



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

Testimony of Andy Brantley

**Before the
United States House of Representatives
House Education and Workforce Subcommittee on Workforce Protections**

**Hearing on
“Federal Wage and Hour Policies in the Twenty-First Century Economy”**

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Good morning, Chairman Byrne, Ranking Member Takano and distinguished members of the Subcommittee. Thank you for holding this hearing today on “Federal Wage and Hour Policies in the Twenty-First Century Economy” and for the opportunity to testify. I am Andy Brantley, president and chief executive officer of the College and University Professional Association for Human Resources, known as CUPA-HR. Prior to joining CUPA-HR, I was associate vice president and chief human resources officer for the University of Georgia (UGA) in Athens, Georgia. Before my arrival at UGA in January 2001, I served as the assistant vice president for business administration and director of human resources at Davidson College, a private college in Davidson, North Carolina.

CUPA-HR serves as the voice of human resources in higher education, representing more than 22,000 human resources professionals and other campus leaders at almost 2,000 colleges and universities across the country, including 93 percent of all United States doctoral institutions, 78 percent of all master’s institutions, 56 percent of all bachelor’s institutions, and nearly 700 community colleges and specialized institutions. Higher education employs over 3.9 million workers nationwide, with colleges and universities in all 50 states.

My testimony today will focus on higher education’s concerns with the U.S. Department of Labor (DOL)’s recent revisions to the “white collar” exemptions to the Fair Labor Standards Act (FLSA)’s overtime pay requirements and our suggestions for moving forward. To say that these changes have been top of mind to higher education HR professionals and higher education institutions is an understatement.

Before I explain why the overtime changes have garnered so much attention from higher education let me say that CUPA-HR and the other higher education associations that engaged on this issue believe 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.

I will talk more about our thoughts on how best to accomplish these goals a bit later. First, I will discuss DOL's proposal and our response and higher education's experiences with the initial stages of complying with the final rule before it was stayed by a federal court.

DOL's Proposal

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, DOL published the [Notice of Proposed Rulemaking \(NPRM\)](#), which proposed several changes to the white collar exemptions and invited public comment on those proposals.

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 (currently \$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 all 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 workweek (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.

In the July rulemaking, DOL proposed several changes to the white collar exemptions, including increasing the current salary threshold of \$455 per week (\$23,660 annually) by 113 percent to \$970 per week (or \$50,440 per year), which the agency estimated to be the 40th percentile of earnings for all full-time salaried workers in 2016. DOL also proposed automatic annual increases to the salary threshold by tying it to one of two indexes.

Higher Education's Response

The proposal generated widespread concern in the higher education community. The FLSA covers all or nearly all of the 3.9 million workers employed by our colleges and universities nationwide. Many employees on campuses are currently exempt from the FLSA's overtime pay requirements pursuant to the white collar regulations but earn less than the threshold DOL had proposed.

CUPA-HR and 18 other higher education associations representing approximately 4,300 two- and four-year public and private nonprofit colleges and universities filed detailed [comments](#) outlining our concerns with DOL's proposal. In short, we argued that while an adjustment to the minimum salary threshold was due, DOL's proposed increase was simply too high. It would require colleges and universities to reclassify large numbers of salaried employees to hourly status. While in some cases these changes would be appropriate and would keep with the intent of the FLSA, in too many instances colleges and universities would be forced to reclassify employees that work in jobs that have always been exempt and are well-suited to exempt status. While hourly pay and nonexempt status is appropriate for certain jobs, it is not appropriate for all

jobs; otherwise Congress would not have created any exemptions to the overtime pay requirements.

As we detailed in our comments, in our view, this mass reclassification would be to the detriment of employees, institutions and students. With respect to employees, there are advantages and disadvantages to exempt and nonexempt status and some jobs are better suited to exempt work, which is why the exemptions exist. As I mentioned previously, employers must carefully track hours for all nonexempt employees and provide them with premium pay for overtime hours. As a result, employers will necessarily avoid situations where tracking nonexempt employees' hours is difficult or impossible. This means employers often restrict hourly employees' access to smart devices and other technology that can be used remotely. Flexible work arrangements and work travel also become extremely cumbersome if not impossible to manage, and jobs that have innate fluctuations in workload must be managed by counting hours instead of just letting a professional get his or her work done.

Thus, while the FLSA protects hourly employees against excessive work hours, nonexempt employees often face diminished workplace autonomy and fewer opportunities for flexible work arrangements, career development and advancement. That is why it's so important that regulations strike the appropriate balance between protecting employees from abuse and allowing white-collar employees autonomy and flexibility. To us it was clear that DOL's proposed threshold was too high, as it would have required mass reclassification of jobs that are clearly performing exempt, professional-level work.

We also detailed in the comments our significant concerns about the burden and costs of this mass reclassification on institutions; not only are colleges and universities often the largest employers in their communities, but in many cases they are the largest employer in the state. Institutions can be extremely complex organizations comprised of teaching hospitals, research facilities, agricultural operations and more, all of which compliment extensive academic program offerings. As a result, colleges and universities employ a very skilled, very diverse workforce of faculty and staff. Adjusting this workforce to the dramatic changes proposed by DOL is complex, not some simple payroll change accomplished with the stroke of a key. Colleges and universities must undergo detailed analysis of how to staff any given department so it can best achieve its mission under new rules that have fundamentally changed when and where employees may work.

As we provided in great detail in our comments, the complexities of this change would be burdensome and costly. As nonprofits and public entities, institutions would have difficulty absorbing these costs as well as costs associated with increased salaries for exempt employees, expanded overtime payments and administrative costs related to tracking hours. In the face of these costs and challenges, many 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.

Finally, we expressed in the comments our concern about DOL's proposed automatic annual updates to the threshold. We do not believe the FLSA grants the authority to DOL to impose automatic updates, and even if it did, the agency should not automatically update the salary level. Not only would annual increases negatively impact institutions' budgets and budget planning,

their ability to provide merit-based pay increases and employee morale, but such increases ignore economic circumstances and changes in our workforce.

Rather than automatically updating the salary level, we argued in the comments that 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. 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 cost analysis — which is an important part of assessing the impact of any increase to the salary level.

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 addition to filing comments, our community also raised our concerns with the Office of Management and Budget (OMB)'s, Office of Information and Regulatory Affairs (OIRA) during its pre-publication review of the final rule. In fact, 25 percent of all stakeholder meetings conducted and nearly 50 percent of letters submitted to the OMB docket were on behalf of either individual institutions or a higher education association. In addition, numerous Members of Congress from both sides of the aisle urged DOL and OMB to carefully consider the impact the proposal would have on higher education before proceeding with the rule.

DOL's Final Rule

Unfortunately, on May 18, 2016, DOL issued its final rule setting the new threshold at \$47,476, which was a modest decrease from the proposed amount of \$50,440, but still a 100 percent increase over the current level of \$23,660. The new rule also requires automatic updates to the threshold every three years, rather than the proposed annual updates. Like the proposal, the final rule would require mass reclassification of many white-collar workers in jobs that have traditionally been and are well suited to exempt status. Thus, the final rule would still have adverse consequences for colleges and universities and their employees and students that we detailed in our comments.

We were deeply disappointed that DOL did not do more to address the concerns of colleges and universities across the country that submitted comments, wrote letters to Congress and met with administration officials.

Professionals in thousands of positions at institutions of higher education that clearly meet the duties test for exemption are paid less than \$47,476. Positions that require bachelor's or master's degrees such as residence hall managers, academic advisors, mental health counselors, admissions counselors, financial aid counselors, student life professionals, alumni development

professionals and many athletics positions typically pay early and mid-career professionals annual salaries of less than \$47,000, particularly in smaller institutions and in rural parts of the country.

CUPA-HR annually collects and analyzes comprehensive salary and benefits data for higher education administrators, professionals, faculty and other staff. Following the release of the final rule, we looked to our *2016 Professionals in Higher Education Salary Survey Report* and found that a threshold of \$47,000, which is slightly below the final rule's \$47,476, would impose significant costs on higher education. Twenty-four position classifications in that survey have median national salaries below the final rule's threshold.¹ If an institution moved just one employee in each of these 24 classifications to \$47,476, the average annual cost increase for that institution would be approximately \$209,000. Institutions will typically have many professionals below \$47,476, particularly institutions in lower-cost areas of the country, which will be those hardest hit by the rule.

In addition to reviewing our salary survey report, we reached out to our membership for data. The 35 institutions that were able to provide data in that short window of time estimated a combined cost of nearly \$115 million to implement the rule in the first year alone and indicated such an expense could trigger tuition hikes and reductions in force and services.

We are also concerned that these initial costs and the subsequent decisions institutions would have to make regarding their employees and students would be continuously repeated as the rule provides for automatic increases to the salary threshold every three years. Each update would raise the standard threshold to the 40th percentile of full-time salaried workers in the lowest-wage Census region and DOL would post the new salary levels just 150 days in advance of their effective date. While increasing the intervals for automatic updates from one year to three years is an improvement, we believe that DOL lacks the authority to impose *any* automatic updates and, for the reasons I mentioned previously, the public is better served when DOL makes any adjustment to the regulations through notice and comment.

In addition, we have significant concerns with DOL's methodology of indexing future increases to the 40th percentile of salaried workers when intervals for threshold adjustments are stacked closely together. Changes brought on by implementation of the rule will dramatically impact who is identified as a salaried worker and thus corrupt the outcome of the 40th percentile in future years. This could lead to exponential and unpredictable increases to the threshold, which would be destabilizing.

Although we were mostly disappointed by the final rule, we were pleased DOL issued specific guidance on the applicability of the final rule to higher education. Although the guidance restates current law, it did increase awareness of certain unique provisions within the regulations that would help higher education comply.

¹ CUPA-HR members report that employees that would face reclassification include those in departments such as academic affairs (librarian, adviser, counselor), student affairs (residence hall manager, admissions counselor, financial aid counselor, student activities officer), institutional affairs (human resources professionals), fiscal affairs (accountant, head cashier, ticket manager), external affairs (alumni development professionals), facilities, information technology, research professionals (including many with advanced degrees), athletics (some assistant coaches, physical therapist, trainer), and managers in food service, security and building and grounds.

Compliance Efforts and Complications

I want to now turn the attention of my testimony to focus on the compliance efforts we undertook at CUPA-HR and the many complications institutions of higher education encountered while racing to transform their complex organizations and unique workforce in the relatively short amount of time DOL provided. When we were reviewing the department's original proposal our members provided ample feedback on the length of time that institutions should be given to bring their workforce into compliance. The vast majority of the feedback we received suggested at least one year was needed in order to adequately implement the changes, yet DOL provided, just over six months with December 1 as the effective date. Given the short time DOL provided we knew this would be a great challenge and is why we as an association devoted our resources towards helping our member institutions prepare for the December 1st effective date.

To do so, we produced webinars and other resources dedicated to the overtime changes throughout the rulemaking process. Although we knew viewership would be high none of us imagined that our February 2016 webinar entitled "FLSA Overtime: How, When and Why to Prepare" would set the record for total viewership only to be upended later in 2016 when a conservatively estimated 5,825 individuals logged in to view our webinar on the final rule. The participation in the event was record-breaking for CUPA-HR, but also remarkable were the 408 content questions submitted during the webinar regarding the new rule's impact on comp time, part-time employees, tracking time, salary calculations and more. Remember, many of these questions came from seasoned human resources professionals who have significant expertise with the Fair Labor Standards Act and the white collar overtime exemptions — although proponents of the rule argued these changes could be made with a "flip of the switch," the interest in our webinars is evidence to the contrary.

Furthermore, after the rule was released, it became clear that lingering problems surrounding the application of the rule to higher education persisted, along with questions surrounding compliance with respect to certain occupational areas. For instance, extension agents for our public land grant institutions are crucial to bringing educational programs, modern technologies and modern agricultural science to citizens across the United States and are often stationed in rural areas of the country where the cost of living is substantially less than urban areas. However, as a result of DOL setting such a high salary threshold, a significant number of extension agents who are currently exempt based on their duties and salaries under current law would either have needed to be reclassified or have their salaries increased. Given the importance of professional autonomy to the success of an extension agent's mission and the impracticality associated with reclassification to hourly status, we began exploring the applicability of the teaching exemption to this profession.

Although most exemptions must meet the salary level test, teachers are not subject to the salary level requirement for the professional exemption if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Higher education has applied this exemption historically to college and university professors and adjunct instructors but application to extension agents is much more complicated, as there is no existing guidance from DOL—presumably because previous updates to the salary level have not excluded a similarly large number of exempt professionals. More specifically, we needed guidance on what activities performed by the extension agent (whether it be instruction not for credit; as a visiting

teacher at K-12 class; instructing farmers on the latest soil, seeds, etc.) might be considered teaching and at what point these activities, combined or separately, constitute a primary duty of teaching. Additionally, it is unclear whether those who may have a primary duty of teaching but do not instruct people enrolled in degree-seeking programs may meet the teaching exemption.

Another area where we sought additional guidance was related to academic administrative personnel and their special exemption, with a potentially reduced salary level, provided to this group of employees within the regulations. Academic administrative personnel are those who help run higher education institutions and interact with students outside the classroom, such as department heads, academic counselors and advisors, intervention specialists, and others with similar responsibilities. To qualify as an academic administrator, the employee must satisfy the “normal” salary requirements or the minimum salary for teachers at their institution and their “primary” duty must consist of “administrative functions directly related to academic instruction or training.”

For example, if the minimum teacher salary at an institution is \$42,000, an exempt academic administrator would only need to be paid \$42,000 to qualify for exemption (assuming the duties performed met the standard). However, the complications with applying this exemption to academic administrators is that the DOL has not provided specific guidance on the term “minimum salary for teachers” and as professors and faculty are oftentimes paid quite differently than staff, applying this exemption is, at best, problematic and, at worst, a lawsuit waiting to happen.

One of the last occupational areas I will discuss is a position that is almost exclusively found in higher education. Resident directors often are responsible for the supervision of graduate coordinators and several resident assistants. They also are responsible for the creation and execution of programming and connecting the “student life work” to the academic work of the institution. Although dependent on their specific role within an institution, resident directors have traditionally been exempt based on their duties and salary. However, had the final rule taken effect in December, a significant number of resident directors would either have needed to be reclassified or have their salaries increased. Reclassification and tracking hours is impractical if not impossible for resident directors, as their workweek can fluctuate dramatically depending on the time of year (orientation, finals, summer break, etc.), and as many live on campus they are often in contact with students or others outside normal working hours. Unfortunately, even though these professional staff may be furnished with room and board, oftentimes a benefit worth many thousands of dollars, employers cannot count this cost as salary for the purposes of meeting the minimum salary threshold.

Of course these were just three of the many issues on which CUPA-HR was working to obtain guidance when the department’s rule was preliminarily enjoined in November.

We have received some feedback from member institutions that implemented changes in anticipation of the rule and prior to the injunction. These members report incurring significant costs, experiencing employee morale issues and finding that several job categories are very difficult to manage as nonexempt. For one large Midwestern university, costs included nearly \$1 million for a “one-time 10-day payment made to everyone switching from exempt to nonexempt in order to address cash flow due to nonexempt payroll being two weeks in arrears.” This was in addition to administrative costs, payroll increases as a result of bumping up some salaries to meet

the new threshold and any overtime pay for those who are reclassified. Members have also reported morale issues as “people who have been ‘professional’ for years now have to track hours.”

Finally, we are hearing from members that “several job categories are very difficult to manage as nonexempt because of the unusual nature of their schedules.” One member provided the following specifics:

[The job categories that have caused the most difficulty] include residential housing staff, who are struggling with how to track time when they run into a student in the dining hall or a student pops in for advice at 11:00 p.m. This has led to some issues of coverage. Complicating the residential housing issue is that we provide room and board for many of them as compensation but this is not factored into their salaries for FLSA purposes. Another job type relates to athletics. We have been able to cover some of the coaches under the teaching exemption, but many athletic trainers are not included. They work unusual hours and travel with teams, which adds a lot of complication to tracking hours.

The Court’s Ruling and Our Suggested Path Forward

The November decision issued by Judge Mazzant in response to a legal challenge brought by a coalition of more than 50 business groups and 21 state attorneys general found that DOL exceeded its delegated authority and ignored Congress’s intent by raising the salary level such that it supplants the duties test. The court's ruling, subsequent appeal by President Obama’s DOL, and the recent 30-day extension granted to the Trump administration’s Department of Justice provides a great level of uncertainty for employers moving forward. Given this uncertainty, we would like to see DOL withdraw the rule and issue a new one that sets a more reasonable salary level.

As I have stated elsewhere in my testimony, CUPA-HR agrees an increase to the minimum salary threshold is due. As most colleges and universities strive to be progressive employers and are often considered to be an employer of choice in a community, CUPA-HR believes DOL should work towards updating the threshold under the new administration but should not consider a similar threshold that is so high that it forces employers to reclassify employees that work in jobs that have always been exempt and are well-suited to exempt status.

While we are not settled on an exact salary level, in a July 2015 survey we conducted of 819 CUPA-HR members, a majority chose a salary level of either \$29,172 (23 percent increase) or \$30,004 (27 percent increase) and 88 percent of respondents indicated any threshold over \$40,352 (71 percent increase) would be too high. These salary levels were not picked randomly; in fact according to the NPRM preamble, DOL considered these salary levels as part of the 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; the final number represents the median of all wage and salaried workers combined.

Additionally, we would like to see DOL issue specific guidance with respect to the many complications that arose while institutions were preparing to comply. In a survey we administered after the injunction just 28 percent of respondents reported implementing their planned changes, while 71 percent either implemented some changes and delayed others or delayed all changes. Although many of our member institutions spent night and day preparing to be compliant with the regulations, it is clear that there would have been many unanswered issues had the rule taken effect on December 1.

Conclusion

Mr. Chairman, thank you again for the opportunity to testify and offer CUPA-HR's support for the committee's focus on modernizing federal wage and hour policies. I am happy to answer any questions from you or other members of the Committee.