College and University Professional Association for Human Resources

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.

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[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.

RESPONSE TO RFI

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

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[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

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[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:

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[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

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[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

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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,

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

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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

Exibit A

College and University Professional Association for Human Resources

September 4, 2015

SUBMITTED ELECTRONICALLY VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov
under e-Docket ID number WHD-2015-0001

Ms. Mary Ziegler
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: Notice of Proposed Rulemaking; Defining and Delimiting the Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees (80 Fed. Reg. 38515, July 6, 2015) (RIN 1235-AA11)**

Dear Ms. Ziegler:

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 19,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions and 600 two-year and specialized institutions.

STATEMENT OF INTEREST

Colleges and universities employ over 3.9 million workers nationwide and there are institutions of higher education located in all 50 states.[1] The Fair Labor Standards Act (FLSA) and similar state laws cover all or nearly all of these employees. Many employees on campuses are

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[1] See http://nces.ed.gov/programs/digest/d13/tables/dt13_314.20.asp.

currently exempt from the FLSA's overtime pay requirements pursuant to the regulations that the U.S. Department of Labor (DOL) proposes to modify in the NPRM, yet many of those earn less than the NPRM's proposed minimum salary level for 2016 of $970 per week (or $50,440 per year).[2] As a result, colleges and universities, their employees, and the students they serve would be significantly affected by the changes in the 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. The higher education associations listed below represent approximately 4,300 two- and four-year public and private nonprofit colleges and universities and the professionals that work at those institutions.

American Association of Collegiate Registrars and Admissions Officers
ACPA—College Student Educators International
American Association of Community Colleges
American Association of State Colleges and Universities
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
American Council on Education
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
Hispanic Association of Colleges and Universities
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
NIRSA: Leaders in Collegiate Recreation

SUMMARY

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). On July 6, 2015, the Department of Labor (DOL) published the NPRM, which proposes several changes to the white collar exemptions and invites public comment on those proposals.

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[2] 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.

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 primary duties test). Employees who do not meet these three requirements or fail to qualify for another specific exemption as outlined in the 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.

DOL proposes several changes to the white collar exemptions, including increasing the current salary threshold of $455 per week ($23,660 annually) by 113% to $970 per week (or $50,440 per year), which the agency estimates will be the 40th percentile of earnings for all full-time salaried workers in 2016. DOL also proposes automatic annual increases to the salary threshold based on the Consumer Price Index for All Urban Consumers or by pegging the salary threshold to the 40th percentile for weekly earnings of all full-time non-hourly (i.e., salaried) employees. DOL proposes publishing the annual increase 60 days before the new threshold becomes effective. Finally, while DOL did not propose any specific changes to the duties test, it said in the NPRM that it is considering doing so. The agency asked several questions that suggest it is considering reinstating aspects of the pre-2004 “long duties test,” which would limit the amount of time exempt employees could perform nonexempt work and/or eliminate the provision in the current regulations on concurrent duties (i.e., the provision in the regulations that allows exempt employees to concurrently perform exempt and nonexempt work such as a manager who supervises employees and serves customers at the same time).

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, however, is simply too high. 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 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.

DOL has proposed a minimum salary level that is far higher than it has adopted in the past and fails to account for regional and industry sector differences in pay. We urge DOL to reconsider and set a salary level more in line with historic trends. Eighty-eight percent of the 796 CUPA-HR members responding to a survey on the NPRM felt DOL should take a more measured approach to raising the salary level, with a majority choosing a salary level of either $29,172 (21.5%) or $30,004 (36.5%), and nearly a third (30.1%) indicating $40,352 would be more appropriate. According to the NPRM preamble, DOL considered these salary levels as part of the current proposed update. The first amount represents the current level — which was set in 2004 — as adjusted for inflation; the second number would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and in retail; and the last number represents median earnings for all hourly and salaried workers combined (rather than just salaried).

If DOL will not consider lowering the proposed salary level for all employers, it should do so for nonprofit and public employers and/or consider expanding the exemption for certain learned professionals from the minimum salary level. DOL also should phase in the new salary level over time to allow employers and employees enough time to make adjustments and preparations, particularly if DOL decides to implement a salary level as high as what it proposed in the NPRM or something similar. This would help mitigate some of the negative consequences related to the proposal for colleges and universities, their employees and students.

Moreover, 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. 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. 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 at least one year prior to implementation.

Finally, for procedural reasons alone, DOL should not change the duties tests at this time. DOL's decision to consider possible changes to the duties test without offering a specific proposal violates the spirit if not the letter of the Administrative Procedure Act. Like DOL's proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act and the various Executive Orders related to regulatory activity. Asking questions is simply no substitute for an actual regulatory proposal that the regulated community can consider, evaluate and comment upon. We strongly urge DOL to provide specific regulatory language for any changes to the duties test in a separate NPRM after it has set the salary level and allow the public sufficient time to review and comment on that proposal.

COMMENTS

I. DOL Should Lower the Proposed Minimum Salary Threshold

Many employees on campuses are currently exempt pursuant to the regulations that the DOL proposes to modify in the NPRM, and many of those earn less than the NPRM's proposed minimum salary level for 2016 of $970 per week (or $50,440 per year).[3] These employees include those in departments such as academic affairs (librarians, advisers, counselors), student affairs (residence hall managers, admissions counselors, financial aid counselors, student activities officers), institutional affairs (human resources professionals and trainers), fiscal affairs (accountants, head cashiers), auxiliary services (textbook managers, ticket managers) external affairs (alumni relations and fundraising professionals), facilities (head of mail services, farm manager), information technology, research and clinical professionals (including many with advanced degrees and those engaged in advanced training such as post-doctoral trainees and residents), athletic affairs (head coach, assistant coach, physical therapist, trainer), managers in food service, security, and building and grounds, and community outreach/educational extension functions (agricultural extension agents, industry extension consultants).[4]

While the undersigned agree that an increase to the minimum salary threshold is due and DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused, the proposed minimum salary threshold is simply too high. To comply with the proposed change, colleges and universities would increase salaries for a few, but 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.

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 2016 minimum of $50,440. The State University System of Florida, for example, found that raising all currently exempt salaries to

[3] See id.

[4] Over 800 CUPA-HR members responded to a survey and identified employees in these occupations as currently exempt employees that make less than the proposed salary threshold.

meet the new threshold would cost its 12 universities a total of $62 million annually.[5] Similarly, the Iowa Association of Community College Trustees found that doing so would cost Iowa Community Colleges $12.6 million in the first quarter of 2016 alone.[6] Another university in the south told CUPA-HR that it estimates it would cost $17 million annually to adjust salaries to meet the minimum salary level — a similar cost estimate to another large private research university, which estimated costs at $14.8 million. These estimates are low in that they do not account for additional costs employers would need to incur to address resulting wage compression[7] and administrative costs (including the need to implement new or expanded timekeeping systems) related to implementing the rule.[8]

Faced with such cost increases, institutions would have no choice but to reclassify large numbers of employees from exempt to hourly, even though many of those employees work in jobs that have always been and are well suited by the nature of the duties to be exempt. In fact, in a recent survey of 814 higher education human resource professionals conducted by CUPA-HR, nearly 87% of those responding to the question (655 of 754) indicated they would have to reclassify *any* exempt employee currently making less than $47,500, as they would not be able to adjust salaries upward to maintain exemptions for those employees.

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. For example, the Iowa Association of Community College Trustees estimates in its comments 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."[9] A small Texas university responding to CUPA-HR's survey stated that of their 437 exempt employees, 239 or 54.8% are currently paid under $50,440, representing the majority of entry-level and mid-level professionals. The director of athletics at a small southern university filed comments noting the disproportionate impact the proposed minimum salary will have on lower cost areas, stating that the change would increase his annual payroll costs by 10% — a cost he could not absorb without layoffs. This point was reiterated by a small liberal arts college in rural New York State,

[5] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.
[6] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[7] 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 $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 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.
[8] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.
[9] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

which informed CUPA-HR that it would have to lay off 20 of its 85 currently exempt employees making less than $50,440.

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 — all colleges and universities would be significantly 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.[10] 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 which make it attractive to employees, such as room and board or tuition reduction.[11] The value of these benefits, however, may not be counted towards meeting the minimum salary level.

Even larger universities and state systems will need to reclassify large numbers of employees. 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 calculates 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 increase 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.[12] One public land grant institution with 24,000 total employees informed CUPA-HR that 35% of its exempt workforce has 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 is 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 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 minimum threshold of $50,400. The National Postdoctoral Association has also expressed concern about the impact of the proposal on its members.[13] Salaries for researchers working on grants are often below DOL's proposed minimum threshold of $50,440. In fact, the National Institutes of Health sets stipend levels for *postdoctoral* researchers well below DOL's proposed minimum salary level, as shown by the chart below.[14] According to the chart, any postdoctoral researcher

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[10] The responses of more than 1,100 two- and four-year institutions to CUPA-HR's 2015 annual salary survey of professionals in higher education indicates that the median earnings of these individuals is about 10% lower than the median earnings of their counterparts in other industries.
[11] See http://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-board-time.
[12] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[13] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[14] Available at http://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-048.html.

with less than five years of experience would no longer be eligible for the white collar exemption, even though they clearly perform what has been traditionally considered exempt professional/learned work.

Career Level	Years of Experience	Stipend for FY 2015	Monthly Stipend
Postdoctoral	0	$42,840	$3,570
	1	$44,556	$3,713
	2	$46,344	$3,862
	3	$48,192	$4,016
	4	$50,112	$4,176
	5	$52,116	$4,343
	6	$54,216	$4,518
	7 or More	$56,376	$4,698

Based on the response to CUPA-HR's survey, the proposed minimum salary threshold would also require reclassification of many employees in other traditionally exempt jobs. According to one institution, 61% of exempt employees holding at least a bachelor's degree would have to be reclassified, including professional auditors and accountants and professionals in education, training, library, life sciences, community and social services, business and administration, educational extension services, and human resources.

2) Reclassification May Adversely Impact Employee Flexibility, Career Advancement and Ability to Perform Job Without Providing Any Increase in Compensation

As stated above, the undersigned agree that an increase to the minimum salary threshold is due and DOL must update the salary levels and 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 hourly employees have the advantage of receiving additional compensation for hours worked over 40 in one week, there are also many advantages to exempt status. 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. As a result, nonexempt employees often have less workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement than their exempt counterparts. In addition, not all jobs lend themselves to hourly work, and reclassified employees may find it difficult to do traditionally exempt jobs as hourly employees.

As noted above, many postdoctoral and other researchers and scholars are paid less than the proposed minimum salary threshold. In the face of limited budgets, some postdocs' pay might be raised above the proposed salary level, some may be laid off, and others would be reclassified as hourly. Yet, like many jobs that traditionally have been and are intended to be exempt, performing research does not lend itself to rigid, supervised schedules. Researchers may find it difficult to schedule lab time and experiments to fit within a required schedule for hourly employees. They also may struggle with abandoning incomplete experiments because they have exhausted their hours for the week or day. One CUPA-HR member describes the situation with postdocs as follows:

> Research in all fields requires collaboration with many individuals both within the institution and throughout the country, and frequently throughout the world. This type of collaboration is vital to innovation, teaching and discovery. Introducing a time clock into this equation will not foster this environment. It will only create another barrier to creative productivity. Much of this research is funded by the federal government, which has a vested interest in research productivity. This is particularly critical in the fields of medicine and technology, where improving the public good is a primary function of government.
>
> Postdocs are critical to the success of obtaining grants and conducting research. Such a drastic change in the salary level means that either postdocs will not be able to work the necessary hours to be effective or that less grant funding will be available, as it will go to postdoc salaries currently below the proposed threshold.

This incompatibility between hourly employment and research/original scholarship may be why the National Postdoctoral Association did not even contemplate in their comments that postdocs would be classified as hourly, expressing concerns instead that "institutions may reduce the number of postdoctoral scholars they employ [or] choose to move postdoctoral scholars into non-employee classifications …"[15]

Postdocs are not the only job classification that does not fit well within the hourly employee framework. In response to our survey, for example, one CUPA-HR member institution noted that for many land-grant institutions, the ability of "farm managers to do administrative work as well as farm work to support research efforts in experimental farms/greenhouses," typically for the benefit of that state's residents, is more productively completed when that individual has autonomy over their own schedule, and varies considerably by growing season. We also have heard from a significant number of members about the impact the proposal would have on athletic coaches, admissions recruiters, residence life and admissions staff who travel for work, necessarily keep irregular hours and have jobs with fluctuating seasonal demands that do not lend themselves to hourly status.

Reclassified employees may also witness a reduction in workplace flexibility that would have allowed them to adjust and incorporate their hours to fit their personal schedules. It is hard for employers to be flexible about when and where an employee works when they must carefully

[15] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

track that employee's hours. As the American Society of Association Executives noted, "flexible work arrangements pose challenges for employers tracking and capturing all compensable work hours and controlling overtime costs for nonexempt employees."[16] Many of our members have expressed concern about this issue. The University of Iowa said in its comments: "nonexempt hourly employees … will have less independence in determining their work hours" and will be unable "to balance work needs with personal demands since there will be less flexibility within our monthly payroll cycle and budget."

Higher education is a sector that has traditionally been able to attract and accommodate a disproportionate number of part-time professionals. Personal demands that may require full-time employees to seek reduced or part-time schedules will be further hampered by the proposed salary level and resulting threat of reclassification. This is evidenced in much of the feedback that CUPA-HR members have provided, 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."

Because it is not clear from the DOL's statements in the preamble that it fully understands this issue, we provide the following example. Under the current regulations, an employee who performs tasks that clearly meet one or more of the exempt duties tests can be classified as exempt so long as his or her salary exceeds $23,660 per year. Thus, a part-time employee working a 50% schedule can still qualify as exempt so long as he or she works in a position that has a full-time salary of approximately $47,000 per year. This is true not because the full-time equivalent salary is $47,000, but because the part-time salary is still in excess of the regulatory minimum.

Under the DOL's proposed minimum salary level, that employee would no longer qualify for exemption. Instead, in Year 1 under the proposal, an employee working a 50% schedule would need to be working in a position earning more than $100,000 on a full-time basis. Obviously, without a pro rata provision, the number of employees who will be eligible for part-time exempt employment will be severely limited.

This was echoed by another comment, which states:

> We understand the intent of this regulation to stem abuse of overtime compensation, but the extension of the minimum exempt salary would be devastating to our small nonprofit. We are two professional women who job share as two half-time exempt employees, each earning less than $50,000. We love our job and are satisfied with our compensation. Neither of us wants to work full-time and the nonprofit cannot afford to pay us each $50,000 year. Hourly compensation does not make sense, as we both manage our own

[16] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1182.

> schedules and projects. Please do not adopt this regulation, and continue to provide us the flexibility to work as half-time professionals.[17]

Additionally, reclassification to nonexempt status may provide employees with fewer career training and advancement opportunities that would increase employees' earning potential later in their career. One Southwestern CUPA-HR member expressed concerns that, "the loss of potential experience and growth opportunities for nonexempt staff [and] the loss of potential out-of-town training opportunities due to the extensive time it takes to administer such travel and potential overtime cost" may delay an employee's trajectory up the wage ladder. Many employees that will need to be reclassified as a result of the NPRM are professionals who have already made great strides in their careers and, as one survey respondent puts it, "will now be required to go back to counting hours and be limited in working overtime, which is counterintuitive to their desire to do what they need to do to get the work done to [further] advance their careers." Similarly, when discussing the impact of reclassification on postdoctoral scholars, one survey respondent states that a 40-hour work week will negatively impact "the intent of a postdoc to advance his/her research training … which would lead to academic papers, new discoveries and advancement of their research career."

Although easily inferred from the aforementioned examples, it is worth highlighting here that 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 acknowledgement 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 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. As one university from New Mexico states, "employees in our organization typically tie exemption status to 'status' within the University, [so] moving an employee from exempt to nonexempt is therefore typically viewed as a demotion even though there is no change in pay." An Ohio university reports similar issues that, "there is typically a status aspect associated with being exempt, and changing status when nothing has changed regarding their duties will upset many people." At a Pennsylvania university, reclassifying "professional positions that regularly use independent discretion and independent decision making" will make employees "feel demeaned and undervalued." In fact, concerns that morale and status will be negatively affected were repeatedly referenced by over 300 of the responding institutions that took part in the CUPA-HR survey.

Moreover, exempt employees, many times, receive richer benefits than nonexempt employees, the access to which current employees would lose if they are reclassified as a result of the proposal. For many CUPA-HR institutions, vacation benefits for nonexempt employees are not as generous as those for exempt employees. Seven institutions comprising six different states

[17] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2324 .

reported that the vacation accruals for exempt employees is greater than that of nonexempt employees. An institution from Iowa reports that, "new exempt employees have 4 weeks of vacation when they begin their employment [while] nonexempt begin with 2 weeks" which will result in all reclassified employees' vacation time being cut in half.

Reclassified employees may also see a reduction in their access to tuition reimbursement. Many institutions offer unique reimbursement plans that allow employees to pursue a higher degree for a fraction of the cost an individual outside of the industry would pay. However, according to one institution from Ohio, "employees who are exempt and will become nonexempt will receive less tuition benefits for family members, [as the] tuition waiver is increased over a 5-year time period for nonexempt and starts at 100% for exempt." Another institution from Florida is worried that reclassified employees will have to work for a whole year before they are eligible for tuition benefits they were entitled to previously, as exempt employees are "eligible to take advantage of tuition benefits one year earlier than nonexempt employees."

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. University of Iowa noted 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, but those employees' "work hours will necessarily be restricted to 40 hours per week [as t]he alternative of paying overtime would generally be cost prohibitive; the annual cost of one hour of overtime per week for each of our 2,700 impacted employees would increase University payroll costs by over $4 million."[18] These sentiments were echoed by the Iowa Association of Community College Trustees, which said in its comments that "[t]he same dollars that aren't available for raising all professional salaries to the proposed salary level are in short supply for overtime payments."[19] A CUPA-HR member at a large Southwestern state university similarly noted in response to the survey that because of limited budget resources, "overtime eligibility will not necessarily result in a windfall of overtime income for newly classified nonexempt employees, or in the hiring of additional staff due to resource issues."

It also doesn't 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. The only likely result is less service and support for students, fewer employees to perform more work and longer wait times for service recipients.

[18] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[19] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

Finally, in some cases, institutions would be required to cut certain positions so they may raise salaries for others, resulting in layoffs for certain employees. As the director of athletics at one institution noted in his comments, if DOL increases the threshold to the proposed level, he would need to cut 10% to 20% of the department's staff, stating "I would not be alone in my ultimate course of action." The National Postdoctoral Association has also contemplated this possibility, expressing concerns that "if the proposed change to $50,440 is made effective immediately … institutions may reduce the number of postdoctoral scholars they employ."[20]

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.[21] The Iowa Association of Community College Trustees noted that "by necessity, education is personnel rich, and comprises 75% of their annual expenses," so changes in employee salaries have a large impact on college and university budgets.[22] As noted above, the State University System of Florida found that raising salaries to meet the threshold would cost its 12 universities a total of $62 million annually,[23] the Iowa Association of Community College Trustees found that doing so would cost Iowa Community Colleges $12.6 million in the first quarter of 2016 alone,[24] the University System of Maryland has put this cost at $15.5 million and another university in the south told CUPA-HR that it estimates it would cost $17 million annually. These estimates are low in that they do not account for additional costs employers would need to incur to avoid wage compression[25], corresponding benefits-cost impacts, and administrative costs related to implementing and administering the rule.[26] 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

[20] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[21] See Universities Feel the Heat Amid Cuts at http://www.wsj.com/articles/SB10001424052702303734204577466470850370002; see also, Statement of F. King Alexander to the U.S. Senate Committee on Health, Education, Labor & Pensions. http://www.help.senate.gov/imo/media/doc/Alexander3.pdf
[22] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[23] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.
[24] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[25] 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 $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 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.
[26] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.

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.[27]

The impact on students is obviously tangible and would be felt directly and substantively in the forms of higher tuition costs and reduced student services. 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 new salary levels "will transfer income from employers to employees in the form of higher earnings." 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 increases in tuition, placing additional burdens directly on the shoulders of students. Such an experience is evident in Iowa Community College Trustees' comments stating "they have no profits to transfer to employees [and] the income transfer means taking tuition money from our students' pockets [in the form of] tuition increases [resulting in] students' significantly delaying, and likely dropping out of, their college education."[28] Another institution from New York similarly reports that "the costs would likely be passed on to students/families as [it is] 94% tuition driven and cannot absorb the additional compensation and related (for example, retirement contribution match) costs."

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. As one institution puts it, "to avoid paying overtime costs, we will need to make scheduling adjustments to allow for some employees who currently work at off-hour events and travel to spend less time in departments where they service students during regular business hours." 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 "restricting hours of operations … negatively impacting services provided to students." Institutions also would be required to cut certain positions, resulting in layoffs for employees and diminished resources for students. As noted above, the National Postdoctoral Association has also contemplated this possibility, expressing concerns that "if the proposed change to $50,440 is made effective immediately … institutions may reduce the number of postdoctoral scholars they employ [or] choose to move postdoctoral scholars into non-employee classifications …"[29]

For low-income students, the potential negative effects of the proposal are only exacerbated. At a time when the Executive Office of the President states that "large gaps remain in educational achievement between students from low-income families and their high-income

[27] We have heard from institutions that costs cannot be recuperated by a tuition increase due to state government mandates, leaving them with few options for how to absorb such a large increase in their budgets.
[28] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[29] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

peers,"[30] it should prove worrisome when a higher education institution reports that "reclassification of workers based on pay level will have a significant impact on our student workers (need to reduce number of workers and/or hours to keep student worker pay budget consistent) by effectively reducing employment opportunities and financial aid to students." A faith-based university in Ohio, which dedicates one third of its operating budget to financial aid, states that, "the financial burden this DOL change will put on us will subject all of these benefits to [a] decrease." When the Executive Office of the President highlights that a main barrier to college access for low-income students is a "lack of guidance and support they need to … enroll and persist in their studies," it is worrisome that a New York university will not have the "ability to be flexible and provide services that our students have come to expect and rely on, especially our under-represented students."

C. DOL Should Lower the Proposed Minimum Salary Threshold and Phase the New Level in Over Time

As outlined in detail above, if the proposal is implemented, colleges and universities would need to reclassify far too many employees who work in jobs that have always been and are intended to be exempt to the detriment of the employee, the institution and students. This is because DOL has proposed a minimum salary level that is far higher than it has in the past and fails to account for regional and industry sector difference in pay.

We urge DOL to reconsider and set a salary level more in line with historic trends. Eighty-eight percent of the 796 CUPA-HR members responding to our survey felt DOL should take a more measured approach to raising the salary level, with a majority choosing either a salary level of $29,172 (21.5%)[31] or $30,004 (36.5%)[32] and nearly a third choosing $40,352 (30.1%)[33].[34]

[30] Increasing College Opportunity for Low-Income Students, Promising Models and a Call to Action at https://www.whitehouse.gov/sites/default/files/docs/white_house_report_on_increasing_college_opportunity_for_low-income_students.pdf

[31] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 23 percent increase over the current threshold.

[32] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 27 percent increase over the current threshold.

[33] This equals approximately the 30th percentile of earnings for all full-time salaried workers and is a 71 percent increase over the current threshold.

[34] The complete responses were as follows:

Which level do you think DOL should use?		
Answer Options	**Response Percent**	**Response Count**
$29,172/year or a 23% increase over the current threshold	21.5%	170
$30,004/year or a 27% increase over the current threshold	36.5%	289
$40,352/year or a 71% increase over the current threshold	30.1%	238
$50,440/year or a 102% increase over the current threshold	6.4%	51

According to the NPRM preamble, DOL considered these salary levels as part of the current proposed update. The first amount represents the current level — which was set in 2004 — adjusted for inflation; the second number would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and retail; and the last number represents median earnings for all wage and salaried workers combined. CUPA-HR's survey results are consistent with a nationwide poll by polling company, inc./WomanTrend, which found that 65% of respondents would increase the salary limit by no more than 50% to $35,490.[35] Taking a more measured approach will better ensure that DOL meets its own goal of avoiding costs associated with setting a salary level so high that it requires reclassification of employees to hourly status "who pass the duties test" (80 Fed. Reg. at 38531).

If DOL will not consider lowering the proposed salary level for all employers, it should do so for nonprofit and public employers[36] and/or consider expanding the exemption for certain learned professionals from the minimum salary level in a manner consistent with the State University System of Florida comments.[37] DOL also should phase in the new salary level over time to allow

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$56,316/year or a 138% increase over the current threshold	2.4%	19
I don't know	3.0%	24
answered question		**791**
skipped question		**18**

[35] See Partnership to Protect Workplace Opportunity fact sheet at http://protectingopportunity.org/wp-content/themes/ppwo/ppwo_1pager.pdf.

[36] The American Society for Association Executives has also requested that DOL "set a lower salary level applicable to all employers or the minimum salary level at a lower percentile of the national average for nonprofit[s]." See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

[37] If DOL decides to expand the exemption to the minimum salaried level for certain learned professionals in line with what the State University System of Florida recommends, it should be done in a separate rulemaking where stakeholders have the opportunity to review and comment on a specific regulatory proposal (see herein section III). The State University System of Florida recommended the following in its comments:

> We recommend a new and revised detailed duties test for learned professionals in post-secondary colleges and universities. The current language is ambiguous relative to this class lacking sufficient detail to allow employers to make fair and confident decisions regarding the proper application of this exemption. This is illustrated by the number of opinion letters and requests for opinion letters over the past 20 years. The questions of teaching, imparting knowledge, classroom versus research, credit vs non-credit, librarians, coaches, trainers, graduate assistant versus teacher of record and the like, remain unaddressed. In an effort to provide clarity and rationale for the distinctions between exempt and nonexempt for each, the CUHRE/APAC is proposing a revision to information outlined in U.S. DOL Wage and Hour Division Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act with insertions noted in [bold] as follows.
>
> > Educators **~~Teachers~~** are exempt if their primary duty is teaching, tutoring, instructing, lecturing, **advising, coaching, mentoring or researching** in the activity of imparting or creating knowledge, and if they are employed and engaged in this activity **~~as a teacher~~** in a higher educational establishment. Exempt teachers include, but are not limited to,

employers and employees to make adjustments and preparations, particularly if DOL decides to implement a salary level as high as what it proposed in the NPRM or something similar. This would help mitigate some of the negative consequences related to the salary increase for colleges and universities, their employees and students.

1) DOL's Proposal Is Inconsistent With the Purpose and History of the Minimum Salary Level

For over a half century, DOL has consistently stated the purpose of the minimum salary level is to provide a "ready method of screening out the obviously nonexempt employees" (69 Fed. Reg. at 22165). Keeping with this purpose, DOL has historically 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. While over the years DOL has used different formulas to calculate the minimum salary level and made various changes to the duties test, the average minimum salary level for all tests for all years adjusted for inflation is $42,236.23. In addition, while the time periods between adjustments to the salary level have varied, increases to the level have been fairly consistent and have amounted to somewhere between 2.8% to 5% annually since 1949.

The proposed minimum salary level of $50,440 is well above and a significant departure from historic minimum salary levels, and amounts to an annualized increase of 10.29% from the last adjustment in 2004.[38] By making such a dramatic increase, DOL appears to be abandoning the historical purpose of the salary level, as the proposed level would not only screen out employees that obviously cannot meet the duties tests, but also many employees who currently *do* meet the tests and work in historically exempt positions. As noted above, DOL's proposed minimum salary level will force colleges and universities to reclassify 40%, 50% and possibly as much as 60% of their currently exempt workers who currently meet the duties test, including highly educated scientists, athletics coaches managing entire teams, and admissions, human resources and other professionals, all of whom are relied upon for their skills and who

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> **professors, instructors, lecturers, librarians, academic advisors, researchers, post-doctoral associates, resident advisors, athletic trainers or coaches.** The salary and salary basis requirements do not apply to bona fide ~~**teachers**~~ **educators.** Having a primary duty of teaching, tutoring, instructing, **advising, coaching, mentoring or researching** in the activity of imparting or creating knowledge includes, by its very nature, exercising discretion and judgment.

These modifications will clarify and capture the academic professionals responsible for creating the holistic experience of the student's matriculation process from onboarding as freshman through to achievement of terminal degrees.

See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

[38] Wage growth from 2004-16 was far below 10.29% annually and in coming to this number DOL seems to have discounted the effects of the Great Recession (2007-2009) and resulting wage stagnation during that perid. See, *Sticky Wages and Nominal Rigidities: Why Nominal Wages Have Been Stagnant Since The Great Recession,* http://www.forbes.com/sites/jonhartley/2015/05/31/sticky-wages-and-nominal-rigidities-why-nominal-wages-have-been-stagnant-since-the-great-recession/.

consistently exercise discretion and independent judgment with respect to matters of significance.

DOL also provides little justification for this departure or for the $50,440 salary level, other than it amounts to the 40th percentile of earnings for all full-time salaried workers in 2016. Yet DOL cites no authority for its determination that the 40th percentile is the appropriate salary level. The 40th percentile has not been a target for past salary levels, and there is no indication that it serves as a particularly useful marker for delineating between which jobs are "obviously nonexempt" and which are not.

2) The Proposed Salary Level Fails to Account for Regional and Sector Differences in Pay

By setting the proposed minimum salary at the 40th percentile of earnings for all full-time salaried workers nationwide, DOL discounts regional and industry differences in pay to the detriment of nonprofits, public employers and those operating in areas with lower costs of living.

As noted above, pay in higher education and the nonprofit and public sectors is frequently lower than nationwide averages, and as a result colleges and universities are more impacted by the rulemaking than those in many other industries.[39] In short, the 40th percentile of all full-time salaried workers nationwide could be the 50th or 60th percentile for colleges and universities.

This is particularly true for institutions operating in areas with a lower cost of living. A salary level appropriate for New York City, San Francisco and Washington, D.C., will not work for Birmingham, Boise, Columbus, Detroit, Baton Rouge or Memphis, let alone the rural and small towns spread out across the country. In many "college towns," in fact, the local college or university is the major employer in town. Yet, DOL's proposed salary threshold is *higher* than minimums set under *any* state laws, nearly $10,000 higher than that of California and nearly $15,000 higher than New York, two of the states with the highest cost of living. As the American Society for Association Executives noted in its comments, "according to the relocation calculator of the FAS Relocation Network, an employee in Washington, D.C., earning an annual salary of $50,400 would only need to earn $26,505 to have a comparable standard of living in Marshalltown, Iowa, where the cost of living is calculated as 47.5% less expensive than in the nation's capital."[40] Further regional concerns with setting the minimum salary at the 40th percentile for all full-time salaried workers is evidenced in an Oxford economics study on regional pay commissioned by the National Retail Federation. For example, the 40th percentile of all full-time salaried workers in the states of Louisiana and Oklahoma is equivalent to

[39] The responses of more than 1,100 two- and four-year institutions to CUPA-HR's 2015 annual salary survey of professionals in higher education indicates that the median earnings of these individuals is about 10% lower than the median earnings of their counterparts in other industries.
[40] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1182.

$784/week — for Oklahoma this means that 54.7% of the currently exempt workforce earns below $970 per week.[41]

As a result, in many cases employees working at colleges and universities in lower cost areas of the country will be classified as hourly, while their counterparts performing the same job elsewhere will be classified as exempt, simply based on regional differences in pay.[42] In addition and as outlined in section I. A., those colleges and universities "with fewer resources and/or in areas with lower cost of living would be the most impacted by the proposal." This would be far less of an issue if the proposed salary level was more in line with historic trends.

3) DOL Should Phase In Over Time Any Salary Increase

Although CUPA-HR supports increasing the minimum salary to a level below DOL's current proposal, should the Department decide to increase the salary to $970 per week or anything above an inflation adjustment from the current (2004) level, it should do so incrementally, over the course of several years, to help smooth the transition and to allow institutions to adjust their budgets, raise tuition incrementally, and change work flows to minimize disruption. As currently proposed, DOL's minimum salary level would increase approximately 113% all at once. As has been discussed in great detail throughout these comments, this would pose huge complications for institutions of higher education. Phasing in the requirement over multiple years would mitigate some of these negative consequences for colleges and universities, their employees and their students.

Widespread and logical support for a phase-in of the salary level is evidenced in various and multiple requests DOL has received in this regard. The Iowa Association of Community College Trustees comments state that "should the Department continue to move the NPRM forward … a minimum of a five-year phase-in period [should be adopted] for compliance."[43] This argument for a phased-in approach, as a result of the innumerable uncertainties posed in the NPRM, is made even stronger in the comments provided by the State University System of Florida which states that, "doing so would provide the DOL and the affected employers with real cost experience data with which to consider future changes to the minimum salary test going forward."[44] Complying with the NPRM is an incredibly difficult task for colleges and universities; however, the concern, as an Indiana institution reports, "is not just to comply with the law [but also] having enough time to balance all of these competing priorities strategically" and is why at least "a two- or three-year phase-in to give us time to respond" is necessary. The National

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[41] See https://nrf.com/sites/default/files/Documents/retail%20library/OE%20Addendum%202%20-%20State%20level%20overtime%20threshold%20analysis.pdf.

[42] DOL recognizes this possibility, noting that it chose the 40th percentile rather than a higher percentile because a higher percentile "could have a negative impact on the ability of employers in low-wage regions and industries to claim the EAP exemptions for employees who have bona fide executive, administrative or professional duties as their primary duty …" 80 Fed. Reg. 38532.

[43] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

[44] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

Postdoctoral Association has also urged DOL to phase in the requirement "[g]iven the enormous complexity and cost of transitioning a large segment of the scientific workforce from an exempt to nonexempt status" and "unintended consequences that would negatively affect postdoctoral scholars in the short term" if the rule were to become effective immediately.[45] Many postdocs are paid on federally-sponsored research grants that must be proposed, awarded and funded three to five years in advance.[46] A phased approach would also allow employers to better adjust employment and other contracts, including collective bargaining agreements.

In addition, due to the rapid nature of the required increase, employers may make classification decisions today that they would not make if the increase was phased in over three or four or even five years. This would allow higher education the ability to prepare for the changes in a way that makes economic sense. It also would allow institutions to determine with additional certainty how many overtime hours are actually being worked by employees in the $23,660 to $50,440 range. Currently, because many of these exempt employees do not record their time, institutions are faced with an information deficit. As the State University System of Florida states, "at this point, the nation is going into this change virtually blind, since employers, for the most part and by definition of exempt status, have never tracked hours of work for exempt employees … [requiring] several years of cost experience."[47] Without information regarding these hours, institutions would need to guess at how many hours are worked, and those guesses will almost certainly account for more overtime than will actually be worked, resulting in a net loss of income to impacted employees.

One large southern institution reports that its internal employee satisfaction/wellbeing survey indicated that exempt professional employees self-report routinely working closer to 50 hours per week than 40. If that were borne out in practice as hourly work, the cost to the institution of 10 hours per week of overtime for such newly-eligible employees would be an additional $10 million per year.

By allowing a gradual increase, colleges and universities can begin gathering the necessary data to ensure as smooth a transition as possible and to mitigate the significant budgetary impact on the institution. Although many of the same issues will exist with respect to morale, flexibility and opportunity, a gradual, phased-in implementation of the new minimum salary would limit the financial disruption experienced by both institutions and their employees.

II. DOL Should Not Automatically Update the Salary Levels

DOL proposes to increase the minimum salary threshold each year henceforth by tying it to either the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly

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[45] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

[46] Many institutions have expressed concern about existing federal and state research grants which specify how funds must be allocated — specifically, jeopardizing millions of dollars of research funding by increasing salaries above the permitted threshold in the contract.

[47] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

earnings of full-time salaried employees. Employers would be given only 60 days' notice to adjust to the annual increases. The undersigned do not believe DOL should automatically update the salary level, as doing so 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.

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. If DOL does choose to move forward with automatic updates, the updates should occur at most every five years based on inflation rather than the 40th percentile, and the agency should provide the public with notice of the new level at least one year prior to implementation.

1) 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 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." [48]

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, allowing DOL, and the regulated community, the opportunity to provide input into the appropriate level.

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

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

[48] 69 Fed. Reg. 22171

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 each year in the *Federal Register* without notice and comment, without a Regulatory Flexibility Act analysis, without any of the other regulatory requirements established by various Executive Orders 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 exemptions, that impact millions of employees and employers, 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.

3) Automatically Updating the Salary Level Would Negatively Impact Institutions' Budgets and Budget Planning, Ability to Provide Merit-Based Increases and Employee Morale

Automatically updating the salary level would negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. The annual increases proposed by DOL would create 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 a survey question on this point 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.

Automatic updates would also interfere with operational and human resource functions as forced annual increases 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, 68.7% (475 of 691 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.[49] If automatic updating goes into effect, employers would need to reclassify employees on an annual 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 a survey said the automatic increases would cause morale issues as a result of reclassification, wage compression and limit on merit-based increases.

In short, increasing the minimum salary level each calendar year would create uncertainty for employers in their budgeting and planning process and significantly undermine employee morale.

4) If DOL Imposes Automatic Updates, the Updates Should Occur at Most Every Five Years and the Agency Should Provide the Public With Notice of the New Level at Least One Year Prior to Implementation

If DOL does choose to move forward with automatic updates despite the undersigned's objections, the updates should occur at most every five years and the agency should provide the public with notice of the new level at least one year prior to implementation. A majority of CUPA-HR members surveyed felt five years is a reasonable period for revisiting the salary threshold, and nearly 60% felt they needed at least a year to implement any automatic updates.

As outlined above, annual automatic increases negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. While the undersigned question DOL's authority to automatically update the salary level and feel DOL and the regulated community would be better served if the agency used notice and comment rulemaking for any increase in the salary level, by extending the update window to five years, DOL could avoid many of the negative consequences associated with automatic annual increases.

DOL proposes to determine the new salary level each year by indexing it to certain data sets collected by the Bureau of Labor Statistics. Under either indexing method proposed by the DOL, it will be virtually impossible to determine the new salary level each year in advance of the

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

DOL's pronouncement in the *Federal Register*. As a result, indexing will not make compliance with the exemptions easier and more routine; rather the indexing proposal creates enormous uncertainty and administrative chaos and will likely require an annual reconsideration of the classification for employees whose status will depend upon (potentially) the responses to a survey conducted several years prior, instead of a legal analysis of the executive, administrative and professional positions.

A lead time of 60 days as DOL has proposed is not nearly enough time for employers to evaluate the impact of the salary levels on labor costs and make sound decisions regarding compliance with the rule. In fact, 173 CUPA-HR members expressed a sense of severe or extreme hardship with having to implement increases within 60 days. As one member states, "our institution comprises five separate entities with a total of 40,000+ employees from across [our Midwestern state]. It would constitute a significant hardship for our institution to accomplish the analysis, formulate recommendations, inform stakeholders, communicate/educate staff and actually initiate the change to include all administrative details such as timekeeping for newly nonexempt employees." This uncertainty will create a trickle-down harm to employees. For instance, employers may implement hours reductions or salary freezes so that they can earmark money for labor costs in order to cover the increased payroll expenses created by the changes to the salary levels.

Furthermore, the timeframe becomes even more impractical given the likelihood that the annual increases will likely be off-cycle of an institution's fiscal and academic budget year. Many institutions will have already completed the budgeting process for their current academic year and fiscal year cycles, and requiring the rule to be implemented within 60 days unnecessarily burdens many higher education budgets. Challenges that arise as a result of a spike in costs will most likely result in layoffs because, as one Arkansas institution points out, "state budget dollars and tuition are set well ahead of the fiscal year [and] adjusting salaries could lead to layoffs, as we cannot raise tuition mid-year and will not receive additional state funding mid-year." Further concerns that a 60-day implementation period will harm tight budgets is also clear in an Alaska institution's response, which reports that the tight timeframe will impose an extreme hardship on the institution because, "state-funded appropriations [are] made a year or more in advance, [while] contracts are annual or multi-year, and collective bargaining agreements[50] [are made on] a three-year cycle," highlighting the impossibility of the potential task at hand.

For these reasons, DOL should limit updates to every five years and provide at least one year's notice of increases to the salary level.

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[50] With regards to collective bargaining agreements, a firm representing many institution noted that: *A significant portion of the university system's workforce is comprised of employees covered by a collective bargaining agreement among our 50 unions. Any changes to wages for positions or classifications covered by one of the collective bargaining agreements (CBA) would be a mandatory subject of bargaining, which could be a daunting task given that we administer 50 CBAs. We are very concerned that it would be very challenging to adequately address the concerns of each group in an equitable manner to meet as short of a deadline as it seems might be implemented based on the proposed rulemaking.*

5) If DOL Imposes Automatic Updates, the Updates Should be Based on Inflation Rather Than the 40th Percentile

If DOL imposes automatic updates, it should tie such updates to inflation rather than pegging it to the 40th percentile of all full-time salaried workers, because implementation of the rule itself will dramatically impact who is identified as a salaried worker and thus corrupt the outcome of the 40th percentile in future years. This could create a series of exponential increases to the salary level caused by changes brought about by implementation of the rule itself.

DOL predicts that in year one of the proposed new regulations alone, 4.6 million currently exempt workers will need to be reclassified as nonexempt or have their salaries raised to maintain exempt status because they currently do not earn a high enough salary to qualify for exempt status (80 FR 38518). Employers may choose to (i) reclassify such workers as nonexempt and convert them to an hourly rate of pay, (ii) reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked, or (iii) increase the salaries of such workers to the new salary threshold to maintain their exempt status. No matter which of these three options employers choose, the effect will be to drastically increase the 40th percentile in the coming years, skewing the number and making it an unreliable index, which is influenced by the rule itself.

In short, if DOL is correct that 4.6 million workers who are currently part of the BLS data will no longer qualify for exempt status under the proposed new regulations due to insufficient base salaries, then there are 4.6 million workers who will either be dropped from the data due to conversion to an hourly rate of pay or will be paid more in total compensation or base salary in response to the new salary level threshold. Accordingly, the 40th percentile of all full-time non-hourly-paid workers will necessarily shift drastically upwards as employers change the compensation of these 4.6 million workers. It is difficult to predict with any level of accuracy exactly what the BLS data on full-time non-hourly-paid workers would look like a few years from now as employers respond to the new salary level of the proposed regulations. It is not difficult to predict, though, that the 2.6% average annual growth rate that the DOL reports has occurred for the 40th percentile between 2003 and 2013 (see 80 FR 38587) is a far cry from the actual annual growth rates that would occur in the first several years after enactment of the new regulations. With an average annual growth rate drastically exceeding the 2.6% that DOL anticipates, it will not take more than a handful of years for the duties tests to be rendered nearly superfluous, as very few employees who are currently eligible for the exemptions would receive a high enough salary level to qualify for exempt status, regardless of their duties. In the low-wage regions and industries, the duties tests would become superfluous even sooner.

For all of these reasons, if the DOL enacts a final rule that includes automatic updates to the salary level based on indexing, the indexing should not be tied to the 40th percentile of all full-time non-hourly-paid employees.

III. DOL Should Not Make Changes to the Duties Test Without Issuing a Separate NPRM Containing Specific Proposed Regulatory Language

For procedural reasons alone, DOL should not change the duties test at this time. DOL's decision to consider possible changes to the duties test without offering a specific proposal violates the spirit if not the letter of the Administrative Procedure Act. Like DOL's proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act and the various Executive Orders related to regulatory activity. Asking questions is simply no substitute for an actual regulatory proposal that the regulated community can consider, evaluate and comment upon. We strongly urge DOL to provide specific regulatory language for any changes to the duties test in a separate NPRM after it has set the salary level and allow the public sufficient time to review and comment on that proposal.

CONCLUSION

The undersigned respectfully request DOL to consider our suggested changes and thank the agency for the opportunity to comment.

Respectfully Submitted,

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On Behalf of the Following Undersigned Organizations:

American Association of Collegiate Registrars and Admissions Officers
ACPA—College Student Educators International
American Association of Community Colleges
American Association of State Colleges and Universities
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
American Council on Education
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
Hispanic Association of Colleges and Universities
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
NIRSA: Leaders in Collegiate Recreation

College and University Professional Association for Human Resources

Exhibit B

Testimony of Andy Brantley

Before the
United States House of Representatives
House Education and Workforce Subcommittee on Workforce Protections

Hearing on
"Federal Wage and Hour Policies in the Twenty-First Century Economy"

February 16, 2017

Good morning, Chairman Byrne, Ranking Member Takano and distinguished members of the Subcommittee. Thank you for holding this hearing today on "Federal Wage and Hour Policies in the Twenty-First Century Economy" and for the opportunity to testify. I am Andy Brantley, president and chief executive officer of the College and University Professional Association for Human Resources, known as CUPA-HR. Prior to joining CUPA-HR, I was associate vice president and chief human resources officer for the University of Georgia (UGA) in Athens, Georgia. Before my arrival at UGA in January 2001, I served as the assistant vice president for business administration and director of human resources at Davidson College, a private college in Davidson, North Carolina.

CUPA-HR serves as the voice of human resources in higher education, representing more than 22,000 human resources professionals and other campus leaders at almost 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 78 percent of all master's institutions, 56 percent of all bachelor's institutions, and nearly 700 community colleges and specialized institutions. Higher education employs over 3.9 million workers nationwide, with colleges and universities in all 50 states.

My testimony today will focus on higher education's concerns with the U.S. Department of Labor (DOL)'s recent revisions to the "white collar" exemptions to the Fair Labor Standards Act (FLSA)'s overtime pay requirements and our suggestions for moving forward. To say that these changes have been top of mind to higher education HR professionals and higher education institutions is an understatement.

Before I explain why the overtime changes have garnered so much attention from higher education let me say that CUPA-HR and the other higher education associations that engaged on this issue believe 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.

I will talk more about our thoughts on how best to accomplish these goals a bit later. First, I will discuss DOL's proposal and our response and higher education's experiences with the initial stages of complying with the final rule before it was stayed by a federal court.

DOL's Proposal

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). On July 6, 2015, DOL published the Notice of Proposed Rulemaking (NPRM), which proposed several changes to the white collar exemptions and invited public comment on those proposals.

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 (currently $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 primary duties test). Employees who do not meet all three requirements or fail to qualify for another specific exemption as outlined in the 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 workweek (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 the July rulemaking, DOL proposed several changes to the white collar exemptions, including increasing the current 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.

Higher Education's Response

The proposal generated widespread concern in the higher education community. The FLSA covers all or nearly all of the 3.9 million workers employed by our colleges and universities nationwide. Many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the white collar regulations but earn less than the threshold DOL had proposed.

CUPA-HR and 18 other higher education associations representing approximately 4,300 two- and four-year public and private nonprofit colleges and universities filed detailed comments outlining our concerns with DOL's proposal. In short, we argued that while an adjustment to the minimum salary threshold was due, DOL's proposed increase was simply too high. It would require colleges and universities to reclassify large numbers of salaried 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.

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.

As we detailed in our comments, in our view, this mass reclassification would be 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. As I mentioned previously, 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. That 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. To us it was clear that DOL's proposed threshold was too high, as it would have required mass reclassification of jobs that are clearly performing exempt, professional-level work.

We also detailed in the comments our significant concerns about the burden and costs of this mass reclassification on institutions; not only are colleges and universities often the largest employers in their communities, but in many cases they are the largest employer in the state. Institutions can be extremely complex organizations comprised of teaching hospitals, research facilities, agricultural operations and more, all of which compliment extensive academic program offerings. As a result, colleges and universities employ a very skilled, very diverse workforce of faculty and staff. Adjusting this workforce to the dramatic changes proposed by DOL is complex, not some simple payroll change accomplished with the stroke of a key. Colleges and universities must undergo detailed analysis of how to staff any given department so it can best achieve its mission under new rules that have fundamentally changed when and where employees may work.

As we provided in great detail in our comments, the complexities of this change would be burdensome and costly. As nonprofits and public entities, institutions would have difficulty absorbing these costs as well as costs associated with increased salaries for exempt employees, expanded overtime payments and administrative costs related to tracking hours. In the face of these costs and challenges, many 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.

Finally, we expressed in the comments our concern about DOL's proposed automatic annual updates to the threshold. We do not believe the FLSA grants the authority to DOL to impose automatic updates, and even if it did, the agency should not automatically update the salary level.

Not only would annual increases negatively impact institutions' budgets and budget planning, their ability to provide merit-based pay increases and employee morale, but such increases ignore economic circumstances and changes in our workforce.

Rather than automatically updating the salary level, we argued in the comments 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. 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 cost analysis — which is an important part of assessing the impact of any increase to the salary level.

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 addition to filing comments, our community also raised our concerns with the Office of Management and Budget (OMB)'s, Office of Information and Regulatory Affairs (OIRA) during its pre-publication review of the final rule. In fact, 25 percent of all stakeholder meetings conducted and nearly 50 percent of letters submitted to the OMB docket were on behalf of either individual institutions or a higher education association. In addition, numerous Members of Congress from both sides of the aisle urged DOL and OMB to carefully consider the impact the proposal would have on higher education before proceeding with the rule.

DOL's Final Rule

Unfortunately, on May 18, 2016, DOL issued its final rule setting the new threshold at $47,476, which was a modest decrease from the proposed amount of $50,440, but still a 100 percent increase over the current level of $23,660. The new rule also requires automatic updates to the threshold every three years, rather than the proposed annual updates. Like the proposal, the final rule would require mass reclassification of many white-collar workers in jobs that have traditionally been and are well suited to exempt status. Thus, the final rule would still have adverse consequences for colleges and universities and their employees and students that we detailed in our comments.

We were deeply disappointed that DOL did not do more to address the concerns of colleges and universities across the country that submitted comments, wrote letters to Congress and met with administration officials.

Professionals in thousands of positions at institutions of higher education that clearly meet the duties test for exemption are paid less than $47,476. Positions that require bachelor's or master's degrees such as residence hall managers, academic advisors, mental health counselors, admissions counselors, financial aid counselors, student life professionals, alumni development professionals and many athletics positions typically pay early and mid-career professionals annual salaries of less than $47,000, particularly in smaller institutions and in rural parts of the country.

CUPA-HR annually collects and analyzes comprehensive salary and benefits data for higher education administrators, professionals, faculty and other staff. Following the release of the final rule, we looked to our *2016 Professionals in Higher Education Salary Survey Report* and found that a threshold of $47,000, which is slightly below the final rule's $47,476, would impose significant costs on higher education. Twenty-four position classifications in that survey have median national salaries below the final rule's threshold.[1] 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. Institutions will typically have many professionals below $47,476, particularly institutions in lower-cost areas of the country, which will be those hardest hit by the rule.

In addition to reviewing our salary survey report, we reached out to our membership for data. The 35 institutions that were able to provide data in that short window of time 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.

We are also concerned that these initial costs and the subsequent decisions institutions would have to make regarding their employees and students would be continuously repeated as the rule provides for automatic increases to the salary threshold every three years. Each update would raise the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region and DOL would post the new salary levels just 150 days in advance of their effective date. While increasing the intervals for automatic updates from one year to three years is an improvement, we believe that DOL lacks the authority to impose *any* automatic updates and, for the reasons I mentioned previously, the public is better served when DOL makes any adjustment to the regulations through notice and comment.

In addition, we have significant concerns with DOL's methodology of indexing future increases to the 40th percentile of salaried workers when intervals for threshold adjustments are stacked closely together. Changes brought on by implementation of the rule will dramatically impact who is identified as a salaried worker and thus corrupt the outcome of the 40th percentile in future years. This could lead to exponential and unpredictable increases to the threshold, which would be destabilizing.

Although we were mostly disappointed by the final rule, we were pleased DOL issued specific guidance on the applicability of the final rule to higher education. Although the guidance restates

[1] CUPA-HR members report that employees that would face reclassification include those in departments such as academic affairs (librarian, adviser, counselor), student affairs (residence hall manager, admissions counselor, financial aid counselor, student activities officer), institutional affairs (human resources professionals), fiscal affairs (accountant, head cashier, ticket manager), external affairs (alumni development professionals), facilities, information technology, research professionals (including many with advanced degrees), athletics (some assistant coaches, physical therapist, trainer), and managers in food service, security and building and grounds.

current law, it did increase awareness of certain unique provisions within the regulations that would help higher education comply.

Compliance Efforts and Complications

I want to now turn the attention of my testimony to focus on the compliance efforts we undertook at CUPA-HR and the many complications institutions of higher education encountered while racing to transform their complex organizations and unique workforce in the relatively short amount of time DOL provided. When we were reviewing the department's original proposal our members provided ample feedback on the length of time that institutions should be given to bring their workforce into compliance. The vast majority of the feedback we received suggested at least one year was needed in order to adequately implement the changes, yet DOL provided, just over six months with December 1 as the effective date. Given the short time DOL provided we knew this would be a great challenge and is why we as an association devoted our resources towards helping our member institutions prepare for the December 1st effective date.

To do so, we produced webinars and other resources dedicated to the overtime changes throughout the rulemaking process. Although we knew viewership would be high none of us imagined that our February 2016 webinar entitled "FLSA Overtime: How, When and Why to Prepare" would set the record for total viewership only to be upended later in 2016 when a conservatively estimated 5,825 individuals logged in to view our webinar on the final rule. The participation in the event was record-breaking for CUPA-HR, but also remarkable were the 408 content questions submitted during the webinar regarding the new rule's impact on comp time, part-time employees, tracking time, salary calculations and more. Remember, many of these questions came from seasoned human resources professionals who have significant expertise with the Fair Labor Standards Act and the white collar overtime exemptions — although proponents of the rule argued these changes could be made with a "flip of the switch," the interest in our webinars is evidence to the contrary.

Furthermore, 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 their 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 and, at worst, a lawsuit waiting to happen.

One of the last occupational areas I will discuss is a position that is almost exclusively found in higher education. Resident directors 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 is impractical if not impossible for resident directors, 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, oftentimes a benefit worth many thousands of dollars, employers cannot count this cost as salary for the purposes of meeting the minimum salary threshold.

Of course these were just three of the many issues on which CUPA-HR was working to obtain guidance when the department's rule was preliminarily enjoined in November.

We have received some feedback from member institutions that implemented changes in anticipation of the rule and prior to the injunction. These members report incurring significant costs, experiencing employee morale issues and finding that several job categories are very difficult to manage as nonexempt. For one large Midwestern university, costs included 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. Members have also reported morale issues as "people who have been 'professional' for years now have to track hours."

Finally, we are hearing from members that "several job categories are very difficult to manage as nonexempt because of the unusual nature of their schedules." One member provided the following specifics:

> [The job categories that have caused the most difficulty] include residential housing staff, who are struggling with how to track time when they run into a student in the dining hall or a student pops in for advice at 11:00 p.m. This has led to some issues of coverage. Complicating the residential housing issue is that we provide room and board for many of them as compensation but this is not factored into their salaries for FLSA purposes. Another job type relates to athletics. We have been able to cover some of the coaches under the teaching exemption, but many athletic trainers are not included. They work unusual hours and travel with teams, which adds a lot of complication to tracking hours.

The Court's Ruling and Our Suggested Path Forward

The November decision issued by Judge Mazzant in response to a legal challenge brought by a coalition of more than 50 business groups and 21 state attorneys general found that DOL exceeded its delegated authority and ignored Congress's intent by raising the salary level such that it supplants the duties test. The court's ruling, subsequent appeal by President Obama's DOL, and the recent 30-day extension granted to the Trump administration's Department of Justice provides a great level of uncertainty for employers moving forward. Given this uncertainty, we would like to see DOL withdraw the rule and issue a new one that sets a more reasonable salary level.

As I have stated elsewhere in my testimony, CUPA-HR agrees an increase to the minimum salary threshold is due. As most colleges and universities strive to be progressive employers and are often considered to be an employer of choice in a community, CUPA-HR believes DOL should work towards updating the threshold under the new administration but should not consider a similar threshold that is so high that it forces employers to reclassify employees that work in jobs that have always been exempt and are well-suited to exempt status.

While we are not settled on an exact salary level, in a July 2015 survey we conducted of 819 CUPA-HR members, a majority chose a salary level of either $29,172 (23 percent increase) or $30,004 (27 percent increase) and 88 percent of respondents indicated any threshold over $40,352 (71 percent increase) would be too high. These salary levels were not picked randomly; in fact according to the NPRM preamble, DOL considered these salary levels as part of the proposed update. The first amount represents the current level — which was set in 2004 — as adjusted for inflation; the second number would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and in retail; the final number represents the median of all wage and salaried workers combined.

Additionally, we would like to see DOL issue specific guidance with respect to the many complications that arose while institutions were preparing to comply. In a survey we administered after the injunction just 28 percent of respondents reported implementing their planned changes, while 71 percent either implemented some changes and delayed others or delayed all changes. Although many of our member institutions spent night and day preparing to be compliant with the regulations, it is clear that there would have been many unanswered issues had the rule taken effect on December 1.

Conclusion

Mr. Chairman, thank you again for the opportunity to testify and offer CUPA-HR's support for the committee's focus on modernizing federal wage and hour policies. I am happy to answer any questions from you or other members of the Committee.

Exhibit C

From: " - [redacted]@DOL.GOV>
Subject: RE: CUPA-HR
Date: November 14, 2016 at 12:24:21 PM EST
To: Josh Ulman <julman@cupahr.org>
Cc: Christi Layman <clayman@cupahr.org>

Hi Josh, thanks for checking back in and sorry for the delay - I have been out of the office a bit. I wanted to share one of the guidance pieces with you that the WHD web team is currently working on adding to our FAQs, but that is really specifically more relevant to the audiences you are talking to and an FLSA question in general. This is on teaching duties as they may apply to extension agents and others. As we've mentioned, we are unable to give a kind of blanket assertion about a group of titles because it seems there may be many different permutations of the duties out there. Instead, we have tried to frame it around that issue of what the regulations delineate, and to try to draw attention instead to the main factor being that the individual's *primary* duty is teaching.

Q: Can teachers who instruct outside of the classroom be considered to have a primary duty of teaching? What about those who may have a primary duty of teaching, but do not instruct people enrolled in degree-seeking programs?
A: 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. See 29 CFR 541.303. Educational establishments include elementary school systems, secondary school systems, institutions of higher education and other educational institutions.

The regulations do not address where bona fide teaching may take place, nor do they address to whom the knowledge can be imparted. For example, it is possible that an agricultural extension agent, who is employed by an educational institution and who travels throughout their region on behalf of that educational institution to provide instruction and information to farmers, has a primary duty of teaching, instructing, or lecturing in the activity of imparting knowledge, and could therefore be an exempt teacher. Likewise, a faculty member employed by an educational establishment who provides instruction through online courses to remote non-credit learners, may have a primary duty of teaching, instructing, or lecturing in the activity of imparting knowledge, and could qualify as an exempt teacher. However, in order for the teaching exemption to apply, the instructor must be employed by the educational establishment, not by a third party, and they must have a *primary* duty of teaching. It is important to remember that job titles alone do not determine exempt status, and that the actual duties performed by the employees must be assessed.

Let me know if you have any questions on the below and I can try to set up a call with our policy team. I hope this is helpful to some of the institutions to whom you may be providing guidance. Some more pieces are forthcoming soon.