College and University Professional
Association for Human Resources

June 12, 2019

The Honorable Alma S. Adams
Chair
Subcommittee on Workforce Protections
U.S. House Education and Labor Committee
2176 Rayburn House Office Building
Washington, D.C. 20515

The Honorable Bradley Byrne
Ranking Member
Subcommittee on Workforce Protections
U.S. House Education and Labor Committee
2101 Rayburn House Office Building
Washington, D.C. 20515

Dear Chair Adams and Ranking Member Byrne:

On behalf of the College and University Professional Association for Human Resources (CUPA-HR), thank you for holding this hearing on the U.S. Department of Labor's (DOL) ongoing efforts to update the regulations at 29 CFR Part 541 defining and delimiting exemptions for executive, administrative and professional employees to the Fair Labor Standard Act's (FLSA) overtime pay requirements. I write to share our views with respect to the current rulemaking as well as DOL's 2016 final rule.

CUPA-HR serves as the voice of human resources in higher education, representing more than 31,000 human resources professionals and other higher education leaders at over 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 79 percent of all master's institutions, 58 percent of all bachelor's institutions and over 500 two-year and specialized institutions. 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]

[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.*

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The FLSA and similar state laws cover all or nearly all of these employees and many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the Part 541 regulations DOL seeks to modify with its current rulemaking and 2016 rule.[4]

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, 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.

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. We also detailed in the comments our significant concerns about the burden and costs of this mass reclassification on institutions.

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 2016 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.

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 required automatic updates to the threshold every three years, rather than the proposed annual updates.

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

[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.

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 have imposed significant costs on higher education. Twenty-four position classifications in that survey have median national salaries below the final rule's threshold.[5] If an institution moved just one employee in each of those 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.

As you know, a federal court struck down the 2016 rule before it went into effect and DOL revisited updating Part 541 by issuing a Request for Information (RFI) on July 26, 2017, holding listening sessions and then issuing a proposed rule on March 22, 2019. CUPA-HR and approximately 20 other higher education associations filed comments in response to the RFI and pending rule. In both sets of comments, we urged DOL to use the same methodology it used in 2004 to set the salary threshold. In the comments on the current rule making, we also suggested DOL make the following improvements to its proposal:

- First, any final rule should allow employers to prorate the salary threshold for part-time employees.

- Second, DOL should count the cost of employer-provided room and board toward the salary threshold.

- Third, while we support DOL's decision to update the threshold only via notice and comment, we believe DOL should update the regulations every five to seven years based on circumstance, as it did prior to the 1970s, not through regularly scheduled updates. Our economy and labor markets are very complex and influenced by technological developments, immigration and other factors and do not follow any linear pattern. As such, DOL should act based on circumstance, not on a rigid schedule. We also are concerned that any automatic update—even one that involves notice and comment—may exceed DOL's authority under the FLSA and, therefore, will be susceptible to legal challenge.

- Fourth, if DOL does decide to proceed with an automatic update, the agency should make clear that any change to the methodology used to determine the standard salary level as

[5] 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.

part of future updates would require multiple proposed rulemakings. In other words, DOL would issue the initial proposal seeking comment on the regularly scheduled update to the salary threshold using the 2004 methodology. As part of that proposal, DOL would also ask if the 2004 methodology remains appropriate. If based on the comments, DOL determines it needs to change the methodology or make other adjustments to the regulation, the agency would need to propose those specific changes in a separate and subsequent rulemaking with an implementation period that accounts for the planning and expectations the DOL set by having updates on regular intervals.

For your convenience, we attach the comments we filed on the 2016 rule, the RFI and the current rulemaking as well as our testimony before this subcommittee on February 16, 2017.

Thank you again for holding this hearing and please do not hesitate to reach out to me to discuss this matter further.

Respectfully Submitted,

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