ASSOCIATION OF PUBLIC & LAND-GRANT UNIVERSITIES

November 6, 2023

Amy DeBisschop
Director, Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Washington, D.C. 20210

RE: Notice of Proposed Rulemaking, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees" (RIN 1235-AA39)

Dear Director DeBisschop,

As president of the Association of Public and Land-grant Universities (APLU), I write to provide comments on the proposed regulations, including sharing concerns and impacts to our nation's public research universities. As the regulatory process moves forward, I urge you to consider our perspectives in order to further an effective and fair rule.

APLU is a research, policy, and advocacy organization dedicated to strengthening and advancing the work of public universities. With a membership of more than 250 public research universities, land-grant institutions, state university systems, and affiliated organizations, APLU's agenda is built on the three pillars of increasing degree completion and academic success, advancing scientific research, and expanding engagement. Annually, our U.S. member campuses enroll 4.2 million undergraduates and 1.2 million graduate students, award 1.2 million degrees, employ 1.1 million faculty and staff, and conduct $48.7 billion in university-based research.

APLU appreciates DOL's mission and responsibility to update the Fair Labor Standards Act overtime regulations and ensure a baseline of protections for our nation's workers, including periodic updates to the minimum salary threshold for overtime exemptions. While recognizing need for greater worker protections, DOL should also consider impacts to state institutions, including unique dynamics of public universities and ways the proposed rule could make delivery of higher education and research more expensive. There are a number of areas in which APLU believes the regulations should be improved. We offer our comments in furtherance of that goal and to serve as a resource as DOL takes next steps to finalize the regulations.

Public research universities are major drivers of innovation and prosperity in their communities and regions. They provide students access to a high-quality, affordable college education that dramatically increases their career prospects, earning potential, and even engagement in their communities through activities such as volunteering. These institutions are also powerhouses for their states, regions, and country, conducting revolutionary research that sparks lifesaving medical breakthroughs; fuels innovation, job creation, and economic growth; and improves quality of life through pathbreaking discoveries.

In addition to submitting this comment letter, APLU joined the broader higher education community in comments submitted by the College and University Professional Association for Human Resources (CUPA-HR), which raises additional areas of support and concern within the proposed regulations. These comments focus on the unique impacts of the proposed regulations to public research institutions. APLU further urges DOL's deep attention to comment letters submitted by individual APLU member institutions.

Summary of Top Recommendations

1) DOL should substantially lower its proposed salary threshold increase for exempt employees.
2) DOL should strongly consider the negative impacts of the proposed rule on the science mission of public research universities.
3) DOL should increase the implementation period of the regulations to 180 days.
4) DOL should rescind plans for automatic updates to the salary threshold.
5) DOL should consider the full array of benefits, in addition to salary, granted to employees of public research institutions.

APLU Recommends DOL Set a Lower Salary Threshold for Exempt Employees.

While we appreciate the interest in updating the salary threshold, APLU strongly believes the proposed minimum salary threshold is simply too high. Its financial impact to public research universities would be massive, substantially driving up expenses to deliver higher education and perform critical scientific research. Updating the salary level from $684 per week ($35,568 per year) to $1,158 per week ($60,209 per year) is a nearly 70 percent increase.

The proposed rule has severe budgetary implications, impacts to human resources and staff morale, and does not adequately factor in the often-cyclical nature of many higher education positions.

- Budgetary Implications

The proposed minimum salary level would likely lead to a mass reclassification of previously exempt employees at many public research universities. Salaries for staff right on the edge of the new threshold may be increased, but the vast majority of workers would likely be reclassified to an hourly status. In many instances, institutions would be forced to reclassify employees in jobs that have been and are intended to be exempt to the detriment of the employee and institution. These changes will particularly impact less-resourced institutions and institutions located in areas with a lower cost of living.

Labor costs are a significant portion of institutional budgets. The labor costs associated with the proposed minimum salary threshold would have an immediate impact on already extremely tight budgets. In many instances, state support for higher education has not rebounded to levels prior to the 2008 recession. One public research university in the Midwest shared their most recent state allocation remains below 1998 funding levels adjusted for inflation. Nationally, just 5.7 percent of state revenue was spent on higher education in 2020, down from a high of almost 9 percent in 1980. Nearly every university providing feedback to APLU expressed doubt additional state funding would be provided to cover increased labor costs.

Given these financial realities, institutions reported they would be forced to consider eliminating certain positions to meet budgetary constraints in addition to reclassifying employees to non-exempt status. Another public research university in the Midwest noted it is unlikely their institution could afford overtime costs for all impacted positions, nor could they hire additional staff to reduce overtime costs. The institution is likely to reprioritize resources, resulting in a reduction of services and jobs across campus. By both limiting the hours newly non-exempt staff are able to work and cutting positions, institutions will be forced to decrease the availability of services available to their students.

An institution noted that under the proposal, overall costs to the university could increase due to overtime, even if the total number of hours remained static throughout the year, based on the seasonal fluctuations in hours worked, further adding strain on tight budgets.

One Midwestern public research university estimates $12.1 million annually in overtime costs for non-exempt staff making below the threshold and another public research university in the West estimates $6.2 million. A public university in the South estimates a minimum of $3 million in additional costs each year. That estimate does not include the ongoing review that would be required to ensure alignment between job classifications and salary levels for those above the salary threshold. A public research university in the Midwest calculated it will cost $2.5 million annually to keep all currently exempt staff exempt under the rule.

For public institutions that have control of their tuition levels, a possibility to address increased labor costs would be for an institution to increase tuition. This, obviously, would impact students and lead to greater costs of attendance, undermining goals shared with the Biden administration of increasing college access and affordability. Where institutions do not have such discretion, increases may need to be approved by governing boards, governors, and/or state legislatures. Even in cases without increased tuition, absorbing costs of this magnitude are not possible without substantially impacting an institution's mission to serve the public.

- Impact to Human Resources and Staff Morale

While the FLSA provides hourly workers with overtime pay in excess of 40 hours per week, non-exempt employees often face limited workplace autonomy, fewer flexible work arrangements, and diminished opportunities for professional development and career advancement. Non-exempt employees must closely track their hours, which are often limited to avoid costly overtime. Managers of non-exempt employees will spend a greater portion of their efforts monitoring staffing levels and wage expenditures under the increased threshold. One small Midwestern public research university noted the number of non-exempt staff at their institution would increase from 230 to over 560 under the new rule, straining existing limited human resources even further.

Many higher education professionals, a number of whom hold advanced degrees, view exempt status as a reflection and recognition of their advanced education and ability to complete their work at a high level with autonomy and flexibility. The professional societies to which many of these employees are encouraged to join by their institutions place a high value on professional development and career advancement opportunities. The loss of exempt status will likely be seen by many employees as a loss of their "professional" status and a demotion, regardless of their job duties and compensation remaining relatively stable. A public research university on the West Coast shared this exact scenario occurred when they reclassified employees during a previous FLSA update and expressed concerns over how a large reclassification of previously exempt employees will be received negatively on campus.

- Fluctuating Nature of Higher Education Work

Many higher education positions experience cyclical work patterns and require a higher number of work hours during specific times throughout the year, while less demanding at other times of the year. As an example, admissions professionals are busiest during the fall and spring as prospective students apply to the institution and admissions decisions are made. Their work volume may decrease over the summer and the beginning stages of the fall term, though the average work volume remains around a standard 40-hour workweek.

The services provided to students and their institutions cannot easily be confined to a rigid workweek. For example, residence hall managers often live in university-owned facilities to both manage the physical facility and provide guidance and mentorship to students living in the residence hall. These on-call, live-in positions serve as trusted staff that residents feel comfortable approaching with issues or concerns in a time and manner most comfortable to them.

Other examples of commonly exempt staff who would likely be reclassified to non-exempt status include academic advisors and counselors, financial aid counselors, student affairs officers, post-doctoral researchers and trainees, physical therapists, and athletic trainers. These professionals provide critical support services to students and institutions, at differing times and in varying volumes throughout the academic year.

DOL Should Strongly Consider the Negative Impacts of the Proposed Rule on the Science Mission of Public Research Universities.

Public and land-grant universities undertake a large share of the federal government's basic research. From biomedical research that yields cures to deadly diseases to advanced computing innovations that help address vexing societal challenges to developing new clean energy solutions, public research universities collaborate to conduct public impact research with society-changing aims. The proposed increase to the salary threshold uniquely impacts the research mission central to public research universities as many postdoctoral and research staff fall under the proposed salary threshold.

Federal scientific research agencies, such as the National Science Foundation and the National Institutes of Health, among others, have long championed research collaborations with public research universities and serve as significant sources of external research funding. As good stewards of taxpayer resources, these grants often include funding for salaried researchers working on the project and overtime costs are typically not included. Under a higher salary threshold, institutions may determine additional funding is required to conduct the same research under the existing threshold or may be forced to allocate additional fixed funding to the research enterprise to maintain productivity levels. Several institutions noted they would likely increase salary requests to external sponsoring federal research agencies to cover these costs. Put bluntly, one public research university stated, "any new mandates that limit the flexibility of existing financial resources will negatively impact the university's ability to fulfill its teaching and research missions."

The regulation will have a disproportionate impact on early career faculty who are working on projects with smaller personnel budgets that will be stretched further by overtime and higher salary thresholds. Early career faculty, who should be focused on establishing a research base to become more competitive for larger and more prestigious grants, will have less staff support resources and may themselves be prohibited from overtime.

Institutions will likely reclassify many researchers to non-exempt status, yet these jobs are designed to be exempt, as academic research does not lend neatly to rigid schedules. The reclassification of these researchers to non-exempt status will limit their ability to conduct their research. Principal investigators on externally funded grants will exert more effort on managing their team's hours worked, rather than spending their efforts conducting the research for which they have received funding. Many tests run in laboratories take hours to conduct and must be performed in precise conditions. Researchers cannot rush to complete tests once they have begun and cannot sacrifice adherence to safety standards to complete tasks within a given period.

Additionally, the quality of academic research depends upon timely, detailed, and often spontaneous collaboration with scientists from across the world. Limiting the opportunities for collaboration will cause research, and therefore the future of our nation, to suffer.

APLU Recommends DOL Increase the Implementation Period of the Regulations to 180 Days.

In the NPRM, DOL proposes the final rule will become effective 60 days following its publication in the Federal Register. Under previous updates to FLSA, the implementation period has ranged between 90 and 180 days. In this instance, DOL states 60 days is appropriate as employees and employers implemented a new salary threshold in 2019 and remain familiar with their procedures. We caution DOL that prior experience implementing FLSA regulations does not guarantee a successful condensed implementation and urge a roll out period of 180 days.

Public research universities face unique challenges in implementing the proposed salary threshold. During the implementation period, public institutions will be required to assess, plan, and enact changes to employee exempt status, salaries, and job structures and would need to educate affected employees on changes to their employment. While institutions have previously implemented a new salary threshold, this is likely the first time many staff have had to consider changes to their employment under FLSA.

Institutions would be required to coordinate the reclassification of some employees and increased wages for others. Institutions would also have to align newly exempt and non-exempt employees with state hiring guidelines. Many states delineate employment categories, job duties, and salary bands for public institutions. While institutions may choose to reclassify some employees as non-exempt and increase salaries to make others exempt, they would also be required to evaluate the positions directly above the wage threshold to ensure they remain aligned with state policies. This cascading effect is a significant burden upon institutions and would require more than 60 days. One public research university in the Midwest calculated that increasing salary for lower paid employees to classify them as exempt will lead to wage compression issues for staff several paygrades above the lower paid employee. This puts the institution in a difficult position – significantly adjust upward the lower paid employee's salary to minimize wage compression issues, or limit responsibilities and classify the employee as non-exempt.

Additionally, many exempt employees at public research institutions are paid on a monthly schedule, while non-exempt employees are paid bi-weekly. Reclassifying previously exempt staff as non-exempt will require the transition to a new pay period. It is unlikely institutions will be able to perfectly align these changing pay periods within 60 days. Extending the implementation period to 180 days will allow institutions more flexibility in selecting a transition date, minimize disruption to employee pay periods, and provide additional time to educate staff on the upcoming changes.

Furthermore, employees at public research universities unionized with greater frequency over the past decade. Any changes to exempt and non-exempt status would require close collaboration with unionized employees' representatives, further making a 60-day implementation period incredibly difficult.

APLU Recommends DOL Rescind Plans for Automatic Updates to the Salary Threshold.

The NPRM includes a mechanism for the salary threshold to be automatically increased every three years based on the 35th percentile of weekly earnings of full-time salaried employees in the lowest-wage Census Region. These updates will be announced in the Federal Register at least 150 days in advance of their effective date. APLU notes the discrepancy between the 60-day implementation period of the final rule and the 150-day implementation period of future updates and encourages DOL to adapt a 180-day implementation period for both rollouts.

It is unclear if DOL has the authority to implement automatic updates to the minimum salary level. When Congress authorized DOL to issue regulations under FLSA, it tasked the Department with doing so by regulation. Previous updates to the salary test have been communicated via notice and comment rulemaking. APLU urges DOL to continue following that process. The ability to publicly comment on the proposed updates allows APLU to work closely with member institutions to identify impacts to campuses to best inform DOL's action. A notice and comment process consistent with the Administrative Procedures Act would allow feedback on evolving and emerging dynamics DOL should consider with each FLSA update, such as economic circumstances and the changing nature of work.

Concerns exist beyond statutory authority. Public research universities receive a significant portion of their operating budgets from their states. Institutional budgets are often set months, in some cases up to a year, in advance of the fiscal year, and not all states set their budget annually. One institution budgets on a five-year forecasting process, heightening the difficulties in preparing for automatic updates to the salary threshold. Some states appropriate funds on a bi-annual basis. Budgets are carefully crafted in consultation with university, state, and governing board stakeholders to responsibly allocate taxpayer dollars. As such, institutional budgets do not easily adapt to significant changes in operating costs and nearly every institution APLU contacted was doubtful their state would provide additional funding to cover changing operating costs. Automatic updates negatively impact the budget planning process, the ability of institutions to provide merit-based increases and introduce budget uncertainty among staff.

DOL Should Consider the Full Array of Benefits, In Addition to Salary, to Employees of Public Research Institutions.

Focusing solely on salary levels does not fully capture the array of benefits afforded to employees at public research universities. Benefits available to public research university employees can include participation in state-run health insurance for themselves and their families, tuition assistance programs, transportation benefits, pensions, and access to campus athletics and recreation facilities, among others. Many residential life positions include free or subsidized housing and meal costs. These benefits can vary by exempt and non-exempt status at many institutions. For example, paid time off accrues differently in one Midwestern state for exempt and non-exempt employees. At one Mid-Atlantic public research university, exempt and non-exempt staff participate in separate state-backed retirement programs, which have different costs to the institution. Additionally, public research universities offer flexible work arrangements, part-time positions, and opportunities for remote work.

The minimum salary threshold proposed in the NPRM does not incorporate non-salary benefits available to employees at public research universities. The example benefits listed above are often beyond what is offered by private employers and contributes to a dedicated and thriving public university workforce. APLU encourages DOL to consider the full scope of benefits offered to public university employees and thus lower the salary threshold.

Thank you for your consideration of APLU's views as DOL moves forward with a final rule to update the FLSA overtime rule. Please do not hesitate to let me know how APLU can be a resource in these efforts.

Sincerely,

Mark Becker
President
Association of Public and Land-grant Universities