Public Employers ask for Relief from the U.S. Department of Labor's Misguided Overtime Proposal

February 11, 2016

Dear Member of Congress:

On behalf of state and local governments, public schools, public institutions of higher education and other public sector entities, the undersigned state and national organizations write to communicate our concerns with the U.S. Department of Labor's (DOL or the Department) proposed changes to the exemptions to the Fair Labor Standard Act's (FLSA) overtime pay requirements for executive, administrative, and professional employees (the "white collar exemptions"). We ask you to please contact the Department and the administration and request they reconsider the rule and make adjustments in accordance with the comments they have received.

DOL last increased the minimum salary level required to qualify for the exemptions in 2004. While an increase to the salary level is due to ensure the exemptions remain relevant and are not abused, DOL's proposed increase is simply too high and would have significant adverse consequences on public sector employers.

The Department proposes more than *doubling* the salary level required to qualify for the white collar exemptions, from $455 per week/$23,660 per year to $970 per week/$50,440 per year. DOL plans to impose this 113 percent increase sometime in 2016. The agency also has proposed automatically increasing the minimum salary annually with only *60 days* notice before the new level becomes effective with no opportunity for comment. Finally, while DOL did not offer a specific proposal to modify the "duties tests," which is used to determine whether a particular employee's job responsibilities are consistent with those of an exempt executive, administrative, and professional, the Department suggests it is considering imposing a new "quantification" requirement. Such a change would require employers to track exactly how much time an employee spends performing specific duties in order to qualify as exempt. This potential additional requirement also is of serious concern, both because of the way DOL is suggesting it without actual proposed regulatory language and because of the difficulties it would impose.

The scale of DOL's proposed increase threatens public sector employees, the crucial functions they perform and the operations of state and local governments—many of which are still recovering from the last recession. Moreover, any increase should be done gradually, over a substantial number of years, to ensure a smooth transition and mitigate the significant budgetary impact from occurring suddenly. In addition, automatic increases to the salary threshold will quickly make it so only a select few in the public sector will be able to avail themselves of the statutorily provided exemptions. Furthermore, the automatic increases will put constant pressure on public sector budgets—particularly during future economic downturns. Lastly, the suggested changes to the duties test would render the exemptions all but irrelevant, as employees would be stripped of autonomy and independent judgment as to the tasks they need to perform, and employers would be required to track exempt employees' hours in the same manner they do hourly employees.

The Department announced last November that it plans to finalize the rule in July 2016, with compliance required later this year. If the agency moves forward with the changes it has proposed, many state and local government employees, budgets, operations, and services will be substantially and negatively impacted. We ask that you contact the Department and other administration officials and urge them to carefully consider the numerous comments filed by public entities and adjust the final rule accordingly. More details about the rule's impact are set forth below.

Impact on Employees

According to the Department, the new minimum salary and annual increases will result in as many as 10 million employees being reclassified from exempt/salaried to non-exempt/hourly over the next 10 years, with 4.6 million facing reclassification in 2016 alone. Many are concerned the Department has underestimated the impact of the rule and that far more employees will be affected. Public sector employees, who often are paid less than their private sector counterparts and tend to receive more of their compensation in benefits (which are not counted in the salary threshold calculation), will be particularly impacted by the proposal.

While hourly pay and nonexempt status is appropriate for certain jobs, it is not appropriate for all jobs; this is why Congress created exemptions to the overtime pay requirements. Yet, the magnitude of the Department's proposed changes will require employers to reclassify employees who work traditional white-collar jobs that offer and require significant professional autonomy, have always been classified as exempt, and are well suited to exempt status.

The employees in these jobs will be negatively impacted by reclassification. Employers need to closely track work hours for nonexempt employees in order to ensure compliance with overtime pay and other requirements; this means reclassified workers will have less autonomy and fewer opportunities for employer-sponsored career training and enhancement. Furthermore, in a survey by the International Public Management Association for Human Resources, 25% of their membership said it would prohibit the use of employer-provided technology outside of work hours to avoid incurring overtime costs if the regulation is finalized as proposed. This as well as the requirement to track employees' hours will surely reduce employees' opportunities to work remotely or for other flexible work arrangements.

It is important to keep in mind that being classified as exempt or nonexempt affects *how* employees are paid, but not necessarily *how much* they are paid. While some have characterized this change in rules as a "pay raise" for employees, employees that are reclassified to nonexempt status as a result of the new rule are not likely to receive a pay increase; in some cases, they may even see a decrease in pay and a reduction in benefits. When reclassifying employees, employers faced with tight budgets will be careful to control labor costs to the extent possible and thus employee compensation will in many cases remain the same. This is particularly true of public employers, given that state and local governments are required to have balanced budgets. While reclassified employees may be eligible for overtime, not all individuals eligible for overtime pay *earn* overtime pay. Moreover, hourly employees are not guaranteed any fixed weekly pay—like salaried employees—or guaranteed any specific hours. Thus, hourly workers' pay and related benefits are vulnerable to reductions on a week-to-week basis based on the hours they work.

Impact on Public Entities

While public entities will necessarily attempt to mitigate the cost of the new regulation, the financial impact on them will still be extreme as some overtime pay and additional part time and temporary workers will likely be necessary. The Kentucky League of Cities estimates that paying one hour of overtime a week to the 2,500 city employees who may have to be reclassified as a result of the proposed rule will cost over $3 million. The University System of Maryland's preliminary estimate is an increase in costs between $16 million and $40 million in just the first year. The Office of Advocacy within the Small Business Administration (SBA) expressed concerns that DOL did not consider the impact of the proposal on "key small entities" like a non-profit organization "operating Head Start programs in southeast Louisiana," which will have to cut many critical services as a result of the proposal's first-year costs of $74,000.

These costs would be imposed at a time when many public entities have not recovered from the last economic downturn. Our nation's public colleges and universities are still attempting to mitigate the impact of recession and post-recession reductions in state funding to higher education. During the six-year period from 2006-2007 to 2012-2013, after adjusting for inflation, four-year public universities experienced state funding cuts of $2,370 per student, while tuition and fee revenues increased by only $1,940, resulting in a shortfall of $430 per full-time student. Increasing costs of public colleges and universities at the levels proposed by the rule would put significant pressure on tuition levels and/or educational services. Municipalities face similar budget challenges. According to the National Association of Counties, only 65 of 3,069 county economies have recovered to their pre-recession levels. A similar reality for cities is evident in the National League of Cities 2015 *City Fiscal Conditions Report,* which shows that, while fiscal conditions continue to improve, they remain weakened nearly eight years after the start of the recession. This has government services already stretched thin. Despite a growth in population, government employment today is less than what it was prior to the recession. For school districts, which collectively are the largest employers in the nation, these thinly stretched state and local budgets translate to fixed school district budgets that cannot absorb unpredictable cost increases. Combine that with implementing the recently authorized Every Student Succeeds Act (ESSA), which returns autonomy and flexibility to the state and local level, and state and local education agencies will be dealing with a myriad of regulations at the exact time they face the fiscal impacts of these DOL rules. The result will be reduced staffing at state education agencies and/or budget cuts at the exact time resources prove most critical to ensuring ESSA success.

Moreover, these increased costs would require either an increase in taxes, a reduction in both public services and employee benefits, or both. It could also mean laying-off or furloughing staff and reducing or eliminating programs and services. As the California State Association of Counties pointed out in its comments to DOL, the proposed increase creates problems for the public sector where salaries are constrained by restricted sources of revenue, bargaining agreements, and civil service rules and therefore tend to be lower than those in the private sector, while pensions and benefits tend to be more generous. Pensions and benefits, however, are not counted toward the minimum salary threshold.

Additionally, the application of a national wage trigger standard will have inequitable impacts, which the final rule should take into account. What is reasonable in Washington, D.C., New York City, and San Francisco will not work in Indianapolis, Louisville, Birmingham or Boise, let alone more rural areas. Yet, DOL set the proposed minimum salary threshold nearly $10,000 higher than the level set under California state law and nearly $15,000 higher than the level under New York state law – two of the country's most expensive states to live.

DOL's proposal also fails to consider cost-of-living differences within states. According to a wage and benefits survey of over 1,000 Pennsylvania townships, the starting salary of Township Managers presiding over populations under 4,000 is $31,907, while the starting salary for a Township Manager presiding over populations larger than 8,000 is $56,243. As the SBA noted in its comments, DOL failed to "consider the difference in purchasing power of its proposed threshold in higher- and lower- wage states and regions." In fact, the SBA found DOL's economic analysis so faulty that it recommended DOL publish a supplemental "analysis on the economic impact of this rule on small entities and consider small business alternatives."

On September 4, many individual public employers and public employer associations submitted comments highlighting the aforementioned concerns with the proposed overtime regulation. In total, the Department received over 290,000 comments on the proposal, considerably higher than the 75,280 comments received in 2004 when the Department last updated the overtime regulation.

A tremendous amount is at stake in this process. In light of the concerns expressed by those in the public sector as well as other stakeholders, we ask that you please contact the Department and the administration and ask them to reconsider the rule and make adjustments in accordance with the comments they have received.

Sincerely,

AASA, The School Superintendents Association

American Association of Community Colleges

American Association of State Colleges and Universities

American Council on Education

Association of American Universities

Association of Public and Land-Grant Universities

Association of School Business Officials International (ASBO)

Connecticut Public Employer Labor Relations Association

Florida Public Employer Labor Relations Association

Illinois Public Employer Labor Relations Association

National Association of Counties

National League of Cities

National School Boards Association

Ohio Public Employer Labor Relations Association

Society for Human Resource Management

The College and University Professional Association for Human Resources (CUPA-HR)

- Alabama Chapter (CUPA-HR)
- InterMountain West Chapter (CUPA-HR)
- Kentucky Chapter (CUPA-HR)
- Michigan Chapter (CUPA-HR)
- New York Metro Chapter (CUPA-HR)
- North Carolina Chapter (CUPA-HR)
- Northern/Central California Chapter (CUPA-HR)
- Ohio Chapter (CUPA-HR)
- Southwestern Pennsylvania Chapter (CUPA-HR)
- Washington State Chapter (CUPA-HR)

The Government Finance Officers Association

The International City/County Management Association

The International Public Management Association for Human Resources

The National Public Employer Labor Relations Association