



UAW LOCAL 5810

2030 Addison Street, Suite 640B
Berkeley, CA 94704

p: (510) 845-5726 f: (510) 845-5863
uaw5810@uaw5810.org
www.uaw5810.org

September 4, 2015

Wage and Hour Division, Department of Labor RIN 1235-AA11 Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees

This letter is written on behalf of UAW Local 5810, which represents over 6,000 Postdoctoral Scholars ("Postdocs") at the 10 campuses comprising the University of California. Last month, UAW International President Dennis Williams submitted comments in support of the proposal on behalf of all UAW members. He specifically urged the Department of Labor to adopt the new overtime standards to cover the maximum amount of people without delay. We are offering additional comments to complement the prior submission. The purpose of this comment is 1) to strongly support the Department of Labor's proposed increase to the salary threshold for the "bona fide professional" overtime exemption, 2) to demonstrate that the proposed increase properly implements the FLSA's overtime protections as applied to Postdocs, and 3) to strenuously argue against any diminution or elimination of FLSA protections for Postdocs.

Who are Postdocs?

A Postdoctoral Scholar, sometimes referred to as a Postdoctoral Researcher or simply a "Postdoc," is an individual who holds a doctoral degree (a PhD or MD) and works in a university under the guidance of a senior researcher. At the University of California, Postdocs work in all fields of learning, but are overwhelmingly concentrated in the fields of science, technology, engineering and math (STEM). Their research is critical to the advancement of science and provides innovation and technological breakthroughs, such as medical treatments, benefiting all of society. Postdocs are hired by the senior researcher and typically serve between three and five years. The senior researcher is the "grand manager," setting the timeline for experiments and publications and establishing work expectations for the lab. A Postdoc's position is typically funded through federal research grants awarded through the University to the senior researcher.

Some definitions of Postdocs, especially those favored by Universities employing Postdocs, emphasize the role of Postdocs as "trainees", often with purpose

of justifying their payment of lower salaries and benefits to Postdocs. The National Postdoctoral Association has defined a Postdoc as “an individual holding a doctoral degree who is engaged in a temporary period of mentored research and/or scholarly training for the purpose of acquiring the professional skills needed in future positions.”

This definition is, however, wrongheaded, since it ignores the significant amount of independent research initiated and pursued by Postdocs. Postdocs now work longer terms as more and more PhDs pursue fewer academic positions. They are not only an integral part of universities’ research programs, but train many of the graduate and undergraduate students who work alongside them.

UAW Local 5810 formed in 2010 in order to secure better working conditions for Postdoc employees at the 10 campuses which make up the University of California. After lengthy bargaining with the University of California, the Union achieved a first-ever collective bargaining contract for Postdocs, which instituted minimum salaries and yearly salary increases. The contract also brought new benefits such as the right to file a complaint for alleged discrimination or sexual harassment through a formal grievance procedure.

Under Local 5810’s current contract with the University of California, new postdoctoral appointments receive at least the current NIH postdoctoral salary in their first year, and salary increases for each year of experience. The 2015 minimum salary scale for UC Postdocs is:

Appointment Step for Postdoctoral Scholar Experience Level	Minimum Salary / Stipend Rates Paid for Experience Level
0	\$42,840
1	\$44,556
2	\$46,344
3	\$48,192
4	\$50,112
5	\$52,116

Each of these salary levels is adjusted annually to match the NIH's Ruth L. Kirschstein National Research Service Awards (NRSA). The parties are currently negotiating for a successor to their first contract, which expires September 30, 2015.

The salaries of UC Postdocs provide a useful snapshot for analyzing the Department of Labor's proposed salary threshold. In July 2015, the average annual salary for a UC Postdoc was \$47,186.38. 44.7% of UC Postdocs, 2,502 individuals, earned a salary equal to, or within one dollar of, the contractual minimum salary rate for their experience, while 55.3% of UC Postdocs, 3,093 individuals, earned a salary above the minimum rate for their experience. 75.2% of UC Postdocs, 4,205 individuals, earned less than \$50,440, the Department's proposed overtime threshold, while 24.8% of UC Postdocs, 1,390 individuals, earned more than \$50,440. While precise information on the number of hours UC Postdocs work is not available, the average Postdoc in the United States works approximately 2650 hours a year, or 53 hours a week.¹

Current Overtime Laws Under the FLSA

The Fair Labor Standards Act requires that employees who work more than 40 hours per week be paid at a rate of one and half times their normal hourly rate for all hours worked over 40 hours. 29 U.S.C.A. § 207. The law also exempts from coverage "any employee employed in a bona fide executive, administrative, or professional capacity," often referred to as the "white collar" exemption. 29 U.S.C.A. § 213.

Implementation of the "white collar" exemption lies with the Department of Labor, which may issue regulations through the rulemaking process. The Department has updated these regulations on eight occasions since 1938, most recently in 2004. The Department maintains similar, but distinct, regulations for executive employees, administrative employees, and professional employees.

The current regulations, codified at 29 C.F.R. § 541, et. seq., apply a three-part test to determine whether an employee is a "bona fide professional":

- 1) The employee is paid a predetermined and fixed amount (the "Salary Basis Test"),
- 2) The amount of salary paid is not less than \$455 per week (the "Salary Level Test"), and
- 3) The employee's job duties primarily require "knowledge of an advanced type in a field of science or learning customarily acquired by a

¹ Stephan, P, How to exploit Postdocs. *BioScience* 63, 245-246 (2013) <http://bio-science.oxfordjournals.org/content/63/4/245.full#ref-6>

prolonged course of specialized intellectual instruction” (the “Duties Test”).

29 C.F.R. § 541.300. An employee is ineligible for overtime only if all three parts of the test are satisfied. The test is applied on an individual basis, not to a “typical” or “average” employee for the position.

The Duties Test is further defined in 29 C.F.R. § 541.301, titled “Learned Professionals.” “Work requiring advanced knowledge” is defined as “work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work.”

§ 541.301(b). The phrase “field of science or learning” includes “the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.” § 541.301(c). The phrase “customarily acquired by a prolonged course of specialized intellectual instruction” restricts the exemption “to professions where specialized academic training is a standard prerequisite for entrance into the profession.” § 541.301(d).

Application of Current Overtime Laws to Postdocs

Under the current regulations, all Postdocs in the UC system are denied the right to overtime because they receive a fixed salary, their salary exceeds \$455 per week (\$23,660 per year), and the work they perform satisfies the primary duties test. Specifically, Postdocs’ work is intellectual in character and requires constant discretion and judgment, is in the field of science and learning, and requires an advanced degree of either a PhD or MD.

However, that is not true in other cases: postdocs in the United States can and do qualify for overtime if their salary is low enough. Before Local 5810 formed in 2010, some UC Postdocs earned as little as \$17,000 per year, making them eligible for overtime protection. Further, anecdotal evidence suggests Postdocs at other U.S. Universities currently receive less than \$23,660 per year. Because of their low salary, those Postdocs are entitled to overtime.²

Finally, the FLSA and its overtime protections apply to employees of public Universities, including the members of Local 5810, because the law’s defini-

² Notably, the Department of Labor does not place the work of Postdocs in the same category as teaching, the practice of law, or the practice of medicine, which are ineligible for overtime in all circumstances.

tion of employee includes employees working for any public entity. 29 U.S.C.A. § 203(s)(1)(c).

Application of Proposed Rule to UC Postdocs

The Department of Labor's proposed rule raises the Salary Level Test for the white collar exemption from \$455 per week to the 40th percentile of earnings for full-time salaried worker (estimated to be \$970 per week or \$50,440 per year in 2016). As noted above, the University of California currently pays 4,205 Postdocs less than \$50,440. If the proposed rule became law today, these Postdocs would qualify for overtime protection, because they no longer earn the minimum salary required to qualify for the bona fide professional exemption.

The Proposed Rule is Appropriate as Applied to Postdocs

The Department of Labor seeks to set a salary threshold which "adequately distinguishes between employees who may meet the duties requirements of the [white collar] exemption and those who likely do not, without necessitating a return to the more detailed long duties test." (Proposed Rule, FR 38517). As applied to Postdocs at the University of California, the Department's proposed salary threshold of \$50,440 per year effectively accomplishes this goal. While most Postdocs meet the criteria of the primary duties test, many would not meet the criteria of the long duties test. Thus, the proposed salary threshold properly classifies most Postdocs as nonexempt, which matches the result the Long Duties Test would reach.

As the Department explained in this rulemaking, the proposed higher salary threshold "compensates for the absence of the long [duties] test, which would have allowed employers to claim the exemption at a lower salary level, but only if they could satisfy a more restrictive duties test." FR 38517 The Long Duties Test, eliminated in 2004, included the additional factor that "the employee must not devote more than 20 percent of his or her time to work that is not an essential part of his or her primary duties." That is particularly significant in the case of Postdocs.

Postdocs are highly trained individuals possessing a doctorate degree, but they also spend a portion of their working time performing nonexempt activities involving "routine mental, manual, mechanical or physical work." For many Postdocs, especially those in their first or second year of appointment as a Postdoc, these routine activities often encompass more than 10 hours, or 20%, of the employees working time per week.

To provide an understanding of the nonexempt tasks performed by Postdocs at the University of California, below is a list of the nonexempt duties Postdocs perform in the fields of Neuroscience, Cell Biology, and Physics:

Nonexempt duties of a Neuroscience Postdoc (~10 hrs/wk):

- Animal husbandry: inspecting the conditions of the animal holding facilities, cleaning the animal holding facilities, performing basic health checks on the animals;
- Preparation for Experiments: training the lab animals, running the MRI scanner;
- Lab maintenance: ordering supplies, backing up data, maintaining computer hardware and software, rewiring of research equipment;
- Administrative Tasks: Institutional Review Board compliance, Human Resources functions related to student-employees.

Nonexempt duties of a Stem Cell Biology Postdoc (~10 hrs/wk):

- Animal husbandry: changing cages of the animals, collecting DNA samples for genotyping;
- Maintaining cell lines: changing out the media (liquid or gel designed to support the growth of cells in petri dishes), selecting cells for passaging to a new petri dish;
- Lab maintenance: cleaning, dishwashing, equipment maintenance, making solutions and reagents, ordering lab materials.

Nonexempt duties of a Physics Postdoc (~10 hrs/wk):

- Maintaining Refrigeration and Alignment Of Lab Equipment: refilling liquid nitrogen and helium in Dewar flasks, replacing cryogenic tanks;
- Computer-Related Tasks: Installing and updating software systems; maintaining local data repositories, backing up data, maintaining access to the lab computer network, maintaining the equipment of the lab computer network;
- General Lab Maintenance: ordering tools, equipment, and lab supplies, maintaining chemical supplies, maintaining tools and equipment for shared use in the laboratory.

These duties involve routine mental, manual, mechanical, or physical work, do not typically require an advanced degree, and in general do not meet the criteria for exempt work.

While the Department of Labor has, on rare occasions, excluded an entire profession from overtime, even for employees who earn less than the salary threshold, that would be wholly inappropriate as applied to Postdocs. As the

Department recognizes, salary level is generally a good indicator of who Congress intended to exclude under the bona fide professional exemption. Congress never intended for this exemption to swallow the entire rule, as has happened over the past 40 years.

While Postdocs meet the primary duties test of the white collar exemption, their low pay indicates that their employers do not view or treat them as bona fide professionals, as Congress intended that term. In fact, numerous reports from the biomedical research community have studied the pay of Postdoctoral scholars and reached the conclusion that the proper compensation for the work performed by Postdocs is above \$50,000.³ Thus, the primary duties test alone is insufficient to determine whether a Postdoc is a bona fide professional.

Application of the now-defunct Long Duties Test to Postdocs provides a useful measuring stick to determine whether the Department's proposed salary threshold is proper for Postdocs. The results of the test, as shown above, show that many Postdocs devote more than 20% of their work to nonexempt activities. Based on this data, the Department's proposed salary threshold properly implements the Bona Fide professional exemption as applied to Postdocs.

Conclusion

UAW Local 5810, on behalf of the 6,000 Postdocs working for the University of California, strongly urges the Department of Labor to implement the higher salary threshold and provide overtime protections to thousands of overworked and underpaid Postdocs.

³ *The Postdoctoral Experience Revisited*, National Academy of Sciences, National Academy of Engineering, and Institute of Medicine (The National Academies Press, 2014); Pickett, C. L., Corb, B. W., Matthews, C. R., Sundquist, W. I. & Berg, J. M., *Toward A Sustainable Biomedical Research Enterprise: Finding Consensus And Implementing Recommendations*. Proceedings of the National Academy of Sciences (2015).