



November 7, 2023

Amy DeBisschop
Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-3502
Washington, DC 20210

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

Dear Ms. DeBisschop:

On behalf of AASA, The School Superintendents Association, the Association of Educational Service Agencies (AESA) and the Association of School Business Officials International (ASBO), we write in response to the above-referenced Notice of Proposed Rulemaking (NPRM). AASA is the national organization representing thousands of our nation’s public school superintendents and district administrators. AESA is a professional organization serving educational service agencies (ESAs) in 45 states; there are 553 agencies nationwide serving over 80% of the public school districts, over 83% of the private schools, over 80% certified teachers, and more than 80% non-certified school employees. ASBO International represents thousands of our nation’s public school district finance and operations leaders.

The nation’s public schools are one of the largest employers in the nation’s economy: “The Bureau of Labor Statistics estimates that in May 2021 [elementary and secondary schools employed over 8 million people](#). That’s more than twice as many workers as are [employed in colleges, universities, and professional schools](#) and over 400,000 more workers than are [employed in all retail sales jobs in the U.S.](#) or in the [construction industry](#). It’s also more than three times the number of employees in the [real estate and rental and leasing industry](#). Elementary and secondary schools employ about two-thirds as many workers as the [U.S. manufacturing industry](#), however.”¹

The realities of the impact of the proposed rule on public schools are unique, and we write our letter from the K12 perspective. At the same time, we align with the response and sentiment as submitted by both the College and University Professional Association for Human Resources (CUPA-HR) and the Partnership to Protect Workplace Opportunity (PPWO).

We understand the importance of the U.S. Department of Labor (DOL) updating the salary levels and overtime regulations from time to time to ensure the exemptions are not abused. That said, while hourly pay and nonexempt status are 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 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. This is not an effortless task: 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. That is why

¹ “School Staffing By the Numbers” EdWeek (June 15, 2022) <https://www.edweek.org/leadership/school-staffing-by-the-numbers/2022/06>

it's so important that regulations strike the appropriate balance between protecting employees from abuse and allowing white-collar employees autonomy and flexibility.

The proposed rule ignores important recent context. In 2016, DOL issued a final rule (the 2016 rule) doubling the minimum salary threshold from the 2004 rulemaking and increasing it to \$913 per week (or \$47,476 per year). Additionally, DOL attempted to impose automatic updates to the threshold every three years. DOL set both the salary threshold and the automatic updates to the threshold so it would exclude from the exemption the bottom 40% of salaried workers in the lowest-cost Census Region. Advocacy from organizations like ours at the time indicated that this type of dramatic increase to the salary threshold would require mass reclassification of professionals in thousands of positions that clearly meet the duties test for exemptions but are paid less than \$47,476 annually and noted that automatic increases without notice and comment are unlawful. In light of federal court action, DOL revised the final rule (in 2019) to set the salary threshold to \$684 per week (\$35,568 per year). The court action was related to concerns that the rule's high salary threshold created a "de facto salary-only test," and that "Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption".²

The current rule rushes the historical timeline. DOL last addressed the Overtime Compensation in 2019, and the adjusted minimum pay threshold took effect in January 2020. We do not believe DOL should increase the salary threshold at this time. From 1938 to 1975, DOL revisited the salary level through the notice and comment rulemaking process at regular intervals—typically every five to nine years. AASA and ASBO find the five-to-nine-year cadence to be historical, measured, and reasoned, and urges DOL to continue to update the salary threshold using the five-to-nine-year intervals.

We are sensitive to the current economic realities. At the same time, we believe DOL should wait to update the salary threshold until inflationary pressures have cooled off and employers have a better understanding of the post-pandemic economic challenges and realities they face. Rapidly rising inflation has impacted nearly everyone in the U.S., and employers have not been immune to the challenges and increased costs that come with that trend. Similarly, the workforce has transitioned in the post-pandemic world to an increased use of remote, hybrid, and flexible work arrangements that employers and employees are still working to figure out. We believe DOL would be best suited to withdraw the current proposal and revisit an update in several years when inflationary pressure has abated and employers and employees have a better sense of how to manage increased demand for remote, hybrid, and flexible work arrangements and other workforce changes arising from the pandemic.

The proposed minimum salary is far too high. When DOL decides to move forward with changing the FLSA overtime regulations, DOL should consider a lower proposed minimum salary threshold. We believe that the proposed minimum salary threshold is too high. Updating the salary level from \$684 per week (\$35,568 per year) to \$1,158 per week (\$60,209 per year) leads to a nearly 70% increase, which will result in a large number of employees being reclassified to nonexempt status. If DOL were to implement its proposal, schools would need to reclassify many currently exempt employees to hourly status, as institutions simply cannot afford to raise those employees' salaries to the proposed 2023 minimum of \$60,209. This will particularly be the case if DOL imposes an increase without sufficient notice for adjustment in the budget cycle. In K12 education, budget cycles typically follow the fiscal year, which for most schools is July 1 to June 30, with approvals of the planned budget occurring months in advance.

We oppose the proposed automatic updates to the salary threshold. Under the NPRM, DOL proposes to automatically increase the minimum salary threshold every three years, using the most current data for the 35th percentile of weekly earnings of full-time salaried employees in the lowest-wage Census Region. The NPRM states that DOL would issue a notice via the Federal Register 150 days prior to the effective date of the increases. We oppose this proposal, as we anticipate that automatically updating the salary level would negatively impact

² *State of Nevada v. United States Department of Labor* (November 22, 2016) at p. 14

<http://www.txed.uscourts.gov/sites/default/files/notable/Memorandum%20Opinion%20and%20Order%20.pdf>

districts' budgets and budget planning, and their ability to provide merit-based increases, thus adversely affecting employee morale. Moreover, we do not believe DOL has the authority to impose automatic updates. Instead, as we have discussed above, we believe DOL should revisit the salary level every five to nine years, as it did from 1938 to 1975, and it should increase the salary level through notice and comment rulemaking that complies with the Administrative Procedures Act. It is beyond the scope of DOL's authority to rely on automatic salary increases; DOL should only increase the salary level via notice and comment rulemaking processes.

DOL should extend the effective date of any final rule implementing a higher salary threshold. Under the NPRM, DOL proposes that the final rule will become effective 60 days after its publication. It is simply not reasonable to expect employers to assess the impact, plan, and implement appropriate and affordable changes to employees exempt status, salaries, and job structures all within the time frames DOL has provided, especially when DOL estimates that 3.4 million employees nationwide will be impacted by the nearly 70% increase to the minimum salary threshold. Moreover, organizations will not have funds budgeted for 2024 to conduct this analysis or make any needed salary adjustments. In K12 education, budget cycles typically follow the fiscal year, which for most districts is July 1 to June 30 with approvals of the planned budget occurring months in advance. We believe DOL should provide at least 180 days for employers to comply with the final rule once it is published.

Thank you for considering our suggested changes. We thank the agency for the opportunity to comment. Please reach out to Noelle Ellerson Ng (nellerson@aasa.org) or Elleka Yost (eyost@asbointl.org) with any questions.

Sincerely,

AASA, The School Superintendents Association
Association of Educational Service Agencies
Association of School Business Officials, International