 per week, which excluded from the exemption roughly the bottom 20 percent of salaried employees in the South and in the retail industry. Would updating the 2004 salary level for inflation be an appropriate basis for setting the standard salary level and, if so, what measure of inflation should be used? Alternatively, would applying the 2004 methodology to current salary data (South and retail industry) be an appropriate basis for setting the salary level? Would setting the salary level using either of these methods require changes to the standard duties test and, if so, what change(s) should be made?

Response:

As expressed in the 2015 Comments, CUPA-HR's 2017 Congressional testimony and the many letters filed with OIRA by higher education organizations and institutions, the higher education community believes that an increase to the salary threshold is due and that DOL has an obligation to update the threshold from time to time to ensure the exemptions are not abused. At this time, we believe DOL's best course of action is as follows:

- update the salary threshold by applying the methodology used in 2004 to current salary data;
- make no changes to the duties test;
- consider prorating the salary threshold for part-time employees; and
- consider changes to 29 CFR Section 541.600 that would allow the cost of employer-provided room and board to count towards the salary threshold.

Salary Threshold

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." This approach is consistent with DOL's statutory obligations and will prevent obvious abuse of the exemption. At the same time, setting the salary threshold within these parameters avoids mass reclassification of employees in jobs that clearly meet the duties test, have always been exempt and are well-suited to exempt status. As detailed in the 2015 Comments and 2017 Congressional

Testimony, this type of mass reclassification is not only inconsistent with the FLSA, but harms employees, institutions and students.[8]

While DOL could rely upon various formulas to set a salary 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.

Also, and importantly, our members clearly favored this approach, with 84% percent of those responding to the 2017 CUPA-HR CHRO Survey indicating that DOL should set a new salary threshold by updating the 2004 level. While 54% supported updating the level via inflation and 30% applying the 2004 methodology, the overall message is the same — that the 2016 salary level was far too high, and the department should set a new salary threshold that is in line with the formula used in the 2004 Rulemaking. These results were consistent with a July 2015 survey CUPA-HR conducted of 819 higher education HR professionals, in which 58% of respondents supported some sort of update to the 2004 threshold, and 88% reported that any threshold over $40,352 would be too high.

We believe that DOL should apply the 2004 methodology rather than use an inflationary adjustment for several reasons. First, the Department 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 the Department 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.

Duties Test

---

[8] Specifically, we said in the 2015 Comments that:

> 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. The changes would also increase the costs of and thus inhibit important research done by universities and their employees.

Whatever formula the Department ultimately decides to use, it should not change the duties test as part of any immediate update. Eighty-four percent of respondents to the 2017 CUPA-HR CHRO Survey said that the duties test should be left unchanged at this time. While we did have members express issues with the current duties test as written, the vast majority of their concerns and comments were expressing the general need for additional examples from the Department on the specific application of "independent judgment and discretion" as it relates to particular positions in higher education. We feel these issues are best addressed via the opinion letter process and other guidance, not with changes to the duties test.

Part-Time Employees and Room and Board

As the Department considers a new threshold, we urge the agency to keep in mind the various negative impacts a high threshold could have on institutions, their employees and students. In particular, we want to draw your attention to room and board and flexible work arrangements.

As noted in the 2015 Comments, higher education is a sector that has traditionally been able to attract and accommodate a disproportionate number of part-time professionals, and too high of a salary threshold would limit the ability to provide such arrangements. This is evidenced in much of the feedback that CUPA-HR members provided for the 2015 Comments, such as the statement from a Southeastern member that, "flexible work arrangements provided for exempt employees seeking reduced or part-time schedules for personal reasons will be significantly reduced under the proposed changes." We suggest the Department consider prorating the salary threshold for part-time employees.

Higher education institutions also disproportionately provide employees with room and board as part of their compensation, particularly residential directors (also known as RDs). RDs often are responsible for the supervision of graduate coordinators and several resident assistants. They also are responsible for the creation and execution of programming and connecting the "student life work" to the academic work of the institution. Although dependent on their specific role within an institution, resident directors have traditionally been exempt based on their duties and salary. However, had the final rule taken effect in December, a significant number of resident directors would either have needed to be reclassified or have their salaries increased. Reclassification and tracking hours for this group of employees is impractical if not impossible, as their workweek can fluctuate dramatically depending on the time of year (orientation, finals, summer break etc.), and as many live on campus, they are often in contact with students or others outside normal working hours. Unfortunately, even though these professional staff may be furnished with room and board, a benefit worth many thousands of dollars, employers cannot count this cost as salary for the purposes of meeting the minimum salary threshold under 29 CFR Section 541.600. In light of our experiences with the 2016 Rule, we ask the Department consider adjusting 541.600 to allow the cost of employer-provided room and board to count towards the salary threshold.

Question 2:

Should the regulations contain multiple standard salary levels? If so, how should these levels be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple salary levels using a percentage-based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple standard salary levels be on particular regions or industries, and on employers with locations in more than one state?

Response:

If DOL updates the salary threshold in accordance with the 2004 methodology, there is no need for the Department to consider setting different salary levels for different regions of the country. Under the FLSA, states can and do impose more protective standards for overtime pay, including setting higher salary thresholds for exemptions. As a result, we believe DOL should focus on setting a nationwide salary floor that is sufficiently low to account for regional and industry differences in pay for nonprofits, public employers and those operating in areas with lower costs of living (the 2004 salary level would be an example of such a floor), and let states decide whether they need a higher threshold.

States are in a better position to determine whether their local economies and employees would benefit from a higher threshold. Not only are states more attuned to current needs of their local economy and workforce, but they will be better able to make timely and accurate adjustments to salary thresholds in the face of changes to regional workforce demographics, the rise and fall of local industries and employers and other changes to the economy.

In addition, while it may seem appealing to set different salary levels to more precisely address regional and industry pay differences, doing so can complicate compliance in an age where many employers have employees working in multiple states and remotely. In fact, over 90% of those responding to our 2017 CUPA-HR CHRO Survey believe that regionally-based thresholds could create arbitrary differences in exemptions around the country (particularly given that regional differences in costs are not stagnant) and would lead to increased confusion, compliance challenges and litigation. As stated in the preamble to the 2004 Notice of Proposed Rulemaking, “the salary tests were originally designed to operate as a ready guide to assist employers in deciding which employees were more likely to meet the duties tests in the exemptions,"[9] and multiple salary levels would only make such determinations more difficult.

Lastly, we also are concerned that tasking the Department with setting multiple salary levels will make the process of updating the regulations, which DOL is obligated to do "from time to time," more contentious and more complex and create further headwinds and delays. Currently, the Department is facing multiple stakeholders with strongly held and differing opinions over what constitutes an appropriate nationwide floor. If DOL starts imposing regional salary thresholds, the number of stakeholders and disagreements will expand, with debates over comparative salary levels, regional boundaries, how to handle employees' temporary assignments in other jurisdictions, state laws and a host of other issues.

Question 3:

Should the Department set different standard salary levels for the executive, administrative and professional exemptions as it did prior to 2004 and, if so, should there be a lower salary for executive and administrative employees as was done from 1963 until the 2004 rulemaking? What would the impact be on employers and employees?

Response:

We believe that the Department should not set different salary levels for the different exemptions. We have not heard of any reasonable justification for making such a change, and over 95% of respondents to our 2017 CUPA-HR CHRO Survey felt that setting salary levels based on the different exemptions could lead to increased confusion, compliance challenges and litigation. An exempt employee's duties often straddle two or even three exemptions, and it may be difficult to determine which exemption applies at any given time. The 2004 regulations recognize this reality, stating that "an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption" (29 CFR Section 541.708). Establishing different salary levels for administrative and executive employees as compared to professional employees (or some other variation) would require employers to make a determination that a particular exemption applied or, more likely, that a particular exemption is that employee's "primary" primary duty. This will inevitably result in increased administrative and compliance burdens and litigation over which specific salary level might apply.

Question 4:

[9] See: https://www.federalregister.gov/d/03-7449/p-28

In the 2016 Final Rule, the Department discussed in detail the pre-2004 long and short test salary levels. To be an effective measure for determining exemption status, should the standard salary level be set within the historical range of the short test salary level, at the long test salary level, between the short and long test salary levels, or should it be based on some other methodology? Would a standard salary level based on each of these methodologies work effectively with the standard duties test or would changes to the duties test be needed?

Response:

We support a standard salary level that follows the parameters outlined in the answers to questions 1-3. We do not support changes to the duties test at this time for the reasons set forth in our answer to question 1.

Question 5:

Does the standard salary level set in the 2016 Final Rule work effectively with the standard duties test or, instead, does it in effect eclipse the role of the duties test in determining exemption status? At what salary level does the duties test no longer fulfill its historical role in determining exempt status?

Response:

The standard salary level that the Department set in the 2016 Rule would eclipse the role of the duties test in many cases. While the salary threshold in the 2016 Rule ($47,484) was slightly lower than what DOL proposed in the NPRM ($50,440), the following statement from our 2015 Comments on NPRM is applicable to the 2016 Rule as well:

> To comply with the proposed change, colleges and universities … would need to reclassify the vast majority of impacted employees to hourly status. While in some cases these changes would 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.

More specifically, following the NPRM's release, we heard from colleges and universities across the country that the proposed minimum salary level would force them to reclassify 40%, 50% and possibly as much as 60% of 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.

For example, the Iowa Association of Community College Trustees estimated in its comments on the NPRM that "community colleges in the most rural areas of Iowa will have 40% to 60% of their staff impacted by the proposed Salary Level Test."[10] A small Texas university responding to CUPA-HR's 2015 survey stated that of their 437 exempt employees, 239 (54.8%) are currently paid under the then-proposed salary threshold of $50,440, representing the majority of entry-level and mid-level professionals.

Even larger universities and state systems said they would need to reclassify large numbers of employees in the face of the proposed changes. One Midwestern university state system said "[i]f the proposed rule is promulgated, the status of over 5,000 employees would change from exempt to nonexempt." A large public university in the South calculated that its nonexempt population would increase from 1/3 of its current regular workforce to 1/2, since it could not afford the $11.8 million salary increases to keep the current level of exemption. Similarly, the University of Iowa said in its comments that "over 2,700 individuals we employ … would immediately change from exempt salaried to nonexempt hourly" as a result of the proposal.[11] One public land-grant institution with 24,000 total employees informed CUPA-HR that 35% of its exempt workforce had salaries below the proposed threshold, including highly-educated scientists and postdoctoral researchers. Similarly, a large Florida university noted that approximately 25% of the exempt workforce would be affected if the proposal was implemented, and the changes would affect "those university functions that rely heavily on funding from grants, donations and other limited sources of funding support (primarily science and research jobs)."

In fact, several large research universities responding to CUPA-HR's 2015 survey noted they would need to reclassify many highly-educated research professionals. One large research university reported that 50% of the exempt scientific and research employees are below the initially proposed threshold of $50,400. The National Postdoctoral Association also expressed concern in its comments about the impact of the proposal on its members.[12] Salaries for researchers working on grants are often below DOL's then-proposed threshold of $50,440. In fact, at the time the NPRM was issued, the National Institutes of Health stipend levels for *postdoctoral* researchers were well below DOL's proposed minimum salary level. NIH has since increased those stipends above the 2016 Rule's threshold ($47,476) to $47,484.[13]

Following the publication of the 2016 Final Rule, CUPA-HR analyzed its *2016 CUPA-HR Professionals in Higher Education Salary Survey Report* in an effort to evaluate the rule's impact. CUPA-HR found that 24 position classifications in that survey had median national salaries below the 2016 threshold — all of the higher education positions that

---

[10] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[11] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[12] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[13] See https://grants.nih.gov/grants/guide/notice-files/NOT-OD-17-002.html.

are reported on the professionals survey are considered exempt.[14] Additionally, and this is explored in further detail in our response to question 6, 57% of institutions responding to the 2017 CUPA-HR CHRO Survey indicated that they made changes in anticipation of the 2016 Final Rule's effective date by reclassifying one or more positions from exempt to nonexempt status.

As Judge Mazzant noted in his August 31, 2017 decision striking down the 2016 rule, the Department's 2016 standard salary level ignores congressional intent, as the significant increase from $455 to $913 "would essentially make an employee's duties, functions, or tasks irrelevant [resulting in] entire categories of previously exempt employees who perform "bona fide executive, administrative, or professional capacity" duties [ineligible] for the EAP exemption based on salary alone, thereby supplanting an analysis of an employee's job duties.[15]

Question 6:

To what extent did employers, in anticipation of the 2016 Final Rule's effective date on December 1, 2016, increase salaries of exempt employees in order to retain their exempt status, decrease newly non-exempt employees' hours or change their implicit hourly rates so that the total amount paid would remain the same, convert worker pay from salaries to hourly wages, or make changes to workplace policies either to limit employee flexibility to work after normal work hours or to track work performed during those times? Where these or other changes occurred, what has been the impact (both economic and non-economic) on the workplace for employers and employees? Did small businesses or other small entities encounter any unique challenges in preparing for the 2016 Final Rule's effective date? Did employers make any additional changes, such as reverting salaries of exempt employees to their prior (pre-rule) levels, after the preliminary injunction was issued?

Response

Immediately following the court's decision to enjoin the 2016 Final Rule, CUPA-HR surveyed its members regarding the extent to which institutions had changed their plans in response to the injunction. Survey responses were as follows:

- 28% of respondents said that they would fully implement all of the changes needed to comply with the 2016 Rule;
- 32% said they would implement some changes and but delay others;

[14] The *2016 CUPA-HR Professionals in Higher Education Salary Survey Report* reflects the salaries of 209,169 professionals in 334 positions at 1,079 colleges and universities nationwide. For more information or to obtain a copy of the full report, go to http://www.cupahr.org/surveys/publications/professionals-higher-education/.
[15] *State of Nevada v. United States Department of Labor* (August 31, 2017) at 14, found on September 11, 2017 at http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20%20Dated%208-31-2017.pdf.

- 32% said they planned to delay all changes;
- 8% said they implemented changes already, but would be reversing some or all of those changes.

These findings are consistent with the responses we received to our more recent 2017 CUPA-HR CHRO Survey in which 28% of members said they implemented their planned changes anyway, 39% implemented some changes and delayed others, and 24% delayed implementation of all changes. Again, 9% of members said that their institution reversed some of the changes they implemented following the preliminary injunction.

In many cases, those institutions that implemented changes followed expected patterns, with many institutions reclassifying employees from exempt to nonexempt status and/or raising salaries for employees. Specifically, of those institutions responding to the 2017 CUPA-HR CHRO Survey, 179 reported reclassifying one or more positions from exempt to nonexempt status and 210 reported raising salaries of one or more professional positions to above the 2016 Final Rule's salary threshold of $47,476.

We were not surprised to see that the institutions that implemented early chose in many cases to raise salaries. Colleges and universities that could afford to increase salaries tended to make those changes in advance of the rule as those changes were welcomed by employees and institutions wanted to ensure all payroll changes were implemented in time for compliance. In addition, colleges and universities said they were reluctant to reverse increases to salaries after those changes were implemented or announced for reasons related to morale and fairness. In contrast, many colleges and universities reported waiting until closer to the compliance deadline to reclassify employees as employees were generally not enthusiastic about this change. Institutions also informed us that they tended to reverse more reclassifications than pay increases that were implemented for the same reason.

While many institutions reported making more complex changes in response to the 2016 Rule, such as revisiting staffing of specific departments and operations, those adjustments were fairly unique to each institution and did not follow any particular patterns.

Economic Impact

The costs of these changes and the anticipated costs for those institutions that reversed or delayed changes are/would have been significant in a time of limited and sometimes shrinking budgets for higher education.[16] As mentioned earlier, in response to question

[16] See Universities Feel the Heat Amid Cuts at http://www.wsj.com/articles/SB10001424052702303734204577466470850370002; see also, Statement of F. King

5, CUPA-HR found that 24 position classifications in our 2016 Salary Survey had median national salaries below the 2016 threshold. From that information, we calculated that if an institution moved just one employee in each of these 24 classifications to $47,476, the average annual cost increase for that institution would be approximately $209,000.[17] We also asked our membership for data on their anticipated costs to implement the 2016 Final Rule. The 35 institutions that could provide data estimated a combined cost of nearly $115 million to implement the rule in the first year alone and indicated such an expense could trigger tuition hikes and reductions in force and services.

As discussed above, while not every institution implemented their planned changes following the preliminary injunction, of those members who reported making some changes and responded to the 2017 CUPA-HR CHRO survey, ninety-two percent indicated that their institutions sustained costs as a result. While many institutions are still in the process of evaluating the exact costs to their institutions, initial estimates by members responding to the 2017 CUPA-HR CHRO Survey regarding costs already incurred are illustrative:

- Ninety-three institutions sustained costs of around $50,000
- Fifty-five institutions sustained costs between $50,000 and $100,000
- Thirty-nine institutions sustained costs between $100,000 and $250,000
- Sixteen institutions sustained costs between $250,00 and $500,000
- Eight institutions sustained costs between $500,000 and $1,000,000
- Six institutions sustained costs of more than $1,000,000

If we assume that for each of the aforementioned cost bands half of institutions report costs at the low end and half at the high end, we can estimate that the total one time cost for implementing the rule for these 219 institutions is over $31.275 million.[18] This does not include ongoing costs as a result of the changes.

We have also received more detailed cost data from some institutions. A university system in the northeast reports that for the 1,000 exempt employees that would have been impacted, the institution would have incurred, on a best-case scenario, costs of $3.4 million in order to increase salaries and/or pay overtime to newly reclassified employees. While this particular institution held off on the majority of changes following

---

Alexander to the U.S. Senate Committee on Health, Education, Labor & Pensions. http://www.help.senate.gov/imo/media/doc/Alexander3.pdf

[17] This of course does not include other costs, such as increases to benefits. The costs would be much higher for institutions paying at the lower end of the salary range and who are therefore likely to have fewer financial resources. They would also be higher for those institutions employing more than one incumbent in these positions.

[18] For example, if 16 institutions report costs between $250,000 and $500,000, we assume costs for eight institutions to be at the lower end ($250,000) and costs for eight institutions to be at the higher end ($500,000) for a total estimated cost for this band of $4.125 million.

the preliminary injunction of the rule, they did raise salaries for 100 postdoctoral students at one of their campuses due to the contractual demands of union bargaining that occurred just before the rule went into effect—this change cost the institution $700,000 in the first year alone. For another large university system along the northeast corridor—an area with a high cost of living—the estimated cost of implementing changes to comply with the Final Rule would have been more than $12,000,000 annually, based on either salary increases or additional overtime costs.[19] Drilling down even more granularly, one large Midwestern university incurred costs of nearly $1 million for a "one-time 10-day payment made to everyone switching from exempt to nonexempt in order to address cash flow due to nonexempt payroll being two weeks in arrears." This was in addition to administrative costs, payroll increases as a result of bumping up some salaries to meet the new threshold and any overtime pay for those who are reclassified.

The cost data related to implementing the 2016 Rule is incomplete, however, as the majority of institutions delayed or reversed changes to their workforce following the preliminary injunction. Others are still undergoing a thorough cost analyses of their actions and therefore unable to provide cost data.

Reclassification

As we explained in question 5, professionals in thousands of positions at colleges and universities that clearly meet the duties test for exemption are paid less than $47,476 and the costs associated with raising salaries to that level were prohibitive for many institutions. As a result, many institutions that did implement changes reclassified a large portion of their exempt workforce to nonexempt positions. Members responding to our 2017 CUPA-HR CHRO Survey, indicated that they reclassified employees in the following job categories:

- Academic Affairs (264 institutions report reclassifying professionals in this category)
- Student Affairs (31 institutions report reclassifying professionals in this category)
- Community outreach/educational extension functions (108 institutions report reclassifying professionals in this category)
- Athletic Affairs (157 institutions report reclassifying professionals in this category)
- Positions relying on grants (65 institutions report reclassifying professionals in this category)

[19] That same university system planned to increase the salaries of 1,200 employees to meet the new salary threshold, to reclassify from exempt to non-exempt nearly 1,100 employees, to revise leave policies, revise workplace practices to telework, and to limit flexibility to work after normal hours. Additionally, all of these changes required extensive discussions with their labor unions prolonging and protracting the process.

In our view, this reclassification was to the detriment of employees, institutions and students. With respect to employees, there are advantages and disadvantages to exempt and nonexempt status and some jobs are better suited to exempt work, which is why the exemptions exist. 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. Flexible work arrangements and work travel also become extremely cumbersome if not impossible to manage, and jobs that have innate fluctuations in workload must be managed by counting hours instead of just letting a professional get his or her work done. Thus, 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.

While it should go without saying, these losses inherently contribute to a negative impact on employee morale. 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 is seen as a demotion in perceived status, even if all other aspects of the work remain the same and even if their overall compensation remains stable or increases with the addition of overtime pay. This sentiment is supported by 91% of institutions that reported reclassifying one or more of their professionals in the 2017 CUPA-HR CHRO Survey. Specifically, members report that they have experienced issues with the following:

- Employee Morale (165 institutions report experiencing issues)
- Reduction in opportunities for professional development (165 institutions report experiencing issues)
- Diminished workplace autonomy (165 institutions report experiencing issues)
- Less flexibility (165 institutions report experiencing issues)
- Time to review all job descriptions (165 institutions report experiencing issues)
- Time to communicate and train staff on changes (165 institutions report experiencing issues)

Additionally, several of the survey respondents indicated that reclassification was causing difficulties handling travel pay, counting vacation time as it takes nonexempt employees longer to accrue time off, creating "an us versus them mentality between employees and departments", spending substantial time creating a mobile app for tracking of hours in various departments, and changes to paid time off plans. This is why it's so important that regulations strike the appropriate balance between protecting employees from abuse and allowing white-collar employees autonomy and flexibility.

Higher Education's Unique Challenges

While higher education shares in many of the same concerns as other impacted stakeholders, after the rule was released, it became clear that lingering problems surrounding the application of the rule to higher education persisted, along with questions surrounding compliance with respect to certain occupational areas. For instance, extension agents for our public land grant institutions are crucial to bringing educational programs, modern technologies and modern agricultural science to citizens across the United States and are often stationed in rural areas of the country where the cost of living is substantially less than urban areas. However, as a result of DOL setting such a high salary threshold, a significant number of extension agents who are currently exempt based on their duties and salaries under current law would either have needed to be reclassified or have their salaries increased. Given the importance of professional autonomy to the success of an extension agent's mission and the impracticality associated with reclassification to hourly status, we began exploring the applicability of the teaching exemption to this profession.

Although most exemptions must meet the salary level test, teachers are not subject to the salary level requirement for the professional exemption if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Higher education has applied this exemption historically to college and university professors and adjunct instructors but application to extension agents is much more complicated, as there is no existing guidance from DOL—presumably because previous updates to the salary level have not excluded a similarly large number of exempt professionals. More specifically, we needed guidance on what activities performed by the extension agent (whether it be instruction not for credit; as a visiting teacher at K-12 class; instructing farmers on the latest soil, seeds, etc.) might be considered teaching and at what point these activities, combined or separately, constitute a primary duty of teaching. Additionally, it is unclear whether those who may have a primary duty of teaching but do not instruct people enrolled in degree-seeking programs may meet the teaching exemption.

Another area where we sought additional guidance was related to academic administrative personnel and the special exemption, with a potentially reduced salary level, provided to this group of employees within the regulations. Academic administrative personnel are those who help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists, and others with similar responsibilities. To qualify as an academic administrator, the employee must satisfy the "normal" salary requirements or the minimum salary for teachers at their institution and their "primary" duty must consist of "administrative functions directly related to academic instruction or training."

For example, if the minimum teacher salary at an institution is $42,000, an exempt academic administrator would only need to be paid $42,000 to qualify for exemption (assuming the duties performed met the standard). However, the complications with applying this exemption to academic administrators is that the DOL has not provided specific guidance on the term “minimum salary for teachers” and as professors and faculty are oftentimes paid quite differently than staff, applying this exemption is, at best, problematic.

Question 7:

Would a test for exemption that relies solely on the duties performed by the employee without regard to the amount of salary paid by the employer be preferable to the current standard test? If so, what elements would be necessary in a duties-only test and would examination of the amount of non-exempt work performed be required?

Response:

We believe the salary threshold plays an important role in preventing abuse of the exemptions, providing clarity for those who are implementing and enforcing the regulations and in screening out “those employees who by virtue of their compensation obviously will not meet the duties tests.” In fact, the support by our members for a threshold is overwhelming, with 88% of those responding to our 2017 CUPA-HR CHRO Survey noting they had serious concerns about eliminating the salary threshold altogether.

Specifically, our members have said that a reasonable salary threshold is an important compliance tool for providing additional clarity to the duties test, particularly as the test relates to exercising independent discretion and judgment. They also have noted that a salary threshold provides another means for evaluating exemptions and that they fear relying solely on the duties test would leave too much room for interpretation, which could increase lawsuits and potentially damage employee morale.

In addition, if the Department were to eliminate the salary threshold, the agency would likely compensate by imposing new duties test requirements or reinterpreting existing requirements in an attempt to curb abuses previously addressed by the salary threshold. These new requirements will inevitably further complicate the exemption analysis not only for those employees currently below the threshold, but also those paid above the threshold. The additional complexity would do nothing to protect those entitled to overtime pay and would undoubtedly invite compliance challenges and unnecessary litigation.

For these reasons, we suggest the Department retain the salary threshold requirement in the current standard test.

Question 8:

Does the salary level set in the 2016 Final Rule exclude from exemption particular occupations that have traditionally been covered by the exemption and, if so, what are those occupations? Do employees in those occupations perform more than 20 percent or 40 percent non-exempt work per week?

Response:

Please see our responses to questions 5 and 6.

Question 9:

The 2016 Final Rule for the first time permitted non-discretionary bonuses and incentive payments (including commissions) to satisfy up to 10 percent of the standard salary level. Is this an appropriate limit, or should the regulations feature a different percentage cap? Is the amount of the standard salary level relevant in determining whether and to what extent such bonus payments should be credited?

Response:

This aspect of the 2016 Rule does not have a significant impact on higher education.

Question 10:

Should there be multiple total annual compensation levels for the highly compensated employee exemption? If so, how should they be set: by size of employer, census region, census division, state, metropolitan statistical area, or some other method? For example, should the regulations set multiple total annual compensation levels using a percentage based adjustment like that used by the federal government in the General Schedule Locality Areas to adjust for the varying cost-of-living across different parts of the United States? What would the impact of multiple total annual compensation levels be on particular regions or industries?

Response:

This aspect of the 2016 Rule does not have a significant impact on higher education.

Question 11

Should the standard salary level and the highly compensated employee total annual compensation level be automatically updated on a periodic basis to ensure that they remain effective, in combination with their respective duties tests, at identifying exempt employees? If so, what mechanism should be used for the automatic update, should automatic updates be delayed during periods of negative economic growth, and what should the time period be between updates to reflect long term economic conditions?

Response:

Over 80% of those responding to our 2017 CUPA-HR CHRO Survey opposed automatic updates because of the potential negative impact on institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. For this reason 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." [20]

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 demonstrates a clear intent that the salary level be revisited as conditions warrant, and that DOL consider input on the appropriate level from the regulated community before making any adjustments.

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 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.

[20] 69 Fed. Reg. 22171

The history of changes to the exemptions emphasizes 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.

DOL needs to fulfill its duty and regularly update the threshold from time to time through notice and comment rulemaking, as it has with every past salary increase. Obviously, the agency has met that requirement before without any preordained intervals for updates and can do so again in the future.

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 the 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.

As mentioned previously, 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 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 NPRM 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.

The financial impact of conducting such analysis year in and year out is significant — and the cost of annual salary adjustments and reclassifications would be far more. In fact, 91% (644 of 705 responses) of CUPA-HR members responding to our 2015 survey said automatic increases would negatively impact their budgets, and 63.6% (444 of 698 responses) said it would negatively impact their ability to engage in financial planning.

Frequent automatic updates would also interfere with operational and human resources functions, as repeated forced increases and related wage compression will make it hard for institutions to provide merit-based pay increases. Out of those responding to the 2015 survey question on this topic, 68.7% (475 of 691 responses) said automatic updates would negatively impact their institution's ability to provide merit-based increases to employees.

Beyond such financial and operational impacts, transitioning employees from exempt to nonexempt status often triggers morale issues.[21] If automatic updating goes into effect and it is imposed in short intervals, employers would need to reclassify employees on a regular 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 whopping 86.6% (603 of 696 responses) of CUPA-HR members responding to the 2015 survey said the automatic increases would cause morale issues as a result of reclassification, wage compression and limit on merit-based increases. More recently, over 50% of those responding to our 2017 CUPA-HR CHRO Survey said that a *one-time* reclassification of employees in anticipation of the 2016 Rule caused morale issues with the reclassified employees. This morale issue would undoubtedly intensify with repeated reclassifications

ADDITIONAL COMMENTS

As part of issuing the 2016 Rule, DOL compiled and reaffirmed existing guidance on the application of the exemptions to higher education employees. The Department was also on the verge of releasing additional guidance on the application of the teaching exemption to agricultural extension agents and others similarly situated when the court issued the November 2016 injunction (this guidance was shared by DOL with us and is attached as Exhibit C). We request that the Department reaffirm the guidance for higher education issued as part of the 2016 Rule and release the guidance on extension agents as soon as possible.

CONCLUSION

The undersigned respectfully request that DOL consider our responses to the RFI and thank the agency for the opportunity to comment.

Respectfully Submitted,

Joshua A. Ulman
Chief Government Relations Officer
College and University Professional Association for Human Resources
1811 Commons Point Drive
Knoxville, TN 37932
202.642.1970
julman@cupahr.org

[21] See, infra, section I. A. 2).

Basil Thomson
Government Relations Specialist
College and University Professional Association for Human Resources
1811 Commons Point Drive
Knoxville, TN 37932
603.582.7334
bthomson@cupahr.org

On Behalf of the Following Undersigned Organizations:

American Association of Collegiate Registrars and Admissions Officers
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
American Indian Higher Education Consortium
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
EDUCAUSE
Hispanic Association of Colleges and Universities (HACU)
NASPA - Student Affairs Administrators in Higher Education
National Association of College and University Business Officers
National Association of College Stores
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NIRSA: Leaders in Collegiate Recreation