Does FLSA Apply to My Ministry?

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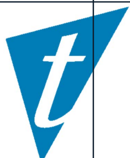

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The Fair Labor Standards Act ("FLSA") was originally passed in response to abuse of workers in the Industrial Revolution. It was intended to make sure that workers got paid for overtime and got paid a living wage, and that children were protected. FLSA sets out provisions governing equal pay, minimum wage, overtime, and record-keeping requirements for certain employers. Essentially, religious organizations may have to worry about FLSA under two conditions: (1) they are considered an "enterprise" under the Act; or (2) their "employees" are subject to FLSA's protections.[1] This memo provides a general overview of the special issues facing religious employers in the context of these two inquiries. Ultimately, whether an employer is subject to FLSA, or whether an employee is included, will depend on the unique factual circumstances of each case. This memo recommends that an individualized assessment of each employer and job description be conducted to ensure a legally defensible position.

I. Does FLSA Apply to Your Ministry Overall Because It Is an Enterprise?

A. Should You Want FLSA to Apply?

FLSA was passed for the protection of workers, and most employees of religious organizations would probably expect to get paid minimum wage and be paid for overtime. When does this become an issue? Sometimes, this may be an issue when there is a program like an internship with a small stipend. The person working is receiving less than minimum wage, but also receives something else of value. A situation like this must be analyzed carefully, and may be better set up as a volunteer position.

More often, workers being underpaid becomes an issue for organizations like missions, or in church mission projects, where even lower level ministry workers may undertake long trips and time-consuming projects. They have a vision and calling to do these projects, but the mission cannot afford to pay them overtime. Also, many in ministry are annoyed at the idea of having to track their hours and clock in and out. While not highly paid, they think of themselves as professionals.

B. Is Your Ministry an Enterprise?

FLSA covers an "enterprise engaged in commerce or in the production of goods for commerce"[2] which, as is relevant to religious organizations, is defined as an enterprise that:

> has employees **engaged in commerce** or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; **and** is an enterprise whose annual gross volume of

[1] *See, e.g.*, U.S. Dep't of Labor, *Overtime Final Rule and the Non-Profit Sector*, available at: https://www.dol.gov/sites/default/files/overtime-nonprofit.pdf; *see also Tony and Susan Alamo Foundation v. Sec. of Labor*, 471 U.S. 290, 295 (1985).

[2] 29 U.S.C. § 203(s).

> sales made or business done is **not less than $500,000** (exclusive of excise taxes at the retail level that are separately stated);
>
> **or**
>
> is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit) . . ..[3]

There is no per se exemption from the Act for churches or religious organizations, but to the extent that a church or religious organization does not engage in commerce as defined by the Act, it would not be subject to the Act as a whole.[4] This aspect of the Act is key for religious organizations that do not engage in ordinary commercial activity as defined by the Act.[5] Also, if the organization has business revenue of less than $500,000, FLSA may not apply if the organization is not one of the institutions defined in the second paragraph. Charitable donations do not count toward this total—this is looking at revenue from commercial activities of the organization.

While some ministries may be sufficiently engaged in business activities to be covered as an enterprise, for most organizations, the key inquiry will be whether their employees are covered for the purposes of the Act. If the organization as a whole is not "an enterprise," you must still look at individuals.

II. Is the Employee Covered?

Even if an organization is not subject to FLSA as a whole under enterprise coverage, it may still have to worry about FLSA's mandates if it has "employees" who are protected by the Act. The general test for whether an employee is covered individually by FLSA is whether that employee is engaged in commerce or in the production of goods for commerce.[6] Because of the expansive definition of "commerce" by the Department of Labor, many employees will be covered under FLSA. Even interstate phone calls can meet the definition of commerce, so unless the employee acts purely within the state, FLSA likely applies.

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[3] 29 U.S.C. § 203(s)(1)(A), (B) (emphasis added).

[4] William W. Basset, W. Cole Durham, Jr., & Robert T. Smith, *Religious Organizations and the Law*, Vol. 2 § 9:34 (2013) ("Since churches themselves are rarely involved in commerce, they are, to that extent, not covered by the Act.").

[5] *See, e.g.*, *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954).

[6] *See, e.g.*, 29 U.S.C. § 206(a).

Even if the employee is generally covered, there are many exceptions to the general rule. Section 213 of the Act provides for a wide variety of exemptions from the minimum wage and maximum hour requirements of the Act. Employees who are exempt may be paid by a salary rather than on an hourly basis, and do not have to track hours. In contrast, non-exempt employees must be paid minimum wage and overtime at time-and-a-half the normal rate for any hours worked over 40 per week. This is true for non-exempt employees whether they are on salary or paid hourly

A. Executive, Administrative, or Professional Exemptions

Most importantly for religious organizations, any employee employed in a bona fide executive,[7] administrative,[8] or professional capacity[9] is exempt from FLSA's minimum wage and maximum hour requirements. In order to qualify for one of these exemptions, an employee must both meet a "duties test" and be paid above a set salary threshold. There are three main "white-collar" exemptions: (1) executive; (2) administrative; and (3) professional.[10]

1. Executive Exemption

The executive exemption is primarily tailored toward the management level employees in the organization. Specifically, in addition to being compensated on a salary basis at the required rate, the employee must meet the following duties test:[11]

- The employee's primary duty must be managing the enterprise, or 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 other full-time employees or their equivalent; and
- 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.

When determining whether an employee meets the executive exemption, FLSA's regulations provide further guidance. According to these regulations, "management" includes activities such as interviewing, selecting, and training employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; disciplining employees; planning the work; and other similar activities.[12]

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[7] 29 CFR § 541.100.
[8] 29 CFR § 541.200.
[9] 29 CFR § 541.300.
[10] Other exemptions could apply as well.
[11] 29 CFR § 541.100.
[12] 29 CFR § 541.102.

2. Administrative Exemption

Contrary to how it appears, the administrative exemption does not exempt all "administrative assistants" or other similar workers who perform clerical, secretarial, or routine work. Instead, the exemption is focused more on employees who are working in slightly higher-level positions with more responsibility. The duties test for the administrative exemption is as follows:

- 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 the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.[13]

FLSA's regulations provide additional guidance. For example, work "directly related to management or general business operations" includes work in areas such as tax, finance, accounting, purchasing, procurement, advertising, marketing, human resources, employee benefits, public relations, computer network, and similar activities, just to name a few.[14] To determine whether an employee exercises "discretion and independent judgment" in their position, the following factors are important, including whether the employee:

- has authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- performs work that affects business operations to a substantial degree;
- has authority to commit the employer in matters that have significant financial impact;
- has authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- provides consultation or expert advice to management;
- is involved in planning long- or short-term business objectives;
- investigates and resolves matters of significance on behalf of management; or
- represents the company in handling complaints, arbitrating disputes or resolving grievances.[15]

Despite requiring independent judgment, simply because an employee's decisions may ultimately be reviewed at a higher level does not necessarily disqualify the person from this exemption.[16]

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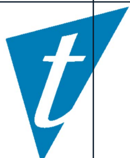
[13] 29 CFR § 541.200.
[14] 29 CFR § 541.201(b).
[15] 29 CFR § 541.202(b).
[16] 29 CFR § 541.202(c).



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3. Professional Exemption

The professional exemption exempts those employees who work in a position that requires advance studies. But it does not simply apply to any employee who has a college degree. It is much more limited. For example, doctors, teachers, and lawyers are the typical positions that fall under the professional exemption. Such an employee must meet the following tests:

- The employee's primary duty must be the performance of 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;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.[17]

This exemption focuses on traditional professions of law, medicine, theology, accounting, engineering, architecture, teaching, and other similar occupations that have a recognized professional status—as distinguished from a skilled trade, which may require advanced knowledge, but is not in a field of science or learning.

The Department of Labor also recognizes a subspecialty in this exemption for creative professionals. For this exemption, rather than advance degrees, 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.[18]

In addition to the executive, administrative, and professional exemptions, there are exemptions that may include skilled computer employees[19] and can include outside sales employees.[20] These are the standard white collar exemptions.

In addition to meeting the duties test, there are minimum salary requirements for white-collar workers to be exempt from FLSA. Up until recently, that amount was fairly low, as little as $23,660 per year or $455 per week.

In 2016, the Department of Labor enacted a rule that was set to raise the salary threshold for determining whether an employee was exempt from FLSA to $913 per week or $47,476 per year.[21] The rule would have also automatically increased this threshold every three years. Practically, this would

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[17] 29 CFR §§ 541.300, 541.301.
[18] 29 CFR § 541.302.
[19] 29 CFR § 541.400.
[20] 29 CFR § 541.500.
[21] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32391 (May 23, 2016) (to be codified at 29 CFR Part 541), available at https://www.gpo.gov/fdsys/pkg/FR-2016-05-23/pdf/2016-11754.pdf.

have made anyone earning a salary less than the threshold eligible for overtime, regardless of whether they met the duties tests for the particular exemptions explained above.

In November of 2016, however, a federal judge in Texas granted an emergency injunction blocking the rule from taking effect. Judge Amos Louis Mazzant—an Obama appointee—concluded that the DOL had exceeded "its delegated authority and ignored Congress's intent by raising the minimum salary level such that it supplants the duties test."[22] Congress, the Court explained, intended the executive, administrative, and professional exemptions to depend on an employee's duties rather than an employee's salary. The fact that the salary thresholds in the new rule were so high made the duties test—the only actual requirement in the statute for whether an employee is exempt from FLSA—essentially irrelevant and created what the Court called "a de facto salary-only test." If Congress wanted this to be the case, it would be Congress's prerogative to do so, not the Department's.

The preliminary injunction ruling is currently on appeal to the United States Court of Appeals for the Fifth Circuit. If the appellate court upholds the ruling, the case will continue to be heard on the merits for a final ruling at the district court level. If overturned, the rule could go into effect. Current consensus appears to be that the rule is unlikely to be implemented in its current form. Not only are the legal battles ongoing, but the new Presidential administration may have an effect on the rule.

That being said, ministries should proceed with caution. It is always possible that the rule could still be implemented, and that it will be implemented retroactively to December 1, 2016. While some organizations have decided simply to go forward as if the rule is in effect and implement any changes they decided to make in response, others have held off and maintained a status quo. For organizations in the latter category, one suggestion to avoid uncertainty, in the event the rule is put into effect retroactively, is to have employees who may be exempt under the old rule, but not the new rule, track their hours. Then, the employer will have a reasonable basis for providing any backpay due, in the event such a circumstance arises.

B. Highly Compensated Employees

A highly-compensated-employee exemption exists for highly-paid employees who meet part but not all of the "duties" test. A highly-compensated employee earns $134,004 or more, performs office or non-manual work, and performs at least one of the exempt duties or responsibilities, or is an exempt executive, administrative or professional employee.[23]

[22] *Nevada v. U.S. Department of Labor,* No. 4:16-CV-00731 (E.D. Tex. Nov. 22, 2016).
[23] *See id.* (salary threshold effective December 1, 2016); *see also* 29 CFR § 514.601.

C. Employees Working in Foreign Countries

Another exemption that may be particularly applicable to mission organizations is for employees who work in foreign countries. An employee "whose services during the workweek are performed in a workplace within a foreign country"—for example, an overseas missionary—is not subject to the minimum wage or maximum hour (and thus the overtime provision) requirements of FLSA.[24] Some territories under United States jurisdiction—such as Puerto Rico, Guam, and others, are not included in the foreign country exception, while others are, so a careful review of this provision is important if a U.S. territory is involved. For U.S.-based mission organizations sending its missionary employees to other countries, this exemption is very important because it applies regardless of the level of salary paid.

D. Volunteers

As a preliminary matter, FLSA does not apply to volunteers. In determining whether an individual is a bona fide volunteer, courts will look not just at whether the individual is receiving a cash wage but at whether he or she is receiving other benefits that may amount to being paid.[25] This includes unpaid interns—it is suggested that interns either be paid at least minimum wage or be completely volunteer. Nonprofits have an easier time justifying unpaid interns to the IRS than do for-profit organizations, because nonprofits historically rely on volunteer labor.

E. Camps

There is an exemption from FLSA for employees employed by "an amusement or recreational establishment," if it does not operate more than seven months a year and meets certain financial requirements.[26] This must be analyzed carefully.

F. Ministerial Exception

For non-volunteers of a church or religious organization subject to the Act, several circuit courts of appeal have recognized a "ministerial exception" to compliance with FLSA, although the rationale behind this exception differs. The Tenth Circuit does not appear to have specifically addressed whether such an exception is recognized in Colorado, but the reasoning from sister circuits is persuasive and may potentially be invoked to justify non-compliance under certain circumstances. The "ministerial exception" analysis is consistent with the body of law that does not allow the courts to interfere in an organization's relationship with a minister.

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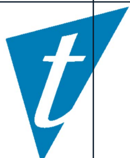
[24] 29 U.S.C. § 213(f) (Employment in foreign countries and certain United States territories).
[25] *Alamo Found.*, 471 U.S. at 301-03.
[26] 29 U.S.C. § 213(a)(3).



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The Fourth Circuit Court of Appeals has specifically recognized a ministerial exception to FLSA, and has held that individuals who fall within this exception are not "employees" under the Act.[27] The court explained that the exception derives from the congressional debate about FLSA and the guidelines issued by the Labor Department's Wage and Hour Administrator.[28] The guidelines specify that "Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be 'employees.'"[29]

The Seventh Circuit Court of Appeals, which has adopted a "presumption" that clerical personnel are not covered by FLSA, has taken a slightly different approach. In *Schleicher v. Salvation Army*, the court held that two ministers were exempt from FLSA's requirements, despite the fact that the religious organization was engaged in ordinary commercial activities by virtue of operating thrift shops.[30] The presumption, the court noted, could be rebutted by proof that, for example, the minister's function is entirely, rather than incidentally, commercial.[31] This presumption avoided the potential Establishment Clause entanglement problems inherent in forcing clerical personnel to be subject to FLSA.[32]

Though not dealing with FLSA directly, the Ninth Circuit Court of Appeals has case law applying the ministerial exception to dismiss a state law wage claim brought by a seminarian who challenged the sufficiency of his wages during his seminary training to become a Roman Catholic priest.[33] In that case, the court dismissed the suit after finding that the employee was a minister for the purpose of the exception; no further inquiry was necessary.[34]

So to the extent the employees are in a ministerial role, they may not be subject to FLSA because of the "ministerial exception." To apply this potential exception, religious organizations will need to define the job description carefully, then analyze it to see if the employee truly is "ministerial."

G. Clergy and Religious Worker "Exemption"

While there is no actual statutory or regulatory "exemption" from FLSA for clergy and religious workers, guidance from the Department of Labor's Wage and Hour Division (WHD)—which oversees FLSA—affirms the position that workers in these positions are not subject to FLSA's provisions. Given the historic role and function of religious workers, this makes sense.

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[27] *See, e.g.*, *Shaliehsabou v. Hebrew Home of Greater Washington, Inc.*, 363 F.3d 299 (4th Cir. 2004).
[28] *Id.* at 305.
[29] *Id.* (quoting *Field Operations Handbook*, Wage and Hour Division, U.S. Dep't of Labor, § 10b03 (1967)).
[30] 518 F.3d 472 (7th Cir. 2008).
[31] *Id.* at 478.
[32] *See id.* at 474, 478.
[33] *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010).
[34] *Id.* at 1293.

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In the latest edition of the WHD's "Field Operations Handbook," an operations manual that provides WHD investigators and staff with guidance for enforcing FLSA, the DOL notes as follows:

> Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be "employees."[35]

With the new DOL overtime rules possibly disqualifying many more workers from the classic professional exemptions, there is an increased concern among ministries in particular that their ministers and other employees will be forced to be paid an increased amount that the ministry cannot bear. This position from the DOL is a strong argument that these workers are not covered.

The last time the DOL raised the salary requirements for the white collar exemptions in 2004, it prepared an economic report that further asserted the position that "clergy and religious workers . . . are not covered by the FLSA . . . ."[36] In addition, the following information was included in the report:[37]

- "Clergy and Religious" were listed in a table entitled "Workers Exempt from the FLSA's Overtime Provisions";
- "[T]here are some workers, such as . . . clergy, who are statutorily exempt or whose exempt status is not affected by the increased salary requirement in the final rule.";
- When discussing the estimated number of workers covered by FLSA, the report notes, "[The Department excluded the 14.9 million workers not covered by the FLSA, such as the self-employed and unpaid volunteers . . ., and the clergy and religious workers . . . .";
- Clergy and Religious Workers are listed in another table entitled "Occupations Exempt from the FLSA's Overtime Provisions" and the WHD Field Operations Handbook, Section 10b03 is cited as the source for this exemption.

While there is a strong argument that clergy and religious workers are not subject to FLSA, as previously noted, the law itself and its accompanying regulations do not specifically provide for such an exemption. The guidance from the DOL is subject to change, or reinterpretation by a different administration. Accordingly, ministries should carefully consider how to address these situations on a case-by-case basis and should continually reevaluate the compensation structure as guidance on this issue continues to be developed.

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[35] *Field Operations Handbook*, Wage and Hour Division, U.S. Dep't of Labor, § 10b03(b) (2016).
[36] Economic Report: Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule, 69 Fed. Reg. 22191 (April 23, 2004), available at https://www.dol.gov/whd/overtime/econreport.pdf.
[37] *See id.*

III. What if FLSA Applies?

If an organization or its employees are covered by FLSA's requirements, several rules apply.

A. Minimum Wage

If FLSA applies, the employee(s) will have to be paid at least the federal minimum wage, which is currently $7.25 per hour. This is the minimum. There may be a state law that requires the minimum wage to be higher and that law may apply on top of the FLSA requirements. For example, in Colorado, if an employer is subject to FLSA, it is also subject to the Colorado minimum wage, which is currently $9.30 per hour. A careful review of the organization's jurisdiction is recommended to ensure compliance with all minimum wage laws.

B. Maximum Hour Requirement or Overtime

Next, if FLSA applies, employees are expected to work no more than 40 hours per week. If their work exceeds 40 hours per week, they must be paid a wage at one-and-a-half times their normal wage for those hours over 40. In other words, unless the employer can show they are exempt, they are entitled to overtime.

C. Record Keeping Requirements

FLSA also requires that covered employers keep certain records for its non-exempt workers. These records include certain identifying information about the employee and about the hours worked and wages earned. The information must be accurate and can be fairly detailed. The following items are a listing of the basic records an employer must maintain:

- Employee's full name and social security number;
- Address, including zip code;
- Birth date, if younger than 19;
- Sex and occupation;
- Time and day of week when employee's workweek begins;
- Hours worked each day;
- Total hours worked each workweek;
- Basis on which employee's wages are paid (for example, $10 per hour; $500 per week, etc.);
- Regularly hourly pay rate;
- Total daily or weekly straight-time earnings;
- Total overtime earnings for the workweek;
- All additions to or deductions from the employee's wages;
- Total wages paid each pay period;
- Date of payment and the pay period covered by the payment.[38]

[38] 29 CFR § 516.2(a). Note, employers must also keep some records for exempt employees, but the records are much more limited. *See* 29 CFR § 516.3.

Payroll records must be kept for three years[39], while records on wage computations (such as time cards or work schedules) must be kept for two years.[40]

D. Youth Employment Standards

Finally, FLSA also mandates certain restrictions on child labor. Typically, FLSA sets age 14 as the minimum age for employment, and limits the number of hours worked by those under age 16. FLSA also sets limits on the type of work that minors can do, particularly limiting dangerous jobs.

IV. Conclusion

FLSA considerations are highly fact-specific. Both the job description and the person's understanding of his or her role will be relevant. The new DOL regulations may have a considerable impact. The approach that we recommend is to analyze positions and job descriptions that may not be subject to FLSA and present a rationale for concluding that they are or are not. We also recommend ensuring that people are paid in a way that seems fair to them, regardless of the FLSA analysis. For instance, while a missionary on the field may expect to work long professional hours for a modest stipend from support-raising, a home office person or church secretary who is not making minimum wage may both have a hard time making ends meet, and may not agree conceptually that she should be exempt from FLSA.

[39] 29 CFR § 516.5.

[40] 29 CFR § 516.6.