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What is the new rule?

The Department of Labor’s (DOL) final overtime rule updates the salary level required for the executive, administrative and professional (“white collar”) exemption to ensure that the Fair Labor Standards Act (FLSA) intended overtime protections are fully implemented. The new rule does not make any changes to the duties test for the executive, administrative, or professional exemptions or to the test for FLSA coverage. Nonetheless, the new, significantly higher salary requirements are cause for all employers, including non-profit organizations, like churches, to re-examine their classifications of workers currently classified as administrative, executive, or professional exempt employees (aka “white collar” workers), as well as employees currently classified as exempt from FLSA coverage. If you have employees who are misclassified, this may be the perfect time to get those issues fixed.

The new salary threshold increases to $684 per week, or $35,568 annually, effective January 1, 2020. Currently, the salary threshold is only $23,660 ($455/week).

What is the FLSA?

The FLSA is a federal law that governs minimum wage and overtime pay. Unless an exemption to the FLSA applies, employers must comply with the law by:
- Pay at least the federal minimum wage or state minimum wage, if higher. Currently, Florida’s minimum wage is $8.46 per hour, higher than the federal minimum.
- Pay overtime after someone physically works 40 hours in one week.
- Pay overtime at a rate of at least one and one-half times an employee’s regular rate.

What does this new law mean?

The change to the FLSA law means that all salaried, exempt positions must earn a minimum of $684 per week or $35,568 annually in order to remain exempt from overtime. If the annual salary is less than $684 per week, the position must be considered nonexempt and is eligible for overtime.

What Should Church Employers Do?

Prior to January 1, 2020, employers should inventory their employment classifications and pay grades to gauge how the new rule will affect their budgets. Many churches may wish to make strategic changes to their compensation structure to alleviate the impact of the new rule. Consider the following:
- In the case of exempt employees already being paid close to the $684/week minimum, consider raising their salary. This is particularly appropriate for employees whose duties regularly require them to work more than 40 hours per week. Before doing this take the opportunity to review the employee’s duties to make sure they clearly meet the test for an exemption under the FLSA.
- In the case of exempt employees who are currently paid significantly less than $684/week and who normally do not work more than 40 hours per week (i.e., do not work any or much overtime), consider keeping them at their current salary level. Remember, however, that since the employee will no longer be exempt, you must track their hours of work and pay 1 ½ times their regular rate (weekly salary ÷ 40 hours) for all hours worked over 40 in any given workweek. With this approach you must have the employee record all of their hours worked each week. You may also find you need to manage overtime carefully to address budgetary consideration. Require non-exempt employees to seek advance approval to work overtime. Use the disciplinary process to ensure compliance. Remember that you have to pay for all hours worked, whether the hours were approved or not.
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- In the case where paying an employee $684/week is not an option, even though the employer depends upon the employee to regularly work more than 40 hours to fulfill an essential function, there are other strategies to consider, to manage the potential for overtime expenses. For example, consider restructuring the position(s) in a way that reduces the need for overtime work, including by using two part-time employees instead of one full-time employee.

Take the Time to Examine Your Current Job Classifications and keep the following in mind:

What is the difference between exempt and nonexempt?

These are job classifications: all positions are classified as either "Exempt" or "Nonexempt." Classifications should be clearly stated in each job description.

Is “exempt” the same as “salaried”?  
No.  Salary is a pay basis.  Exempt is a job classification based upon salary and duties.

Hourly

Hourly employees are non-exempt and must be paid for overtime.  Their actual hours worked must be tracked and recorded.

Salary Nonexempt

It is alright to pay an employee whose duties do not meet any test for exemption (non-exempt) a salary.  However, that does not mean you do not have to pay overtime.  Nonexempt employees are expected to work the normal workday and workweek.  Because salaried non-exempt employees must be paid overtime for all hours worked in excess of 40 in a workweek, the employer must maintain a true and accurate record of all hours worked.

Salary Exempt

To be exempt from overtime requirements, and employee must not only be paid at least $684/week but also meet all of the elements of following tests:

**Executive Exemption:** The employee must be compensated on a salary basis at a rate not less than $684 per week.  The employee’s primary duty must be managing a customarily recognized department or subdivision of the enterprise.  The employee must customarily and regularly direct the work of at least two or more full-time employees or their equivalent.  The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees must be given particular weight.

**Administrative Exemption:** The employee must be compensated on a salary or fee basis at a rate not less than $684 per week.  The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or employer’s customers.  The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
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**Professional Exemption:** The employee must be compensated on a salary or fee basis at a rate not less than $684 per week. The employee’s primary duty must be the performance of work requiring advanced knowledge defined as work that is predominately intellectual in character and that includes work requiring the consistent exercise of discretion and judgment. The advanced knowledge must be in a field of science or learning. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

**Teachers’ Exemption:** Teachers are exempt from overtime 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. Exempt teachers include academic teachers, kindergarten or nursery school teachers, and music teachers. The salary and salary basis requirements do not apply to bona fide teachers. **N.b.,** the teachers’ exemption does not apply to employees engaged to care for the physical needs of children, such as daycare personnel.

**Creative Professional Exemption:** To qualify for the creative professional employee exemption, all of the following must be met:

- The employee must be compensated on salary or fee basis (as defined in the regulations) at a rate not less than $684 per week.
- The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.
- Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, writers, novelists, and others as set forth in the regulations. **Caution:** While the duties tests for exemption seem fairly simple, many employers run afoul of the FLSA by straining to fit a job into a category. If there is any doubt whether a position clearly meets the test for exemption, the church should consider obtaining professional advice.

Are All Positions Covered Under the FLSA?

**Some Positions May Not Be Covered by the FLSA**

- Although there is no express exception from FLSA coverage under the Act, case law has construed the FLSA so that some non-profit organizations or some individual employees who serve certain functions within non-profit organizations are not covered by the overtime or other requirements under the FLSA.
  - **Enterprise Coverage:** Typically churches are not deemed to be covered enterprises under the FLSA; however, if a church generates $500,000 or more as the result of its business activities (excluding charitable donations), it is a covered “enterprise,” and all of its employees not covered by another exception must be paid overtime under the FLSA or meet the FLSA requirements for an exemption. **Note: even if the church is not a covered “enterprise,” that is not the end of the analysis, because an employee may be individually covered as the result of the employee’s actual job duties.**
    - Certain types of entities or activities automatically trigger “enterprise coverage;”
      - Hospitals
      - Schools and preschools
      - Providing medical or nursing care for residents
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- **Individual Coverage:** An employee of a church will be covered by the overtime provisions of the FLSA if the employee engages in “interstate commerce” on a “regular and recurrent basis.” Engaging in interstate commerce includes making or receiving interstate telephone calls, shipping materials to or ordering materials from out-of-state, purchasing goods from interstate retailers, and traveling or transporting others across state lines.

- **In other words, exceptions to coverage under the FLSA are exceedingly rare, and the safest course of action is to assume that all non-ministerial employees of a church are covered by the FLSA.** In practical terms, exceptions to coverage are effectively limited to employees whose job functions involve carrying out religious or charitable functions of the church and whose individual duties do not involve engaging in interstate commerce.
  
  - By way of rare example, back in 2005, and based upon the facts and circumstances that existed at the time, the Middle District Court held that the houseparents at the Florida United Methodist Children’s Home, whose duties essentially consist of acting *in loco parentis* for the residents of a FUMCH cottage, were not covered by the FLSA, because FUMCH is a religious and charitable organization that did not meet the test for “enterprise coverage” and because the duties of the houseparents did not require regular and recurrent use of interstate phones or mail or require purchasing goods for a retailer or traveling across state lines.

- In summary, coverage determinations (whether enterprise or individual) are fact-intensive inquiries informed by esoteric case law, and coverage may be triggered by relatively incidental use of the phones, mails, or other avenues of interstate commerce. Accordingly, if you have any question as to whether your church or one of your employees is exempt from coverage or whether your church or one of its employees continues to be exempt from coverage, you should consult a legal professional.

- **The Ministerial Exception**

  - Although there is not express exemption from FLSA coverage for ministerial employees, a body of case law has been developed under the First Amendment’s separation of church and state provisions that bars a secular court of government agency from interfering with a church’s employment decisions regarding its “ministerial” employees.

  - The “ministerial” exception applies not only to ordained clergy but also to lay employees whose job duties are “ministerial” in nature. Under the case law, the “ministerial” exception has been held to apply to any employee who leads a religious organization, conducts worship services or important religious ceremonies or rituals, serves as a messenger or teacher of the church’s faith, or whose function is inextricably linked to carrying out a mission or ministry of the church.

  - Examples of employees held by various courts to be covered by the “ministerial” exception include:
    
    - Ordained Clergy
    - Choir Director/Director Music Ministry
    - Lay Teacher in a religious school
    - Church Communications Manager
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- Principal of church school
- Hospital Chaplain
- Youth Director

The courts consider the application of the “ministerial” exception on a fact-intensive, case-by-case basis, so there is no guarantee that a court in your jurisdiction will reach the same conclusion as a court in another jurisdiction. However, by analogy with positions previously deemed “ministerial,” it is likely a court would find that the exception also applies to directors of all church ministries, such as Director of Children’s and Families Ministries, Director of Outreach Ministries, and the like.

The types of positions that would not be deemed “ministerial” include positions whose primary functions are administrative, support, or secular in nature, such as: Finance Director, Office Manager, Daycare worker, Secretary, Director of Operations, Director of Facilities/Maintenance.