



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

February 8, 2022

The Honorable Jessica Looman
Acting Administrator
Wage and Hour Division
United States Department of Labor
Washington, DC 20210

Re: Overtime Regulations Proposed in the Fall 2021 Regulatory Agenda

Dear Acting Administrator Looman:

I write on behalf of the College and University Professional Association for Human Resources (“CUPA-HR”) and the 14 undersigned higher education organizations in response to the Department of Labor’s (“DOL”) announcement in the Fall 2021 Unified Agenda of Regulatory and Deregulatory Actions (“Fall Regulatory Agenda”) that the Wage and Hour Administration (“WHD”) plans to develop and release in April 2022 a Notice of Proposed Rulemaking (“NPRM”) on “the exemption of bona fide executive, administrative, and professional employees from the Fair Labor Standards Act’s minimum wage and overtime requirements.”

Specifically, DOL states that “one of the primary goals of this rulemaking would be to update the salary level requirement” of the executive, administrative, and professional employees exemptions, also known as the “white collar” or “EAP” exemptions. [DOL’s Statement of Regulatory Priorities](#) further explains that the WHD will “ensure that middle class jobs pay middle class wages [by] extending important overtime pay protections to millions of workers and raising their pay.”

Our collective associations represent approximately 4,300 two- and four-year public and private nonprofit colleges and universities and the professionals that work at those institutions in all 50 states across the country. As colleges and universities employ approximately 3.9 million

workers nationwide¹ and many are the largest employer or among the largest in the state in which they operate,² changes to the Fair Labor Standards Act (“FLSA”), including those referenced above, have the potential to significantly affect institutions, their employees, and the students they serve. As such, we are writing to bring to your attention our collective experience with DOL’s past attempts to increase the salary level and respectfully request that your agency meet with the higher education community during the initial stages of this rulemaking process to ensure application of the white-collar exemptions in a manner that protects employees and workplace fairness, while also ensuring the exemptions function as intended.

Background

The FLSA requires employers to pay their employees at least a minimum hourly wage and a premium “overtime” pay rate of 1.5 times the employee’s regular 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. 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.” Until January 1, 2020, these “white-collar” employees were exempt from the FLSA’s overtime and wage requirements if the employees were paid a salary of at least \$455 per week (\$23,660 annually) and primarily performed responsibilities that DOL considers customary of executive, administrative, and professional work. The \$455 weekly pay threshold and definitions for EAP duties were set by DOL in 2004 through regulation.³ Prior to 2004, DOL had adjusted the exemptions every five to nine years, with the last adjustment made in 1975.

Recent Changes to the White-Collar Exemptions and the Unprecedented Attention They Garnered from Higher Education

On March 13, 2014, President Barack Obama issued a [memorandum](#) directing the Secretary of Labor to make changes to the 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 then-current salary threshold of \$455 per week (\$23,660 annually) by 113 percent to \$970 per week (\$50,440 per year), which the agency estimated to be the 40th percentile of earnings for all full-time salaried workers in 2016.⁴ The NPRM also included annual increases to the threshold based on inflation.

¹ Published by National Center for Education Statistics at <https://nces.ed.gov/ipeds/TrendGenerator/app/answer/5/30>, link confirmed on January 27, 2022.

² Information available at <https://www.careeronestop.org/Toolkit/Jobs/find-largest-employers.aspx> shows that in institutions of higher education consistently rank among the largest employers in every state and are the largest in several states.

³ DOL’s [final rule](#) (2019 Final Rule) raising the minimum salary level generally required for exemption from \$455 per week (\$23,660 annually) to \$684 per week (\$35,568 annually) went into effect on January 1, 2020.

⁴ [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees](#), 80 Fed. Reg. 38515 (July 6, 2015)

CUPA-HR and 18 other higher education associations filed detailed comments outlining our concerns with DOL's proposal.⁵ 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, costs, and impacts on employees and students of this mass reclassification. In addition, we expressed concern with the proposed costs of annual recalculations and that annual increases would put constant pressure on fixed budgets and cause issues with salary compression.

In addition to filing comments, our community also raised our concerns with the Office of Management and Budget's ("OMB") Office of Information and Regulatory Affairs ("OIRA") during its pre-publication review of the 2016 final rule. Notably, 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 also urged DOL and OMB to carefully consider the impact the proposal would have on higher education before proceeding with the rule.

Despite these concerns, DOL only made modest changes to its proposal and issued a final rule that would have increased the overtime pay minimum salary threshold from \$23,660 to \$47,660, amounting to an increase of over 100 percent.⁶ The new rule also would have 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 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. 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 hardest hit by the rule.

⁵ [CUPA-HR Comments to July 2015 NPRM](#) (September 4, 2015)

⁶ [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees](#), 81 Fed. Reg. 32391 (May 23, 2016)

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 workforce and services.

On November 22, 2016, before the 2016 final rule could go into effect, a federal court in Texas temporarily enjoined DOL from enforcing the new regulation. In September 2017, the 2016 final rule was permanently enjoined by federal courts, and DOL revisited updating the white-collar exemptions 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.⁷ Finally, in September 2019, DOL issued a final rule implementing the new minimum salary threshold at \$35,568, which remains in effect today.⁸

Considerations on Next Steps

The higher education community believes DOL is obligated to update the regulations governing the EAP exemptions every five to nine years as it did prior to 1975 and that these updates should include appropriate increases to the minimum salary threshold. Given the impact EAP regulatory changes have on the workforce, however, DOL must engage with stakeholders prior to releasing any proposed changes so it can better gauge impacts on employers and employees in an economy that may have changed significantly since the last update. DOL held such meetings in 2004, 2014-2015, and 2019.

Pre-NPRM stakeholder meetings are particularly important now given the rapid and unprecedented changes to the workforce as a result of the COVID-19 pandemic. For example, the pandemic resulted in dramatic increases in remote work and flexibility in schedules. Many of these changes may be permanent. Hourly employment and associated employer obligations to track employees work time may not be consistent with certain remote work and independent control over schedules. As a result, changes to the minimum salary threshold or other EAP requirements that will result in large scale reclassification of workers from exempt to nonexempt may make remote work and certain flexibility with schedules extremely cumbersome, if not impossible, to manage. In addition, DOL should discuss with stakeholders the possible impact on employees and employers that EAP changes would have in light of historically tight labor markets and high inflation.

Given higher education’s significant participation with DOL and OMB in the previous overtime rulemakings and our new challenges to address pandemic-related workforce structure changes under a new minimum salary threshold, we encourage DOL to hold stakeholder meetings prior to releasing the anticipated overtime NPRM. Such meetings will allow us to work with the Department to gather information that to help chart a course for adjusting the EAP exemptions

⁷ [CUPA-HR Comments to March 2019 NPRM](#) (May 21, 2019).

⁸ [Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees](#), 84 Fed. Reg. 51230 (September 27, 2019)

for higher education institutions, employees working at those institutions, and economy generally.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink that reads "Bailey Graves". The script is cursive and fluid.

Bailey Graves
CUPA-HR Government Relations Team
bailey@ulmanpolicy.com

On behalf of:

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 Universities

Association of Catholic Colleges and Universities

Association of Governing Boards of Universities and Colleges

Association of Public and Land-grant Universities

CCCU - Council for Christian Colleges & Universities

College and University Professional Association for Human Resources

EDUCAUSE

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