September 2, 2015

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

Dear Ms. Ziegler:


On July 6, 2015, the U.S. Department of Labor, Wage and Hour Division, published in the Federal Register a Notice of Proposed Rulemaking: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees. This correspondence is in response to the request for comments.

The proposed regulation would increase the minimum salary threshold to the 40th percentile of weekly earnings for full-time salaried workers. Based on 2016 salary estimates, the proposed minimum salary threshold would be $970 per week or $50,440 annually. The threshold is currently set at $455 per week or $23,660 annually. The proposed doubling of the minimum salary threshold upon which an individual is considered exempt from provisions of the FLSA will significantly impact University of Wisconsin System institutions in numerous ways. If the proposed rule is promulgated, the status of over 5,000 UW System employees would change from exempt to nonexempt. Any changes made as a result of the proposed rule would require careful analysis and action by our institutions to appropriately manage the financial, operational, and administrative ramifications.

There are a number of unanswered questions about how a higher minimum salary threshold will affect the FLSA designation of employees at the UW System institutions. Below are some of the major issues, questions, and concerns that have arisen:

- **Overtime pay** – Under the proposed regulation more employees will be eligible to receive overtime for hours worked in excess of 40 hours per week. It is difficult to estimate how...
much paid overtime these employees will receive, but it is clear that there will be paid overtime in areas where there is none now. Job-specific analyses are needed to determine which incumbent employees will earn overtime pay and how much they will earn. In order to minimize the impacts to students, HR professionals at each UW System institution have started considering how to best handle a higher minimum salary threshold, but they are concerned that there will not be sufficient time to conduct an audit of the positions that may become nonexempt; to estimate costs as a result of increased pay; and to implement the changes that will be required.

- Implementation choices – The proposed rule will require UW System institutions to consider a number of options, all of which will impact their budgets, staffing, and scheduling of employees. For example, should weekly salary increases (i.e., increases that would maintain the employee’s exempt status) be combined with a restructuring of employment contracts for some employees? If so, should some 12-month contracts be changed to nine-month contracts? And for nonexempt employees, should UW System institutions expand flexible workweek options to reduce overtime pay?

- The “teacher” exemption for employees who are not faculty members – If the proposed regulations are enacted, the question of who is exempt from overtime requirements as a “teacher” takes on added importance. To be designated as a “teacher,” an employee’s primary duty must be to impart knowledge as a teacher. Determining whether employees in certain job titles are “teachers” is a time-consuming process because position-specific analyses are needed. For example, the nature of the work performed by student assistants (e.g., project assistants, research assistants, and teaching assistants) must be audited in order to determine whether these employees should be designated as “teachers.”

- The impact of increased salary costs on grants and program revenue budgets – The financial impact on grants would be considerable, both for salaries and associated fringe benefit costs.

- Postdoctoral and other employees-in-training (EIT) – The UW System employs more than 1,000 research staff, including research associates and postdoctoral fellows, who are paid less than the proposed minimum salary threshold. If these researchers are covered under the proposed rules, we would need to increase these researchers' compensation, eliminate research positions, and reclassify some as hourly employees. With declining funding and our continued reliance on EITs to conduct critical research, these changes would have a devastating effect on our research enterprise.

Moreover, the research EITs conduct is not amenable to rigid work schedules. It will be difficult to schedule lab time and experiments to fit within the required schedules for the researchers we will need to reclassify as hourly employees. It would be highly problematic – and could even delay scientific breakthroughs – if we require researchers to shut down their work because they have exhausted their hours for the week. Finally, many of the federal grants that support postdocs use a budget model which receives no annual increases. Therefore, with biomedical expenses far outpacing inflation the purchasing power and the ability to fund postdoctoral positions significantly...
diminishes over the life of the award. Those postdoctoral researchers paid from NIH institutional or individual training grants at the $42,800 level cannot be supplemented with federal funds even if mentors had those discretionary dollars. Therefore, to ensure that UW System can continue to conduct cutting-edge research, we recommend that the Department of Labor exempt postdoctoral and other employees-in-training (i.e., postdoctoral researchers within five years of receiving their doctorates).

As inferred above, the proposed regulations increase the threshold too quickly for UW System institutions to adequately understand and plan for the consequences of such an increase. Raising the threshold to $50,440 by January 1, 2016 does not provide UW System institutions with sufficient time to develop implementation strategies.

The range of options available to meet the new threshold within the timeframe specified is exceedingly challenging from a fiscal perspective. An incremental approach, possibly staggering a minimum salary threshold increase over several years, should be considered and would likely be more manageable. It should still be noted, however, that such increases would still have a sizable financial impact, especially on public institutions of higher education that have seen deep cuts in state support in recent years. This is especially the case when having to implement a substantial increase to the threshold rate that does not account for regional or sector-based cost differences.

Relatedly, the proposal to increase the minimum salary threshold each year by tying it to either the Consumer Price Index for All Urban Consumers or the 40th percentile of weekly earnings of full-time salaried employees is troublesome. Employers would be given only 60 days’ notice to adjust to the annual increases, leaving our institutions with a reduced ability to engage in budget planning. Increases to the minimum threshold should be considered at less frequent, but still regular intervals. For example, from 1938 to 1975, the Department of Labor updated the salary level every five to nine years. Such proposals to increase the minimum threshold should provide the public with notice and the opportunity to comment through a regular rulemaking process.

In conclusion, we strongly urge the U.S. Department of Labor to consider the significant potential impacts of the proposed FLSA regulations and take concrete steps to address these questions and concerns prior to promulgation.

Sincerely,

Ray Cross
President

cc: Board of Regents
    Chancellors
    Provosts
    Cabinet