



**College and University Professional
Association for Human Resources**

May 21, 2019

SUBMITTED ELECTRONICALLY VIA FEDERAL eRULEMAKING PORTAL: www.regulations.gov
under e-Docket ID number WHD-2019-0001

Ms. Melissa Smith
Director of the Division of Regulations, Legislation, and Interpretations
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 Exemptions for
Executive, Administrative, Professional, Outside Sales and Computer Employees (84
Fed. Reg. 10900, March 22, 2019) (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 Notice of Proposed Rulemaking (NPRM). 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.

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

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>.

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 or department) seeks to modify with this rulemaking.⁴ As a result, colleges and universities, their employees, and the students they serve would be affected by proposed changes in this NPRM.

The following higher education associations respectfully submit these comments outlining the impact of the NPRM on institutions of higher education and their students and employees and offer suggestions for improving the proposal. 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
American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Medical Colleges
Association of American Universities
Association of Community College Trustees
Association of Governing Boards of Universities and Colleges
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
NASPA – Student Affairs Administrators in Higher Education
National Association of College Stores
National Association of College and University Business Officers
National Association of Independent Colleges and Universities
National Association of Student Financial Aid Administrators
NIRSA: Leaders in Collegiate Recreation

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>.

SUMMARY

The FLSA requires employers to pay their employees at least a minimum hourly wage, which is set by the statute, and an “overtime” rate of 1.5 times the employee’s regular hourly wage for every hour the employee works over 40 hours in a given week. The statute exempts certain categories of employees from these requirements, including executive, administrative and professional employees (sometimes referred to the “EAP” or “white collar” exemption). The FLSA tasks DOL with defining executive, administrative and professional employees by regulation and requires the department to revisit these definitions from “time to time.” Under the current regulations, last set by DOL’s final rule in 2004, 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).

On May 23, 2016, DOL issued a final rule (the 2016 rule) doubling 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. As we noted during the notice and comment leading up to release of the 2016 rule, this type of dramatic increase to the salary threshold would require mass reclassification of professionals in thousands of positions at institutions of higher education that clearly meet the duties test for exemptions but are paid less than \$47,476.⁵ We also noted that automatic increases without notice and comment are unlawful.⁶

On November 22, 2016, a federal court temporarily enjoined DOL from enforcing the 2016 rule and issued a decision permanently enjoining the rule on September 1, 2017 on the grounds that the rule’s high salary threshold created a “de facto salary-only test,” and that “Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption.”⁷ In response, DOL issued a Request for Information (RFI) on June 26, 2017, seeking comment about how DOL should go about updating the overtime regulations in light of the court’s ruling.

On September 25, 2017, CUPA-HR, in partnership with 20 other higher education associations, filed substantive comments on the RFI.⁸ The comments recommended that DOL:

⁵ See Attached Exhibit A, Comments by CUPA-HR and other higher education groups in response to DOL’s 2015 proposed rule.

⁶ Id.

⁷ *State of Nevada v. United States Department of Labor* (November 22, 2016) at 14

<http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20.pdf>.

⁸ See Attached Exhibit B, Comments by CUPA-HR and other higher education groups in response to DOL’s 2017 RFI.

- 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;
- continue with its past practice of updating the regulations as appropriate through notice and comment rulemaking rather than through any automatic mechanism; 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.

On March 22, 2019, DOL published the NPRM which formally rescinds the 2016 rule, proposes several changes to the white collar exemptions and invites public comment on those proposals. Specifically, DOL proposes increasing the current (2004) level of \$455 per week (\$23,660 annually) to \$679 per week (\$35,308 per year) by using the same formula it employed in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and in retail. DOL also proposes requiring, every four years, an update to the salary threshold using the 2004 formula through notice-and-comment rulemaking. The Secretary could suspend any update based on the economic circumstance or for other reasons. The department did not propose any changes to the existing “duties test.”

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. We also support DOL’s decision to update the salary threshold by applying the methodology used in 2004 to current salary data and its decision not to make any changes to the duties test.

We also have several suggestions for improving on the proposal (our first three points were included in our comments to the 2016 rule and the RFI):

- 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 update. 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 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.

COMMENTS

I. DOL Should Update the Salary Threshold By Applying the Methodology Used in 2004 to Current Salary Data

A. DOL’s Proposal is Consistent 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. The Department’s approach in this rulemaking 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 by the higher education community in previous comments on the salary threshold, this type of mass reclassification, associated with setting the salary level too high, is not only inconsistent with the FLSA, but harms employees, institutions and students.⁹ Furthermore, this type of mass reclassification ignores congressional intent by essentially making “an employee’s duties, functions, or tasks irrelevant [resulting in] entire categories of previously exempt

⁹ 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.

See Exhibit A page 3.

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.¹⁰

B. Updating the 2004 Methodology with Current Data is Preferable to an Inflationary Alternative

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.

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.

C. DOL’s Methodology Accounts for Regional and Sector Differences in Pay

By proposing to set the standard salary level at the 20th percentile of earnings for full-time salaried workers in the lowest-wage Census region and in the retail sector, DOL is 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. Under the FLSA, states can and do impose more protective standards for overtime pay, including setting higher salary thresholds for exemptions. This is why the Department does not need to consider setting different salary levels for different regions of the country as States are in a better position to determine whether their local economies and employees would benefit from a higher threshold.

II. DOL Should Prorate the Salary Threshold for Part-Time Employees

As noted in the previous comments on the EAP exemption, higher education is a sector that has traditionally been able to attract and accommodate a disproportionate number of part-time

¹⁰ *State of Nevada v. United States Department of Labor* (August 31, 2017) at 14, <http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20Dated%208-31-2017.pdf>.

professionals, and the salary threshold should accommodate such arrangements. This is evidenced in much of the feedback that CUPA-HR members provided for past 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.” While the Department has proposed a salary level that is much more in line with historic trends, greatly reducing the impact of the proposal on part-time employees, there still are currently exempt employees on campus that would have difficulty reducing their full-time status to part-time status.

To understand why, 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 the salary exceeds \$23,660 per year. Thus, a part-time employee working a 50% schedule can still qualify as exempt so long as that person 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, an employee working a 50% schedule would need to be working in a position earning more than \$70,616 on a full-time basis. Without a pro rata provision, the number of employees who will be eligible for part-time exempt employment will be more limited than it is today, so we suggest the Department consider prorating the salary threshold for part-time employees.

III. DOL Should Allow the Cost of Employer-Provided Room and Board to Count Towards the Salary Threshold

Compared to other employers, higher education institutions 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, resident assistants and management of one or more student residence halls. They also are responsible for the creation and execution of programming connecting the “student life experience” 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 2016 rule taken effect, a significant number of resident directors would either have needed to be reclassified or have their salaries increased. Reclassification to non-exempt and tracking of 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, campus emergencies, summer break etc.). Since these employees typically live on campus, they are often in contact with students or others outside normal working hours, making it very difficult to determine what student contact constitutes work time. 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 541.606(a). While DOL’s current proposal

impacts far fewer RD's, close to 50% of resident hall managers living in the South and Midwest make less than DOL's proposed threshold, but also receive room and board. As a result, we ask the Department to consider adjusting 541.606 to allow the cost of employer-provided room and board to count towards the salary threshold.

We also urge the Department to make this change to create a consistent position on room and board across the various overtime pay regulations. Currently, while employers cannot count room and board as salary for the purposes of meeting the white-collar exemptions, under 29 CFR 778.116, employers must include the cost of room and board as compensation when calculating a worker's overtime pay rate. We believe that it is inconsistent for DOL to require employers to count room and board as compensation for the purposes of calculating overtime costs for nonexempt employees while at the same time requiring they disregard that very cost when determining whether an employee meets the standard salary threshold of the white collar exemptions. As such we ask that the department align the part 541 regulations with part 778 regulations so that room and board can be calculated as compensation for purposes of meeting the standard salary threshold.

IV. Future Updates to the Salary Threshold

DOL has proposed codifying in regulations a commitment that the department will revisit the salary thresholds on regular intervals. Specifically, every four years DOL would publish a NPRM in the Federal Register proposing to update to the thresholds using the same methodology that appears in any final rule (in this instance the 2004 methodology) and inviting comment on whether another methodology should be used. The commitment would also stipulate that the Secretary could suspend any update based on the economic circumstance or for other reasons, by publishing a notice in the Federal Register explaining reasons for the suspension.

We are supportive of DOL's intention to update the salary levels on a more regular basis and have consistently recognized the need for the department to do so from time to time through notice and comment rulemaking. We are thankful that DOL is proposing to only increase the salary level via notice and comment rulemaking. We believe, however, DOL should update the thresholds based on circumstances every five to seven years, as it did prior to the 1970s, not through any regularly scheduled updates. We also are concerned that any preordained intervals for updates—even via notice and comment rulemaking and associated economic analysis—may exceed DOL's authority and make any final rule more susceptible to legal challenge. Lastly, if DOL does move forward with automatic updates, the agency must clarify that any changes to the methodology for determining the salary threshold would require multiple NPRMs.

As we have discussed in greater detail in previous comments to the department on the Part 541 regulations, every time DOL has increased the salary test to date, 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.

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, in response to requests for an automatic updating mechanism, that “nothing in the legislative or regulatory history ... would support indexing or automatic increases.”¹¹ However, understanding the need for more regular updates the Department in 2004 expressed its intent “in the future to update the salary levels on a more regular basis.”¹²

We are concerned that DOL’s current proposal which goes beyond merely expressing its intent to update the regulations more regularly is not supported by the FLSA and could jeopardize any final rule. In addition, 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.

As mentioned in previous comments, if DOL does move forward with its proposal to require regularly scheduled updates via notice and comment, it should do so in intervals no shorter than five years, as 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.

Lastly, if DOL does move forward with updates on regularly scheduled intervals, it must clarify how a future Secretary and Department could or could not change the methodology used to determine the salary threshold in future updates. As evidenced by the 2016 Rule, Secretaries and Departments will differ in their approach to what they regard as an economically feasible and appropriate salary threshold. Yet, if the Department promulgates a final rule with updates on regular intervals based on a specific formula, employers and employees will expect and plan for those changes. DOL must account for such planning before making any changes to the methodology or intervals and adhere to the Administrative Procedure Act requirements by providing specific proposals on which the public may comment. As such, DOL must clarify that any future Secretary that wishes to change the methodology used to update the salary threshold must do so through multiple NPRMs that allow for public input and preparation.

Specifically, we suggest DOL clarify that any changes to the methodology or intervals for updates adhere to the following procedures or something similar. 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 ask if the 2004 methodology remains

¹¹ 69 Fed. Reg. 22171.

¹² 69 Fed. Reg. 22171-72.

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.

CONCLUSION

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

Respectfully Submitted,



Joshua A. Ulman

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



Basil Thomson

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