College and University Professional Association for Human Resources

September 4, 2015

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Ms. Mary Ziegler
Director of the Division of Regulations, Legislation, and Interpretation
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 Exemption for Executive, Administrative, Professional, Outside Sales and Computer Employees (80 Fed. Reg. 38515, July 6, 2015) (RIN 1235-AA11)

Dear Ms. Ziegler:

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 19,000 human resources professionals and other campus leaders at over 1,900 colleges and universities across the country, including 91 percent of all United States doctoral institutions, 77 percent of all master's institutions, 57 percent of all bachelor's institutions and 600 two-year and specialized institutions.

STATEMENT OF INTEREST

Colleges and universities employ over 3.9 million workers nationwide and there are institutions of higher education located in all 50 states.[1] 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) proposes to modify in the NPRM, yet many of those earn

[1] See http://nces.ed.gov/programs/digest/d13/tables/dt13_314.20.asp.

less than the NPRM's proposed minimum salary level for 2016 of $970 per week (or $50,440 per year).[2] As a result, colleges and universities, their employees, and the students they serve would be significantly affected by the changes in the 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
ACPA—College Student Educators International
American Association of Community Colleges
American Association of State Colleges and Universities
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
American Council on Education
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
Hispanic Association of Colleges and Universities
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
NIRSA: Leaders in Collegiate Recreation

SUMMARY

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, the Department of Labor (DOL) published the NPRM, which proposes several changes to the white collar exemptions and invites public comment on those proposals.

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[2] 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.

Under the current regulations, 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). Employees who do not meet these three requirements or fail to qualify for another specific exemption as outlined in the regulations must be treated as "hourly" or "nonexempt" employees and must be paid for each hour worked and at a rate of one and a half times their normal hourly rate for all hours worked over 40 in a given work week (the latter is known as "overtime"). To ensure employees are paid for all hours worked and at the proper rate for overtime, employers must carefully track the hours nonexempt employees work.

DOL proposes several changes to the white collar exemptions, including increasing the current salary threshold of $455 per week ($23,660 annually) by 113% to $970 per week (or $50,440 per year), which the agency estimates will be the 40th percentile of earnings for all full-time salaried workers in 2016. DOL also proposes automatic annual increases to the salary threshold based on the Consumer Price Index for All Urban Consumers or by pegging the salary threshold to the 40th percentile for weekly earnings of all full-time non-hourly (i.e., salaried) employees. DOL proposes publishing the annual increase 60 days before the new threshold becomes effective. Finally, while DOL did not propose any specific changes to the duties test, it said in the NPRM that it is considering doing so. The agency asked several questions that suggest it is considering reinstating aspects of the pre-2004 "long duties test," which would limit the amount of time exempt employees could perform nonexempt work and/or eliminate the provision in the current regulations on concurrent duties (i.e., the provision in the regulations that allows exempt employees to concurrently perform exempt and nonexempt work such as a manager who supervises employees and serves customers at the same time).

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. The proposed minimum salary threshold, however, is simply too high. To comply with the proposed change, colleges and universities would increase salaries for a few individuals whose current pay is closest to the new threshold, but would need to reclassify the vast majority of impacted 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. This mass reclassification would be to the detriment of employees, institutions and students. 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.

DOL has proposed a minimum salary level that is far higher than it has adopted in the past and fails to account for regional and industry sector differences in pay. We urge DOL to reconsider and set a salary level more in line with historic trends. Eighty-eight percent of the 796 CUPA-HR members responding to a survey on the NPRM felt DOL should take a more measured approach to raising the salary level, with a majority choosing a salary level of either $29,172 (21.5%) or $30,004 (36.5%), and nearly a third (30.1%) indicating $40,352 would be more appropriate. According to the NPRM preamble, DOL considered these salary levels as part of the current proposed update. The first amount represents the current level — which was set in 2004 — as adjusted for inflation; the second number would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and in retail; and the last number represents median earnings for all hourly and salaried workers combined (rather than just salaried).

If DOL will not consider lowering the proposed salary level for all employers, it should do so for nonprofit and public employers and/or consider expanding the exemption for certain learned professionals from the minimum salary level. DOL also should phase in the new salary level over time to allow employers and employees enough time to make adjustments and preparations, particularly if DOL decides to implement a salary level as high as what it proposed in the NPRM or something similar. This would help mitigate some of the negative consequences related to the proposal for colleges and universities, their employees and students.

Moreover, the undersigned do not believe DOL has the authority to impose automatic updates, and even if it did, the agency should not automatically update the salary level, as doing so will also negatively impact institutions' budgets and budget planning, their ability to provide merit-based increases and employee morale. DOL should instead revisit the salary level at regular intervals, as it did from 1938 to 1975, when the agency updated the salary level every five to nine years, and each salary increase should be made through notice and comment rulemaking that complies with the Administrative Procedure Act. If DOL does choose to move forward with automatic updates, the updates should occur at most every five years and the agency should provide the public with notice of the new level at least one year prior to implementation.

Finally, for procedural reasons alone, DOL should not change the duties tests at this time. DOL's decision to consider possible changes to the duties test without offering a specific proposal violates the spirit if not the letter of the Administrative Procedure Act. Like DOL's proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act and the various Executive Orders related to regulatory activity. Asking questions is simply no substitute for an actual regulatory proposal that the regulated community can consider, evaluate and comment upon. We strongly urge DOL to provide specific regulatory language for any changes to the duties test in a separate NPRM after it has set the salary level and allow the public sufficient time to review and comment on that proposal.

COMMENTS

I. DOL Should Lower the Proposed Minimum Salary Threshold

Many employees on campuses are currently exempt pursuant to the regulations that the DOL proposes to modify in the NPRM, and many of those earn less than the NPRM's proposed minimum salary level for 2016 of $970 per week (or $50,440 per year).[3] These employees include those in departments such as academic affairs (librarians, advisers, counselors), student affairs (residence hall managers, admissions counselors, financial aid counselors, student activities officers), institutional affairs (human resources professionals and trainers), fiscal affairs (accountants, head cashiers), auxiliary services (textbook managers, ticket managers) external affairs (alumni relations and fundraising professionals), facilities (head of mail services, farm manager), information technology, research and clinical professionals (including many with advanced degrees and those engaged in advanced training such as post-doctoral trainees and residents), athletic affairs (head coach, assistant coach, physical therapist, trainer), managers in food service, security, and building and grounds, and community outreach/educational extension functions (agricultural extension agents, industry extension consultants).[4]

While the undersigned agree that an increase to the minimum salary threshold is due and DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused, the proposed minimum salary threshold is simply too high. To comply with the proposed change, colleges and universities would increase salaries for a few, but would need to reclassify the vast majority of impacted employees to hourly status. While in some cases these changes would be appropriate and 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 and are intended to be exempt to the detriment of the employee, the institution and students.

A. Impact of Proposed Minimum Salary Level on Higher Education Employees

1) The Proposed Minimum Salary Level Will Trigger Mass Reclassification of Traditionally White Collar Employees, Particularly at Institutions With Fewer Resources and/or in Areas With Lower Cost of Living

As noted above, if DOL were to implement its proposal, colleges and universities would need to reclassify many currently exempt employees to hourly status, as institutions simply cannot afford to raise those employees' salaries to the proposed 2016 minimum of $50,440. The State University System of Florida, for example, found that raising all currently exempt salaries to

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[3] See id.

[4] Over 800 CUPA-HR members responded to a survey and identified employees in these occupations as currently exempt employees that make less than the proposed salary threshold.

meet the new threshold would cost its 12 universities a total of $62 million annually.[5] Similarly, the Iowa Association of Community College Trustees found that doing so would cost Iowa Community Colleges $12.6 million in the first quarter of 2016 alone.[6] Another university in the south told CUPA-HR that it estimates it would cost $17 million annually to adjust salaries to meet the minimum salary level — a similar cost estimate to another large private research university, which estimated costs at $14.8 million. These estimates are low in that they do not account for additional costs employers would need to incur to address resulting wage compression[7] and administrative costs (including the need to implement new or expanded timekeeping systems) related to implementing the rule.[8]

Faced with such cost increases, institutions would have no choice but to reclassify large numbers of employees from exempt to hourly, even though many of those employees work in jobs that have always been and are well suited by the nature of the duties to be exempt. In fact, in a recent survey of 814 higher education human resource professionals conducted by CUPA-HR, nearly 87% of those responding to the question (655 of 754) indicated they would have to reclassify *any* exempt employee currently making less than $47,500, as they would not be able to adjust salaries upward to maintain exemptions for those employees.

The number and type of employees reclassified at any given college or university, however, would depend largely on the institution's resources, location and workforce. In many cases, those with fewer resources and/or in areas with lower cost of living would be the most impacted by the proposal. For example, the Iowa Association of Community College Trustees estimates in its comments that "community colleges in the most rural areas of Iowa will have 40% to 60% of their staff impacted by the proposed Salary Level Test."[9] A small Texas university responding to CUPA-HR's survey stated that of their 437 exempt employees, 239 or 54.8% are currently paid under $50,440, representing the majority of entry-level and mid-level professionals. The director of athletics at a small southern university filed comments noting the disproportionate impact the proposed minimum salary will have on lower cost areas, stating that the change would increase his annual payroll costs by 10% — a cost he could not absorb without layoffs. This point was reiterated by a small liberal arts college in rural New York State,

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[5] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

[6] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

[7] Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed and to avoid wage compression. Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.

[8] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.

[9] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

which informed CUPA-HR that it would have to lay off 20 of its 85 currently exempt employees making less than $50,440.

That said, employees at smaller institutions and those in lower cost areas of the country are not the only ones that would be impacted by the proposal — all colleges and universities would be significantly impacted. Because pay in higher education and the nonprofit and public sectors is frequently lower than nationwide averages, colleges and universities would need to reclassify a disproportionately larger percentage of their workforce than those in many other industries.[10] Employees working in higher education often trade lower pay for better quality of life or job satisfaction — such as the unique opportunity for professionals to pursue research — or other benefits unique to the higher education setting which make it attractive to employees, such as room and board or tuition reduction.[11] The value of these benefits, however, may not be counted towards meeting the minimum salary level.

Even larger universities and state systems will need to reclassify large numbers of employees. One Midwestern university state system said "[i]f the proposed rule is promulgated, the status of over 5,000 employees would change from exempt to nonexempt." A large public university in the South calculates that its nonexempt population would increase from 1/3 of its current regular workforce to 1/2, since it could not afford the $11.8 million salary increase to keep the current level of exemption. Similarly, the University of Iowa said in its comments that "over 2,700 individuals we employ … would immediately change from exempt salaried to nonexempt hourly" as a result of the proposal.[12] One public land grant institution with 24,000 total employees informed CUPA-HR that 35% of its exempt workforce has salaries below the proposed threshold, including highly-educated scientists and postdoctoral researchers. Similarly, a large Florida university noted that approximately 25% of the exempt workforce would be affected if the proposal is implemented, and the changes would affect "those university functions that rely heavily on funding from grants, donations and other limited sources of funding support (primarily science and research jobs)."

In fact, several large research universities responding to CUPA-HR's survey noted they would need to reclassify many highly-educated research professionals. One large research university reported that 50% of the exempt scientific and research employees are below the minimum threshold of $50,400. The National Postdoctoral Association has also expressed concern about the impact of the proposal on its members.[13] Salaries for researchers working on grants are often below DOL's proposed minimum threshold of $50,440. In fact, the National Institutes of Health sets stipend levels for *postdoctoral* researchers well below DOL's proposed minimum salary level, as shown by the chart below.[14] According to the chart, any postdoctoral researcher

[10] The responses of more than 1,100 two- and four-year institutions to CUPA-HR's 2015 annual salary survey of professionals in higher education indicates that the median earnings of these individuals is about 10% lower than the median earnings of their counterparts in other industries.
[11] See http://trends.collegeboard.org/college-pricing/figures-tables/tuition-fees-room-board-time.
[12] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[13] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[14] Available at http://grants.nih.gov/grants/guide/notice-files/NOT-OD-15-048.html.

with less than five years of experience would no longer be eligible for the white collar exemption, even though they clearly perform what has been traditionally considered exempt professional/learned work.

Career Level	**Years of Experience**	**Stipend for FY 2015**	**Monthly Stipend**
Postdoctoral	0	$42,840	$3,570
	1	$44,556	$3,713
	2	$46,344	$3,862
	3	$48,192	$4,016
	4	$50,112	$4,176
	5	$52,116	$4,343
	6	$54,216	$4,518
	7 or More	$56,376	$4,698

Based on the response to CUPA-HR's survey, the proposed minimum salary threshold would also require reclassification of many employees in other traditionally exempt jobs. According to one institution, 61% of exempt employees holding at least a bachelor's degree would have to be reclassified, including professional auditors and accountants and professionals in education, training, library, life sciences, community and social services, business and administration, educational extension services, and human resources.

2) Reclassification May Adversely Impact Employee Flexibility, Career Advancement and Ability to Perform Job Without Providing Any Increase in Compensation

As stated above, the undersigned agree that an increase to the minimum salary threshold is due and DOL must update the salary levels and regulations from time to time to ensure the exemptions are not abused. That said, 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. Moreover, while hourly employees have the advantage of receiving additional compensation for hours worked over 40 in one week, there are also many advantages to exempt status. Employers must closely track nonexempt employees' hours to ensure compliance with overtime pay and other requirements, and they often limit employees' work hours to avoid costly overtime pay. As a result, nonexempt employees often have less workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement than their exempt counterparts. In addition, not all jobs lend themselves to hourly work, and reclassified employees may find it difficult to do traditionally exempt jobs as hourly employees.

As noted above, many postdoctoral and other researchers and scholars are paid less than the proposed minimum salary threshold. In the face of limited budgets, some postdocs' pay might be raised above the proposed salary level, some may be laid off, and others would be reclassified as hourly. Yet, like many jobs that traditionally have been and are intended to be exempt, performing research does not lend itself to rigid, supervised schedules. Researchers may find it difficult to schedule lab time and experiments to fit within a required schedule for hourly employees. They also may struggle with abandoning incomplete experiments because they have exhausted their hours for the week or day. One CUPA-HR member describes the situation with postdocs as follows:

> Research in all fields requires collaboration with many individuals both within the institution and throughout the country, and frequently throughout the world. This type of collaboration is vital to innovation, teaching and discovery. Introducing a time clock into this equation will not foster this environment. It will only create another barrier to creative productivity. Much of this research is funded by the federal government, which has a vested interest in research productivity. This is particularly critical in the fields of medicine and technology, where improving the public good is a primary function of government.
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> Postdocs are critical to the success of obtaining grants and conducting research. Such a drastic change in the salary level means that either postdocs will not be able to work the necessary hours to be effective or that less grant funding will be available, as it will go to postdoc salaries currently below the proposed threshold.

This incompatibility between hourly employment and research/original scholarship may be why the National Postdoctoral Association did not even contemplate in their comments that postdocs would be classified as hourly, expressing concerns instead that "institutions may reduce the number of postdoctoral scholars they employ [or] choose to move postdoctoral scholars into non-employee classifications …"[15]

Postdocs are not the only job classification that does not fit well within the hourly employee framework. In response to our survey, for example, one CUPA-HR member institution noted that for many land-grant institutions, the ability of "farm managers to do administrative work as well as farm work to support research efforts in experimental farms/greenhouses," typically for the benefit of that state's residents, is more productively completed when that individual has autonomy over their own schedule, and varies considerably by growing season. We also have heard from a significant number of members about the impact the proposal would have on athletic coaches, admissions recruiters, residence life and admissions staff who travel for work, necessarily keep irregular hours and have jobs with fluctuating seasonal demands that do not lend themselves to hourly status.

Reclassified employees may also witness a reduction in workplace flexibility that would have allowed them to adjust and incorporate their hours to fit their personal schedules. It is hard for employers to be flexible about when and where an employee works when they must carefully

[15] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

track that employee's hours. As the American Society of Association Executives noted, "flexible work arrangements pose challenges for employers tracking and capturing all compensable work hours and controlling overtime costs for nonexempt employees."[16] Many of our members have expressed concern about this issue. The University of Iowa said in its comments: "nonexempt hourly employees … will have less independence in determining their work hours" and will be unable "to balance work needs with personal demands since there will be less flexibility within our monthly payroll cycle and budget."

Higher education is a sector that has traditionally been able to attract and accommodate a disproportionate number of part-time professionals. Personal demands that may require full-time employees to seek reduced or part-time schedules will be further hampered by the proposed salary level and resulting threat of reclassification. This is evidenced in much of the feedback that CUPA-HR members have provided, 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."

Because it is not clear from the DOL's statements in the preamble that it fully understands this issue, 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 his or her salary exceeds $23,660 per year. Thus, a part-time employee working a 50% schedule can still qualify as exempt so long as he or she 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, in Year 1 under the proposal, an employee working a 50% schedule would need to be working in a position earning more than $100,000 on a full-time basis. Obviously, without a pro rata provision, the number of employees who will be eligible for part-time exempt employment will be severely limited.

This was echoed by another comment, which states:

> We understand the intent of this regulation to stem abuse of overtime compensation, but the extension of the minimum exempt salary would be devastating to our small nonprofit. We are two professional women who job share as two half-time exempt employees, each earning less than $50,000. We love our job and are satisfied with our compensation. Neither of us wants to work full-time and the nonprofit cannot afford to pay us each $50,000 year. Hourly compensation does not make sense, as we both manage our own

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[16] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1182.

> schedules and projects. Please do not adopt this regulation, and continue to provide us the flexibility to work as half-time professionals.[17]

Additionally, reclassification to nonexempt status may provide employees with fewer career training and advancement opportunities that would increase employees' earning potential later in their career. One Southwestern CUPA-HR member expressed concerns that, "the loss of potential experience and growth opportunities for nonexempt staff [and] the loss of potential out-of-town training opportunities due to the extensive time it takes to administer such travel and potential overtime cost" may delay an employee's trajectory up the wage ladder. Many employees that will need to be reclassified as a result of the NPRM are professionals who have already made great strides in their careers and, as one survey respondent puts it, "will now be required to go back to counting hours and be limited in working overtime, which is counterintuitive to their desire to do what they need to do to get the work done to [further] advance their careers." Similarly, when discussing the impact of reclassification on postdoctoral scholars, one survey respondent states that a 40-hour work week will negatively impact "the intent of a postdoc to advance his/her research training … which would lead to academic papers, new discoveries and advancement of their research career."

Although easily inferred from the aforementioned examples, it is worth highlighting here that loss of autonomy, loss of flexibility and loss of career advancement opportunities contribute to a negative impact on employee morale. Many CUPA-HR members are concerned that DOL has not given sufficient acknowledgement to the reality that many higher education professionals view their exempt status as a reflection and recognition of their advanced education, academic success and professional prestige. Loss of exempt status may be seen as a demotion in perceived status, even if all other aspects of the work remain the same and even if their overall compensation remains stable or increases with the addition of overtime pay. As one university from New Mexico states, "employees in our organization typically tie exemption status to 'status' within the University, [so] moving an employee from exempt to nonexempt is therefore typically viewed as a demotion even though there is no change in pay." An Ohio university reports similar issues that, "there is typically a status aspect associated with being exempt, and changing status when nothing has changed regarding their duties will upset many people." At a Pennsylvania university, reclassifying "professional positions that regularly use independent discretion and independent decision making" will make employees "feel demeaned and undervalued." In fact, concerns that morale and status will be negatively affected were repeatedly referenced by over 300 of the responding institutions that took part in the CUPA-HR survey.

Moreover, exempt employees, many times, receive richer benefits than nonexempt employees, the access to which current employees would lose if they are reclassified as a result of the proposal. For many CUPA-HR institutions, vacation benefits for nonexempt employees are not as generous as those for exempt employees. Seven institutions comprising six different states

[17] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2324 .

reported that the vacation accruals for exempt employees is greater than that of nonexempt employees. An institution from Iowa reports that, “new exempt employees have 4 weeks of vacation when they begin their employment [while] nonexempt begin with 2 weeks” which will result in all reclassified employees’ vacation time being cut in half.

Reclassified employees may also see a reduction in their access to tuition reimbursement. Many institutions offer unique reimbursement plans that allow employees to pursue a higher degree for a fraction of the cost an individual outside of the industry would pay. However, according to one institution from Ohio, “employees who are exempt and will become nonexempt will receive less tuition benefits for family members, [as the] tuition waiver is increased over a 5-year time period for nonexempt and starts at 100% for exempt.” Another institution from Florida is worried that reclassified employees will have to work for a whole year before they are eligible for tuition benefits they were entitled to previously, as exempt employees are “eligible to take advantage of tuition benefits one year earlier than nonexempt employees.”

It is also important to keep in mind that being classified as exempt or nonexempt affects *how* an employee is paid and what hours they may work in a given week, but it does not necessarily affect *how much* they are paid. For employees that are reclassified from exempt to hourly, this would mean eligibility for overtime pay, but not necessarily any increase in pay. University of Iowa noted in its comments that “over 2,700 individuals we employ … would immediately change from exempt salaried to nonexempt hourly” as a result of the proposal, but those employees’ “work hours will necessarily be restricted to 40 hours per week [as t]he alternative of paying overtime would generally be cost prohibitive; the annual cost of one hour of overtime per week for each of our 2,700 impacted employees would increase University payroll costs by over $4 million.”[18] These sentiments were echoed by the Iowa Association of Community College Trustees, which said in its comments that “[t]he same dollars that aren’t available for raising all professional salaries to the proposed salary level are in short supply for overtime payments.”[19] A CUPA-HR member at a large Southwestern state university similarly noted in response to the survey that because of limited budget resources, “overtime eligibility will not necessarily result in a windfall of overtime income for newly classified nonexempt employees, or in the hiring of additional staff due to resource issues.”

It also doesn’t mean that – to avoid overtime pay – higher education employers would alternatively add additional employees. Since colleges and universities are under constant pressure — including from the federal government itself — to keep the costs of higher education as affordable as possible, none of the alternatives are financially viable. Institutions cannot raise salaries, they cannot start paying new overtime, and they cannot hire additional employees. The only likely result is less service and support for students, fewer employees to perform more work and longer wait times for service recipients.

[18] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2316.
[19] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.

Finally, in some cases, institutions would be required to cut certain positions so they may raise salaries for others, resulting in layoffs for certain employees. As the director of athletics at one institution noted in his comments, if DOL increases the threshold to the proposed level, he would need to cut 10% to 20% of the department's staff, stating "I would not be alone in my ultimate course of action." The National Postdoctoral Association has also contemplated this possibility, expressing concerns that "if the proposed change to $50,440 is made effective immediately … institutions may reduce the number of postdoctoral scholars they employ."[20]

B. Impact of Proposed Minimum Salary Level on Higher Education Institutions and Students

For colleges and universities, the administrative and labor costs associated with these changes would be significant in a time of limited and sometimes shrinking budgets for higher education.[21] The Iowa Association of Community College Trustees noted that "by necessity, education is personnel rich, and comprises 75% of their annual expenses," so changes in employee salaries have a large impact on college and university budgets.[22] As noted above, the State University System of Florida found that raising salaries to meet the threshold would cost its 12 universities a total of $62 million annually,[23] the Iowa Association of Community College Trustees found that doing so would cost Iowa Community Colleges $12.6 million in the first quarter of 2016 alone,[24] the University System of Maryland has put this cost at $15.5 million and another university in the south told CUPA-HR that it estimates it would cost $17 million annually. These estimates are low in that they do not account for additional costs employers would need to incur to avoid wage compression[25], corresponding benefits-cost impacts, and administrative costs related to implementing and administering the rule.[26] While institutions may be able to compensate for some of the salary increases driven by the proposal by eliminating certain positions and avoid other increases by reclassifying employees, both these

[20] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.
[21] See Universities Feel the Heat Amid Cuts at http://www.wsj.com/articles/SB10001424052702303734204577466470850370002; see also, Statement of F. King Alexander to the U.S. Senate Committee on Health, Education, Labor & Pensions. http://www.help.senate.gov/imo/media/doc/Alexander3.pdf
[22] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[23] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.
[24] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[25] Where employees below the proposed salary minimum have their salaries raised to meet the new minimum, employees above the new minimum will likewise need to have their salaries raised to account for the relative value of the work being performed and to avoid wage compression. Take for instance a group of employees who currently are below the proposed minimum salary level. Assuming that the employees currently earn $700 per week and their supervisors earn $1,000 per week, the decision to raise the employees' salary to $970 per week to continue their exempt classification does not simply impact those employees. Their supervisors — although not legally required to be paid more to be treated as exempt — nevertheless will need to be paid more to maintain morale and avoid salary compression.
[26] Over 80% of respondents to CUPA-HR's survey found all of DOL's cost estimates were significantly low, with the majority of respondents calculating real costs to be 100% higher.

options would cause a reduction in services. In short, in the face of these costs, institutions would be under pressure to both reduce services *and* raise tuition to cover costs.[27]

The impact on students is obviously tangible and would be felt directly and substantively in the forms of higher tuition costs and reduced student services. Many higher education institutions' primary source of revenue is derived through tuition and fees. As nonprofits and public entities, colleges and universities would not be able to absorb the increased costs that come with higher salaries for exempt employees or expanded overtime payments. The NPRM states that the new salary levels "will transfer income from employers to employees in the form of higher earnings." However, since there are no profits to transfer to employees, additional costs, whether due to increased salaries, overtime payments or related administrative costs, would need to come from increases in tuition, placing additional burdens directly on the shoulders of students. Such an experience is evident in Iowa Community College Trustees' comments stating "they have no profits to transfer to employees [and] the income transfer means taking tuition money from our students' pockets [in the form of] tuition increases [resulting in] students' significantly delaying, and likely dropping out of, their college education."[28] Another institution from New York similarly reports that "the costs would likely be passed on to students/families as [it is] 94% tuition driven and cannot absorb the additional compensation and related (for example, retirement contribution match) costs."

The negative potential impact that this proposal could have on students does not stop with greater financial burdens, but is also exacerbated by the potential for crucial student services to be cut as well. As one institution puts it, "to avoid paying overtime costs, we will need to make scheduling adjustments to allow for some employees who currently work at off-hour events and travel to spend less time in departments where they service students during regular business hours." Many of the intrinsic benefits of higher education, such as the ability for students to receive "extra help" or "guidance" in their studies and personal lives, may be greatly diminished as institutions accommodate budgetary stresses by "restricting hours of operations … negatively impacting services provided to students." Institutions also would be required to cut certain positions, resulting in layoffs for employees and diminished resources for students. As noted above, the National Postdoctoral Association has also contemplated this possibility, expressing concerns that "if the proposed change to $50,440 is made effective immediately … institutions may reduce the number of postdoctoral scholars they employ [or] choose to move postdoctoral scholars into non-employee classifications …"[29]

For low-income students, the potential negative effects of the proposal are only exacerbated. At a time when the Executive Office of the President states that "large gaps remain in educational achievement between students from low-income families and their high-income

[27] We have heard from institutions that costs cannot be recuperated by a tuition increase due to state government mandates, leaving them with few options for how to absorb such a large increase in their budgets.
[28] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[29] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

peers," [30] it should prove worrisome when a higher education institution reports that "reclassification of workers based on pay level will have a significant impact on our student workers (need to reduce number of workers and/or hours to keep student worker pay budget consistent) by effectively reducing employment opportunities and financial aid to students." A faith-based university in Ohio, which dedicates one third of its operating budget to financial aid, states that, "the financial burden this DOL change will put on us will subject all of these benefits to [a] decrease." When the Executive Office of the President highlights that a main barrier to college access for low-income students is a "lack of guidance and support they need to … enroll and persist in their studies," it is worrisome that a New York university will not have the "ability to be flexible and provide services that our students have come to expect and rely on, especially our under-represented students."

C. DOL Should Lower the Proposed Minimum Salary Threshold and Phase the New Level in Over Time

As outlined in detail above, if the proposal is implemented, colleges and universities would need to reclassify far too many employees who work in jobs that have always been and are intended to be exempt to the detriment of the employee, the institution and students. This is because DOL has proposed a minimum salary level that is far higher than it has in the past and fails to account for regional and industry sector difference in pay.

We urge DOL to reconsider and set a salary level more in line with historic trends. Eighty-eight percent of the 796 CUPA-HR members responding to our survey felt DOL should take a more measured approach to raising the salary level, with a majority choosing either a salary level of $29,172 (21.5%)[31] or $30,004 (36.5%)[32] and nearly a third choosing $40,352 (30.1%)[33].[34]

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[30] Increasing College Opportunity for Low-Income Students, Promising Models and a Call to Action at https://www.whitehouse.gov/sites/default/files/docs/white_house_report_on_increasing_college_opportunity_for_low-income_students.pdf

[31] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 23 percent increase over the current threshold.

[32] This equals approximately the 15th percentile of earnings for all full-time salaried workers and is a 27 percent increase over the current threshold.

[33] This equals approximately the 30th percentile of earnings for all full-time salaried workers and is a 71 percent increase over the current threshold.

[34] The complete responses were as follows:

Which level do you think DOL should use?		
Answer Options	Response Percent	Response Count
$29,172/year or a 23% increase over the current threshold	21.5%	170
$30,004/year or a 27% increase over the current threshold	36.5%	289
$40,352/year or a 71% increase over the current threshold	30.1%	238
$50,440/year or a 102% increase over the current threshold	6.4%	51

According to the NPRM preamble, DOL considered these salary levels as part of the current proposed update. The first amount represents the current level — which was set in 2004 — adjusted for inflation; the second number would be the salary level if DOL applied the same formula used to update the salary in 2004, which was set to the 20th percentile of earnings for full-time salaried employees in the South and retail; and the last number represents median earnings for all wage and salaried workers combined. CUPA-HR's survey results are consistent with a nationwide poll by polling company, inc./WomanTrend, which found that 65% of respondents would increase the salary limit by no more than 50% to $35,490.[35] Taking a more measured approach will better ensure that DOL meets its own goal of avoiding costs associated with setting a salary level so high that it requires reclassification of employees to hourly status "who pass the duties test" (80 Fed. Reg. at 38531).

If DOL will not consider lowering the proposed salary level for all employers, it should do so for nonprofit and public employers[36] and/or consider expanding the exemption for certain learned professionals from the minimum salary level in a manner consistent with the State University System of Florida comments.[37] DOL also should phase in the new salary level over time to allow

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$56,316/year or a 138% increase over the current threshold	2.4%	19
I don't know	3.0%	24
answered question		**791**
skipped question		**18**

[35] See Partnership to Protect Workplace Opportunity fact sheet at http://protectingopportunity.org/wp-content/themes/ppwo/ppwo_1pager.pdf.

[36] The American Society for Association Executives has also requested that DOL "set a lower salary level applicable to all employers or the minimum salary level at a lower percentile of the national average for nonprofit[s]." See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

[37] If DOL decides to expand the exemption to the minimum salaried level for certain learned professionals in line with what the State University System of Florida recommends, it should be done in a separate rulemaking where stakeholders have the opportunity to review and comment on a specific regulatory proposal (see herein section III). The State University System of Florida recommended the following in its comments:

> We recommend a new and revised detailed duties test for learned professionals in post-secondary colleges and universities. The current language is ambiguous relative to this class lacking sufficient detail to allow employers to make fair and confident decisions regarding the proper application of this exemption. This is illustrated by the number of opinion letters and requests for opinion letters over the past 20 years. The questions of teaching, imparting knowledge, classroom versus research, credit vs non-credit, librarians, coaches, trainers, graduate assistant versus teacher of record and the like, remain unaddressed. In an effort to provide clarity and rationale for the distinctions between exempt and nonexempt for each, the CUHRE/APAC is proposing a revision to information outlined in U.S. DOL Wage and Hour Division Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act with insertions noted in [bold] as follows.
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>> Educators ~~**Teachers**~~ are exempt if their primary duty is teaching, tutoring, instructing, lecturing, **advising, coaching, mentoring or researching** in the activity of imparting or creating knowledge, and if they are employed and engaged in this activity ~~**as a teacher**~~ in a higher educational establishment. Exempt teachers include, but are not limited to,

employers and employees to make adjustments and preparations, particularly if DOL decides to implement a salary level as high as what it proposed in the NPRM or something similar. This would help mitigate some of the negative consequences related to the salary increase for colleges and universities, their employees and students.

1) DOL's Proposal Is Inconsistent 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. While over the years DOL has used different formulas to calculate the minimum salary level and made various changes to the duties test, the average minimum salary level for all tests for all years adjusted for inflation is $42,236.23. In addition, while the time periods between adjustments to the salary level have varied, increases to the level have been fairly consistent and have amounted to somewhere between 2.8% to 5% annually since 1949.

The proposed minimum salary level of $50,440 is well above and a significant departure from historic minimum salary levels, and amounts to an annualized increase of 10.29% from the last adjustment in 2004.[38] By making such a dramatic increase, DOL appears to be abandoning the historical purpose of the salary level, as the proposed level would not only screen out employees that obviously cannot meet the duties tests, but also many employees who currently *do* meet the tests and work in historically exempt positions. As noted above, DOL's proposed minimum salary level will force colleges and universities to reclassify 40%, 50% and possibly as much as 60% of their currently exempt workers who currently meet the duties test, including highly educated scientists, athletics coaches managing entire teams, and admissions, human resources and other professionals, all of whom are relied upon for their skills and who

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> **professors, instructors, lecturers, librarians, academic advisors, researchers, post-doctoral associates, resident advisors, athletic trainers or coaches.** The salary and salary basis requirements do not apply to bona fide ~~**teachers**~~ **educators.** Having a primary duty of teaching, tutoring, instructing, **advising, coaching, mentoring or researching** in the activity of imparting or creating knowledge includes, by its very nature, exercising discretion and judgment.

These modifications will clarify and capture the academic professionals responsible for creating the holistic experience of the student's matriculation process from onboarding as freshman through to achievement of terminal degrees.

See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

[38] Wage growth from 2004-16 was far below 10.29% annually and in coming to this number DOL seems to have discounted the effects of the Great Recession (2007-2009) and resulting wage stagnation during that perid. See, *Sticky Wages and Nominal Rigidities: Why Nominal Wages Have Been Stagnant Since The Great Recession,* http://www.forbes.com/sites/jonhartley/2015/05/31/sticky-wages-and-nominal-rigidities-why-nominal-wages-have-been-stagnant-since-the-great-recession/.

consistently exercise discretion and independent judgment with respect to matters of significance.

DOL also provides little justification for this departure or for the $50,440 salary level, other than it amounts to the 40th percentile of earnings for all full-time salaried workers in 2016. Yet DOL cites no authority for its determination that the 40th percentile is the appropriate salary level. The 40th percentile has not been a target for past salary levels, and there is no indication that it serves as a particularly useful marker for delineating between which jobs are "obviously nonexempt" and which are not.

2) The Proposed Salary Level Fails to Account for Regional and Sector Differences in Pay

By setting the proposed minimum salary at the 40th percentile of earnings for all full-time salaried workers nationwide, DOL discounts regional and industry differences in pay to the detriment of nonprofits, public employers and those operating in areas with lower costs of living.

As noted above, pay in higher education and the nonprofit and public sectors is frequently lower than nationwide averages, and as a result colleges and universities are more impacted by the rulemaking than those in many other industries.[39] In short, the 40th percentile of all full-time salaried workers nationwide could be the 50th or 60th percentile for colleges and universities.

This is particularly true for institutions operating in areas with a lower cost of living. A salary level appropriate for New York City, San Francisco and Washington, D.C., will not work for Birmingham, Boise, Columbus, Detroit, Baton Rouge or Memphis, let alone the rural and small towns spread out across the country. In many "college towns," in fact, the local college or university is the major employer in town. Yet, DOL's proposed salary threshold is *higher* than minimums set under *any* state laws, nearly $10,000 higher than that of California and nearly $15,000 higher than New York, two of the states with the highest cost of living. As the American Society for Association Executives noted in its comments, "according to the relocation calculator of the FAS Relocation Network, an employee in Washington, D.C., earning an annual salary of $50,400 would only need to earn $26,505 to have a comparable standard of living in Marshalltown, Iowa, where the cost of living is calculated as 47.5% less expensive than in the nation's capital."[40] Further regional concerns with setting the minimum salary at the 40th percentile for all full-time salaried workers is evidenced in an Oxford economics study on regional pay commissioned by the National Retail Federation. For example, the 40th percentile of all full-time salaried workers in the states of Louisiana and Oklahoma is equivalent to

[39] The responses of more than 1,100 two- and four-year institutions to CUPA-HR's 2015 annual salary survey of professionals in higher education indicates that the median earnings of these individuals is about 10% lower than the median earnings of their counterparts in other industries.
[40] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-1182.

$784/week — for Oklahoma this means that 54.7% of the currently exempt workforce earns below $970 per week.[41]

As a result, in many cases employees working at colleges and universities in lower cost areas of the country will be classified as hourly, while their counterparts performing the same job elsewhere will be classified as exempt, simply based on regional differences in pay.[42] In addition and as outlined in section I. A., those colleges and universities "with fewer resources and/or in areas with lower cost of living would be the most impacted by the proposal." This would be far less of an issue if the proposed salary level was more in line with historic trends.

3) DOL Should Phase In Over Time Any Salary Increase

Although CUPA-HR supports increasing the minimum salary to a level below DOL's current proposal, should the Department decide to increase the salary to $970 per week or anything above an inflation adjustment from the current (2004) level, it should do so incrementally, over the course of several years, to help smooth the transition and to allow institutions to adjust their budgets, raise tuition incrementally, and change work flows to minimize disruption. As currently proposed, DOL's minimum salary level would increase approximately 113% all at once. As has been discussed in great detail throughout these comments, this would pose huge complications for institutions of higher education. Phasing in the requirement over multiple years would mitigate some of these negative consequences for colleges and universities, their employees and their students.

Widespread and logical support for a phase-in of the salary level is evidenced in various and multiple requests DOL has received in this regard. The Iowa Association of Community College Trustees comments state that "should the Department continue to move the NPRM forward … a minimum of a five-year phase-in period [should be adopted] for compliance."[43] This argument for a phased-in approach, as a result of the innumerable uncertainties posed in the NPRM, is made even stronger in the comments provided by the State University System of Florida which states that, "doing so would provide the DOL and the affected employers with real cost experience data with which to consider future changes to the minimum salary test going forward."[44] Complying with the NPRM is an incredibly difficult task for colleges and universities; however, the concern, as an Indiana institution reports, "is not just to comply with the law [but also] having enough time to balance all of these competing priorities strategically" and is why at least "a two- or three-year phase-in to give us time to respond" is necessary. The National

[41] See https://nrf.com/sites/default/files/Documents/retail%20library/OE%20Addendum%202%20-%20State%20level%20overtime%20threshold%20analysis.pdf.
[42] DOL recognizes this possibility, noting that it chose the 40th percentile rather than a higher percentile because a higher percentile "could have a negative impact on the ability of employers in low-wage regions and industries to claim the EAP exemptions for employees who have bona fide executive, administrative or professional duties as their primary duty …" 80 Fed. Reg. 38532.
[43] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2398.
[44] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

Postdoctoral Association has also urged DOL to phase in the requirement "[g]iven the enormous complexity and cost of transitioning a large segment of the scientific workforce from an exempt to nonexempt status" and "unintended consequences that would negatively affect postdoctoral scholars in the short term" if the rule were to become effective immediately.[45] Many postdocs are paid on federally-sponsored research grants that must be proposed, awarded and funded three to five years in advance.[46] A phased approach would also allow employers to better adjust employment and other contracts, including collective bargaining agreements.

In addition, due to the rapid nature of the required increase, employers may make classification decisions today that they would not make if the increase was phased in over three or four or even five years. This would allow higher education the ability to prepare for the changes in a way that makes economic sense. It also would allow institutions to determine with additional certainty how many overtime hours are actually being worked by employees in the $23,660 to $50,440 range. Currently, because many of these exempt employees do not record their time, institutions are faced with an information deficit. As the State University System of Florida states, "at this point, the nation is going into this change virtually blind, since employers, for the most part and by definition of exempt status, have never tracked hours of work for exempt employees … [requiring] several years of cost experience."[47] Without information regarding these hours, institutions would need to guess at how many hours are worked, and those guesses will almost certainly account for more overtime than will actually be worked, resulting in a net loss of income to impacted employees.

One large southern institution reports that its internal employee satisfaction/wellbeing survey indicated that exempt professional employees self-report routinely working closer to 50 hours per week than 40. If that were borne out in practice as hourly work, the cost to the institution of 10 hours per week of overtime for such newly-eligible employees would be an additional $10 million per year.

By allowing a gradual increase, colleges and universities can begin gathering the necessary data to ensure as smooth a transition as possible and to mitigate the significant budgetary impact on the institution. Although many of the same issues will exist with respect to morale, flexibility and opportunity, a gradual, phased-in implementation of the new minimum salary would limit the financial disruption experienced by both institutions and their employees.

II. DOL Should Not Automatically Update the Salary Levels

DOL proposes to increase the minimum salary threshold each year henceforth by tying it to either the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly

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[45] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2507.

[46] Many institutions have expressed concern about existing federal and state research grants which specify how funds must be allocated — specifically, jeopardizing millions of dollars of research funding by increasing salaries above the permitted threshold in the contract.

[47] See comments at http://www.regulations.gov/#!documentDetail;D=WHD-2015-0001-2242.

earnings of full-time salaried employees. Employers would be given only 60 days' notice to adjust to the annual increases. The undersigned do not believe DOL should automatically update the salary level, as doing so would negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. Moreover, we do not believe DOL has the authority to impose automatic updates.

DOL should instead revisit the salary level at regular intervals, as it did from 1938 to 1975, when the agency updated the salary level every five to nine years and each salary increase should be made through notice and comment rulemaking that complies with the Administrative Procedure Act. If DOL does choose to move forward with automatic updates, the updates should occur at most every five years based on inflation rather than the 40th percentile, and the agency should provide the public with notice of the new level at least one year prior to implementation.

1) DOL Lacks the Authority to Impose Automatic Updates

DOL lacks the authority to impose automatic updates to the salary level and must engage in notice and comment rulemaking *each* time it wishes to make an increase. 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 that "nothing in the legislative or regulatory history … would support indexing or automatic increases." [48]

Congress could have expressly provided authority to impose automatic updates as it has expressly permitted indexing in other statutes, including the Social Security Act and the Patient Protection and Affordable Care Act, but it did not. Moreover, when Congress has amended the FLSA to increase the minimum wage, it similarly has not indexed that amount. Congress's actions — or, more precisely, lack of action — on this front demonstrates a clear intent that the salary level be revisited as conditions warrant, allowing DOL, and the regulated community, the opportunity to provide input into the appropriate level.

2) Regardless of Authority, DOL Should Only Increase the Salary Level Via Notice and Comment Rulemaking

Regardless of whether it has authority or not to impose automatic updates, DOL should only increase the salary level via notice and comment rulemaking. To date, every time DOL has increased the salary test, 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

[48] 69 Fed. Reg. 22171

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.

The history of changes to the exemptions exemplifies this point. Over the years, DOL rulemakings have made various adjustments to salary levels. Each time, the duration between updates and the rates of increase have varied (generally within a range), and in many cases DOL has imposed different salary levels for executives, professionals and administrative employees and different salary levels for different duties tests. Each time, DOL engaged in thoughtful rulemaking that resulted in tailored changes aimed at helping to ensure that the exemptions remained true to their purpose in the face of changing workforces and changing economic circumstances.

In the current rulemaking, however, DOL proposes to announce a new salary level each year in the *Federal Register* without notice and comment, without a Regulatory Flexibility Act analysis, without any of the other regulatory requirements established by various Executive Orders and without input from stakeholders. Each of those regulatory requirements is intended to force the agency and the public to consider the consequences of its proposed actions. Something as important as the FLSA exemptions, that impact millions of employees and employers, warrants this type of due diligence.

DOL needs to fulfill its duty and regularly update the threshold through notice and comment rulemaking, as it has with every past salary increase. Obviously, the agency has met that requirement before and can do so again in the future without imposing the rigid and costly automatic updates being considered.

3) Automatically Updating the Salary Level Would Negatively Impact Institutions' Budgets and Budget Planning, Ability to Provide Merit-Based Increases and Employee Morale

Automatically updating the salary level would negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. The annual increases proposed by DOL would create uncertainty year in and year out as to the application of the white collar exemptions. Once the specific salary threshold is ascertainable for a new year, colleges and universities would need to rapidly assess which exempt employees would be affected and determine the impact and viability of increasing salaries to maintain exemptions versus converting employees to hourly status.

The financial impact of conducting such analysis year in and year out is significant — and the cost of annual salary adjustments and reclassifications would be far more. In fact, 91% (644 of 705 responses) of CUPA-HR members responding to a survey question on this point said automatic increases would negatively impact their budgets, and 63.6% (444 of 698 responses) said it would negatively impact their ability to engage in financial planning.

Automatic updates would also interfere with operational and human resource functions as forced annual increases and related wage compression will make it hard for institutions to provide merit-based pay increases. Out of those responding to the survey question on this topic, 68.7% (475 of 691 responses) said automatic updates would negatively impact their institution's ability to provide merit-based increases to all employees.

Beyond such financial and operational impacts, transitioning employees from exempt to nonexempt status often triggers morale issues.[49] If automatic updating goes into effect, employers would need to reclassify employees on an annual basis, which would likely cause long-term morale issues. The morale issues would be exacerbated by two other unintended consequences resulting from the automatic increases — wage compression and deterioration in institutions' ability to provide merit-based increases. A whopping 86.6% (603 of 696 responses) of CUPA-HR members responding to a survey said the automatic increases would cause morale issues as a result of reclassification, wage compression and limit on merit-based increases.

In short, increasing the minimum salary level each calendar year would create uncertainty for employers in their budgeting and planning process and significantly undermine employee morale.

4) If DOL Imposes Automatic Updates, the Updates Should Occur at Most Every Five Years and the Agency Should Provide the Public With Notice of the New Level at Least One Year Prior to Implementation

If DOL does choose to move forward with automatic updates despite the undersigned's objections, the updates should occur at most every five years and the agency should provide the public with notice of the new level at least one year prior to implementation. A majority of CUPA-HR members surveyed felt five years is a reasonable period for revisiting the salary threshold, and nearly 60% felt they needed at least a year to implement any automatic updates.

As outlined above, annual automatic increases negatively impact institutions' budgets and budget planning, ability to provide merit-based increases and employee morale. While the undersigned question DOL's authority to automatically update the salary level and feel DOL and the regulated community would be better served if the agency used notice and comment rulemaking for any increase in the salary level, by extending the update window to five years, DOL could avoid many of the negative consequences associated with automatic annual increases.

DOL proposes to determine the new salary level each year by indexing it to certain data sets collected by the Bureau of Labor Statistics. Under either indexing method proposed by the DOL, it will be virtually impossible to determine the new salary level each year in advance of the

[49] See, infra, section I. A. 2).

DOL's pronouncement in the *Federal Register*. As a result, indexing will not make compliance with the exemptions easier and more routine; rather the indexing proposal creates enormous uncertainty and administrative chaos and will likely require an annual reconsideration of the classification for employees whose status will depend upon (potentially) the responses to a survey conducted several years prior, instead of a legal analysis of the executive, administrative and professional positions.

A lead time of 60 days as DOL has proposed is not nearly enough time for employers to evaluate the impact of the salary levels on labor costs and make sound decisions regarding compliance with the rule. In fact, 173 CUPA-HR members expressed a sense of severe or extreme hardship with having to implement increases within 60 days. As one member states, "our institution comprises five separate entities with a total of 40,000+ employees from across [our Midwestern state]. It would constitute a significant hardship for our institution to accomplish the analysis, formulate recommendations, inform stakeholders, communicate/educate staff and actually initiate the change to include all administrative details such as timekeeping for newly nonexempt employees." This uncertainty will create a trickle-down harm to employees. For instance, employers may implement hours reductions or salary freezes so that they can earmark money for labor costs in order to cover the increased payroll expenses created by the changes to the salary levels.

Furthermore, the timeframe becomes even more impractical given the likelihood that the annual increases will likely be off-cycle of an institution's fiscal and academic budget year. Many institutions will have already completed the budgeting process for their current academic year and fiscal year cycles, and requiring the rule to be implemented within 60 days unnecessarily burdens many higher education budgets. Challenges that arise as a result of a spike in costs will most likely result in layoffs because, as one Arkansas institution points out, "state budget dollars and tuition are set well ahead of the fiscal year [and] adjusting salaries could lead to layoffs, as we cannot raise tuition mid-year and will not receive additional state funding mid-year." Further concerns that a 60-day implementation period will harm tight budgets is also clear in an Alaska institution's response, which reports that the tight timeframe will impose an extreme hardship on the institution because, "state-funded appropriations [are] made a year or more in advance, [while] contracts are annual or multi-year, and collective bargaining agreements[50] [are made on] a three-year cycle," highlighting the impossibility of the potential task at hand.

For these reasons, DOL should limit updates to every five years and provide at least one year's notice of increases to the salary level.

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[50] With regards to collective bargaining agreements, a firm representing many institution noted that: *A significant portion of the university system's workforce is comprised of employees covered by a collective bargaining agreement among our 50 unions. Any changes to wages for positions or classifications covered by one of the collective bargaining agreements (CBA) would be a mandatory subject of bargaining, which could be a daunting task given that we administer 50 CBAs. We are very concerned that it would be very challenging to adequately address the concerns of each group in an equitable manner to meet as short of a deadline as it seems might be implemented based on the proposed rulemaking.*

5) If DOL Imposes Automatic Updates, the Updates Should be Based on Inflation Rather Than the 40th Percentile

If DOL imposes automatic updates, it should tie such updates to inflation rather than pegging it to the 40th percentile of all full-time salaried workers, because implementation of the rule itself will dramatically impact who is identified as a salaried worker and thus corrupt the outcome of the 40th percentile in future years. This could create a series of exponential increases to the salary level caused by changes brought about by implementation of the rule itself.

DOL predicts that in year one of the proposed new regulations alone, 4.6 million currently exempt workers will need to be reclassified as nonexempt or have their salaries raised to maintain exempt status because they currently do not earn a high enough salary to qualify for exempt status (80 FR 38518). Employers may choose to (i) reclassify such workers as nonexempt and convert them to an hourly rate of pay, (ii) reclassify such workers as nonexempt and continue to pay them a salary plus overtime compensation for any overtime hours worked, or (iii) increase the salaries of such workers to the new salary threshold to maintain their exempt status. No matter which of these three options employers choose, the effect will be to drastically increase the 40th percentile in the coming years, skewing the number and making it an unreliable index, which is influenced by the rule itself.

In short, if DOL is correct that 4.6 million workers who are currently part of the BLS data will no longer qualify for exempt status under the proposed new regulations due to insufficient base salaries, then there are 4.6 million workers who will either be dropped from the data due to conversion to an hourly rate of pay or will be paid more in total compensation or base salary in response to the new salary level threshold. Accordingly, the 40th percentile of all full-time non-hourly-paid workers will necessarily shift drastically upwards as employers change the compensation of these 4.6 million workers. It is difficult to predict with any level of accuracy exactly what the BLS data on full-time non-hourly-paid workers would look like a few years from now as employers respond to the new salary level of the proposed regulations. It is not difficult to predict, though, that the 2.6% average annual growth rate that the DOL reports has occurred for the 40th percentile between 2003 and 2013 (see 80 FR 38587) is a far cry from the actual annual growth rates that would occur in the first several years after enactment of the new regulations. With an average annual growth rate drastically exceeding the 2.6% that DOL anticipates, it will not take more than a handful of years for the duties tests to be rendered nearly superfluous, as very few employees who are currently eligible for the exemptions would receive a high enough salary level to qualify for exempt status, regardless of their duties. In the low-wage regions and industries, the duties tests would become superfluous even sooner.

For all of these reasons, if the DOL enacts a final rule that includes automatic updates to the salary level based on indexing, the indexing should not be tied to the 40th percentile of all full-time non-hourly-paid employees.

III. DOL Should Not Make Changes to the Duties Test Without Issuing a Separate NPRM Containing Specific Proposed Regulatory Language

For procedural reasons alone, DOL should not change the duties test at this time. DOL's decision to consider possible changes to the duties test without offering a specific proposal violates the spirit if not the letter of the Administrative Procedure Act. Like DOL's proposal with respect to indexing, such action is contrary to the requirements of the APA, the Regulatory Flexibility Act and the various Executive Orders related to regulatory activity. Asking questions is simply no substitute for an actual regulatory proposal that the regulated community can consider, evaluate and comment upon. We strongly urge DOL to provide specific regulatory language for any changes to the duties test in a separate NPRM after it has set the salary level and allow the public sufficient time to review and comment on that proposal.

CONCLUSION

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

Respectfully Submitted,

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On Behalf of the Following Undersigned Organizations:

American Association of Collegiate Registrars and Admissions Officers
ACPA—College Student Educators International
American Association of Community Colleges
American Association of State Colleges and Universities
Association of American Universities
Association of College and University Housing Officers – International
Association of Community College Trustees
American Council on Education
Association of Jesuit Colleges and Universities
Association of Public and Land-grant Universities
College and University Professional Association for Human Resources
Council of Graduate Schools
Hispanic Association of Colleges and Universities
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
NIRSA: Leaders in Collegiate Recreation