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VIA ELECTRONIC SUBMISSION

Mary Ziegler
Director, 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: Comments in Support of DOL's Notice of Proposed Rulemaking Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees under the Fair Labor Standards Act, RIN 1235-AA11.

Dear Ms. Ziegler:

New Faculty Majority: The National Coalition for Adjunct and Contingent Equity (NFM) and the NFM Foundation are pleased to provide public comment on the Notice of Proposed Rulemaking regarding the Department of Labor's (DOL) proposed rulemaking regarding the executive, administrative, professional (EAP) and related exemptions under the Fair Labor Standards Act (FLSA); RIN 1235-AA11 ("NPRM").

Background of Commentators

NFM and the NFM Foundation (NFM) are affiliated national non-profit associations whose mission is to improve the quality of higher education by improving the working conditions of the majority of its faculty. Currently, 75% (more than 1 million) faculty members teach "off the tenure track," that is, without secure access to the rights and responsibilities of faculty in tenured or tenure-track positions. NFM believes that this situation puts the quality of higher education, the integrity of college teaching, and the rights of non-tenure-track faculty at risk.

NFM membership is open to and includes faculty, administrators, students, parents, and any member of the public concerned with the well-documented relationship of faculty working conditions to student learning conditions.¹

Key Facts

In order to further contextualize our comments, we offer some key facts:

- Almost all faculty, whether officially full-time or "part-time," are classified as *exempt* employees.²
- Faculty are designated "learned professionals" under the provisions of the Act and are therefore included in the category of employee to whom the EAP exemptions apply.
- "Part-time" faculty earn approximately 60% less than comparable full-time tenure-track and tenured faculty when salaries are expressed on an hourly basis.³
- In a recent survey of adjunct faculty by the Faculty Forward Network, 40% of respondents reported working 40 hours or more per week in "part-time" positions. The effective hourly rate of pay reported by 83% of survey respondents, based on the number of hours they had to work in order to fulfill their responsibilities to their students, was less than \$15 per hour, in spite of the fact that their minimum qualification for teaching at the college level is a Master's degree. Of that 83%, 24% had an effective hourly rate of below \$10 per hour and 16% below \$7.25 per hour.
- In the most comprehensive survey yet, by the Coalition on the Academic Workforce, of faculty classified as "part-time," it was discovered that that annualized compensation for "part-time" contingent faculty was between \$31,300 and \$69,500 *less* than that for full-time workers in all occupations with identical educational attainment. This represents a salary differential of between 87 and 310 percent.

Comments and Suggestions:

¹ See especially The Delphi Project on the Changing Faculty and Student Success (www.thechangingfaculty.org). Also, note the following statement from the Association of American Colleges and Universities: "The continued increase in contingent faculty appointments is an "elephant in the room" for American higher education, threatening the future of scholarly community and putting at grave risk AAC&U's commitment to high-quality liberal education and inclusive excellence for all." (http://www.aacu.org/About/documents/strategicplan2013_17.pdf)

² "... FLSA-exempt employees (e.g. adjunct faculty in a university setting or a project-based professional) may work variable hours but do not track nor keep hours." <http://www.dol.gov/ebsa/pdf/tr12-02-0022.pdf>

³ Curtis, 2005, and Toutkoushian & Bellas, 2003, cited in Kezar & Sam, *Understanding the New Majority of Non-Tenure-Track Faculty in Higher Education: Demographics, Experiences, and Plans of Action*, ASHE: 2010.

1. We support the proposed revisions. The current salary floor threshold below which a worker cannot be called exempt is unacceptably low, and we support the proposal to raise it. The current threshold of \$455 per week is \$23,660 per year. This is so low that it allows employers to exclude workers earning less than the poverty level for a family of four from overtime protection. In practical terms, what this current salary threshold means is that workers classified as exempt may actually get paid little more than the minimum wage. Workers classified as exempt from overtime get paid nothing extra at all for their hours worked over 40 hours. An assistant retail or fast food manager who is paid \$25,000 annually and works an average of 60 hours per week would have an effective hourly rate of pay that is just above \$8.00. This is unacceptable and the proposed changes are a welcome remedy.

2. At the same time, we note that the proposed revisions do not apply to teachers, especially including college and university faculty on temporary, "part-time," and precarious appointments, who now constitute the majority of faculty in higher education and average upwards of 70% at community colleges in particular. This exclusion will continue to create undue hardship, including susceptibility to wage theft, for a category of worker whose employment conditions do not conform with the image of privilege and power that may have motivated the original imposition of the exemption. We therefore call on the Department to seek an additional remedy that will extend the protections of the FLSA to contingent faculty.

College faculty on temporary, "part-time," and contingent appointments are properly classified as exempt because of the nature of the work that they do. However, the number of hours that contingent faculty, especially those who are officially considered "part-time" must work in order to fulfill their responsibilities is far greater than either their designation or their salaries suggest, effectively pushing down their hourly rate of pay. In a recent survey of adjunct faculty by the Faculty Forward Network, for example, 40% of respondents reported working 40 hours or more per week in "part-time" positions. The effective hourly rate of pay reported by 83% of survey respondents, based on the number of hours they had to work in order to fulfill their responsibilities to their students, was less than \$15 per hour, in spite of the fact that the minimum qualification for teaching at the college level is a Master's degree. Of that 83%, 24% had an effective hourly rate of below \$10 per hour and 16% below \$7.25 per hour.

Students who pay the same tuition for classes taught by contingent, especially "part-time," faculty as for classes taught by full-time and tenure-line professors rightfully expect to receive the same level of support from their instructors regardless of employment status. Thus, contingent faculty are implicitly expected to work more hours than they are paid for to ensure that students receive the quantity and quality of support for which they are paying ever-increasing tuition. In order to meet this expectation, most contingent and especially "part-time" faculty must work more hours than they are paid for.

At the same time, many colleges and universities have claimed that it is "reasonable" for "part-time" faculty to work 29 hours or fewer per week (in order to avoid giving these faculty access to healthcare under the Employer Mandate of the Affordable Care Act). **The resulting situation is inherently contradictory: faculty have a professional obligation to provide a higher level of service, quantitatively and qualitatively, than they are allowed to be compensated for, even as they are denied access to overtime compensation and to protection from wage theft.**

The significance of this situation is reflected in another report, this one by the Coalition on the Academic Workforce, which reported that annualized compensation for "part-time" contingent faculty was between \$31,300 and \$69,500 *less* than that for full-time workers in all occupations and with identical educational attainment. This represents a salary differential of between 87 and 310 percent.

Notably, adjunct faculty members' exempt status is not differentiated from tenure-track faculty members' exempt status. All faculty regardless of time or tenure status are required to engage in the same kind of out-of-class professional development and student engagement that is required to support student learning.

Other professions which are similarly designated as exempt yet which allow for part-time hourly designation, such as medicine and law, seem to presume that practitioners will be paid at an hourly rate that is 100% pro-rated to full-time work. In contrast, adjunct faculty earn approximately 60% less than comparable full-time tenure-track and tenured faculty when salaries are expressed on an hourly basis.⁴ Thus the exemption from eligibility for the salary threshold is inherently unfair to faculty on contingent, "part-time" appointments, who are expected to do the same work as full-time colleagues without access to compensation for that work.

The assertions of some full-time faculty and administrators that the extreme pay disparity between adjunct and full-time tenure track faculty is justified by a purported difference in the type and amount of work required by full-time faculty is not supported, first because of the aforementioned identical responsibilities of faculty toward students and the common designation of adjunct and tenure-line faculty as exempt.

Assertions of different responsibilities are also not supported because adjunct faculty regularly carry out these additional types and amounts of work (service and research) without official recognition of that work. It is understood within the culture of higher education that adjuncts are expected to perform these additional types and amounts of work (service and research) in order to be judged as effectively carrying out their responsibilities. For example, The Modern Language Association, which is the disciplinary organization that governs teaching and scholarship in English and Foreign Languages, invokes this expectation as part of its own argument for a 100% pro rata salary:

Recognizing that many variables enter into determinations of salary, the MLA believes that part-time faculty members should be compensated pro rata to salaries for full-time faculty members performing similar duties, whether by a per-course, per-credit-hour, or full-time-equivalent percentage. The following factors should be considered in determining compensation increases above annual minimums, as reflected in an appropriate salary schedule:

⁴ Curtis, 2005, and Toutkoushian & Bellas, 2003, cited in Kezar & Sam, *Understanding the New Majority of Non-Tenure-Track Faculty in Higher Education: Demographics, Experiences, and Plans of Action*, ASHE: 2010.

- Instructional workload: number of contact hours, class size, advising, and method for evaluating student work and assigning grades (e.g., labor-intensive reading and commenting on student papers)
- Ancillary duties, including but not limited to: recruitment; supervisory role and responsibilities; research, publication, other forms of professional development, and curriculum development⁵

Within academic culture, adjuncts are expected to volunteer the same services that tenure-track faculty provide, to the extent to which adjuncts are willing to be exploited or to the extent to which adjuncts are compelled by economic and personal circumstances to be exploited.

The Teacher Exemption: Overtaken by History

Contingent faculty, like most faculty, are denied access to essential protections of the FLSA because they fall under the professional exemption to the overtime pay requirements of the Act. Faculty have been determined to be "learned professionals" under the provisions of the Act. This means that their primary duty is to perform work

requiring "advanced knowledge," defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment. Such "advanced knowledge" therefore involves more than routine mental, mechanical, or physical work. Additionally, the advanced knowledge must be in a field of science or learning and be customarily acquired by a prolonged course of specialized intellectual instruction. Common fields of science or learning include medicine, law, theology, accounting, actuarial computation, teaching, engineering, architecture, pharmacy, and various types of chemical, physical and biological sciences.⁶

It is important to note that the rationale underlying the professional exemption seems to be predicated on assumptions that are no longer valid, if they ever were. In a 1993 article in the American University Law Review arguing for long overdue reform of the FLSA, Peter D. DeChiara notes that "Congress never made explicit its reasons for exempting managerial and professional employees when it enacted the FLSA in 1938" and speculates that the Act's framers may have assumed that such employees were inherently "privileged" both in terms of compensation and access to "bargaining power."⁷

It is clear that such assumptions continue to be reflected in popular misconceptions about the numbers and working conditions of college faculty. The stereotype of the overpaid and underworked professor still has sway, and even those who should know better are quick to assume that the rising cost of higher education must be attributable to high faculty salaries.⁸ Instead, over decades, the working conditions of the academic workforce have relentlessly deteriorated into brutal utilitarianism, in which highly trained

⁵ http://www.mla.org/mla_recommendation_course

⁶ http://www.nixonpeabody.com/Professional_overtime_exemption_learned_professionals_and-creative_professionals

⁷ <http://www.aulawreview.org/pdfs/43/43-1/dechiara.pdf>

⁸ <https://www.insidehighered.com/quicktakes/2012/01/19/faculty-groups-try-educate-biden-salaries>

and experienced college teachers and researchers are hired and fired with little attention to the institution's obligations to students or the profession, much less to the individuals themselves. Furthermore, contingent faculty often face significant obstacles to organizing and to effective collective bargaining, due sometimes to explicitly restrictive laws and sometimes to a culture of intimidation creating *de facto* restrictions on their ability to organize and/or bargain effectively.

DeChiara goes on to argue that regardless of the framers' intentions, economic and political developments, which include tremendous growth in the number of professional employees as well as a reduction in their access to collective bargaining since 1938, clearly point to the need at least for a re-examination of the managerial/professional exemption, and indeed for extending stronger protections to this class of employee:

As the U.S. economy has grown more competitive, American employers have responded by laying off workers while demanding more effort from those they continue to employ. In this move to create leaner, more cost-effective operations, employers have not spared their managerial and professional employees. As a result, significant numbers of managers and professionals go jobless while those with jobs strain under employer demands for excessive hours. These twin problems of unemployment and overwork for the managerial-professional class cannot be easily overlooked; while managerial and professional employees constituted a slim portion of the labor force when Congress enacted the FLSA, the last fifty [now seventy-seven] years have seen their ranks swell to the point where they now constitute over one-quarter of the entire paid workforce.

In short, when this exemption was devised, there was an expectation that teachers would always receive professional wages commensurate with the educational preparation, responsibility, and workload that this important occupation requires. The reality has been dramatically and discouragingly different. The proposed rules will do much to improve working conditions for countless numbers of our non-academic colleagues. However, until college faculty on contingent, and especially "part-time," precarious appointments are also deemed eligible for the full protection of the FLSA, this remedy will not be complete.