



How will changes to the Fair Labor Standards Act affect your ministry?

The Department of Labor has made changes to the Fair Labor Standards Act which will become effective December 1, 2016. These changes could affect you as an employee or employer. We've summarized the changes and potential impact here. Employment disputes are a frequent cause of grievances and lawsuits against churches. Please don't ignore these requirements.¹

Background: The Fair Labor Standards Act was first enacted in 1938 to protect employees involved in inter-state commerce. Individual states adopted similar standards for other workers in their states. The essence of FLSA is simple: it prescribes a 40-hour work-week and overtime pay (time and a half) for more than 40 hours.

Where FLSA gets complicated is in determining which employer/employee is subject to FLSA and which isn't. There are three classifications: 1) those that are always exempt, 2) those that are never exempt, and 3) those that might be exempt. What differentiates them is their job duties, and (in some cases) their salary level.

1. Those that are never exempt must be paid hourly and overtime.
2. Those that are always exempt can be paid salary, of any amount.
3. Those that might be exempt can be paid salary, but it must be above a specified minimum.

The DOL changed this last item: increasing the minimum salary test from \$23,660 to \$47,476. The goal of the change was to move more employees from salary to hourly status and thereby qualify them for overtime pay.

The DOL did not change anything else:

- No change to the duties test.
- No change for exempt employees working less than full time.
- No change to non-profits exception. Non-profits are still exempt. However, the non-profit exception is so restricted that few non-profits are truly exempt.

Non-profits are exempt from FLSA, except when:

- The non-profit is involved in an "enterprise." An enterprise is any revenue generating activity (book store, thrift store, etc.) that raises more than \$500,000 per year or a "named enterprise" (school, pre-school, hospital, medical care facility) regardless of how much revenue is made. All employees involved in these enterprises are subject to FLSA.

¹ Disclaimer: FLSA is complicated. Any attempt to summarize FLSA will be imprecise and could lead to inaccurate application. Please research the entire law and before taking any action.



- A non-profit is involved in “interstate commerce” (doing business with entities out of state.) This includes such common activities as purchasing office supplies from an out of state company, or sending a newsletter to an out of state person, or making phone calls to someone in another state. We suspect that most non-profits engage in these activities, and therefore few non-profits have comprehensive exemption from FLSA. All employees involved in interstate commerce are subject to FLSA.

Common Ministry Employees:

Part time employees are exempt from the salary minimum. Part timers may be paid salary (if they meet the duties test), they don’t have to satisfy the salary minimum. However, if they don’t fulfill the duties test they must be paid hourly and time and a half for overtime

School Teachers and Pre-School Teachers are exempt from the salary minimum. They can be paid salary, of any amount, and no overtime. They do not have to fulfill the salary minimum.

Ministers are always exempt from the salary minimum. Ministers can be paid a salary of any amount, and no overtime. The DOL acknowledged in 2004 that clergy were not covered by FLSA. Furthermore, the Supreme Court in 2012 upheld a “ministerial exception” excluding clergy from various employment laws.

Unfortunately, the DOL has not defined who qualifies for the ministerial exception, and the DOL is not bound to the IRS standard of clergy². Consequently it is possible to apply the ministerial exception to someone that does not qualify to receive clergy compensation according to the IRS.

However, we fear that granting a ministerial exception to those that do not qualify to be compensated as clergy according to the IRS may invite scrutiny by the DOL. And since the penalty for violating FLSA is substantial we suggest that employers should not apply the ministerial exception to those that do not qualify according to the IRS.

For example, if a church employs a full time staff pastor who has ministerial job duties and a ministerial credential, that employee qualifies for the ministerial exception, is not subject to FLSA, and is not subject to the salary minimum.

² The IRS has adopted a 5-fold test to determine who is eligible for clergy compensation/benefits (such as a housing allowance.) Essentially, the minister must have BOTH ministerial duties AND ministerial credentials to be eligible for clergy compensation.



However, if the full time staff pastor has ministerial job duties but does not have ministerial credentials, that employee cannot be compensated as clergy according to the IRS. We suggest that the church not grant them the ministerial exception to FLSA either. In this case the employer has five choices:

- 1) require them to obtain a recognized ministerial credential (authorizing the ministerial exception)
- 2) reduce their work hours to part time (exempting them from FLSA)
- 3) prohibit them from involvement in interstate commerce (exempting them from FLSA)
- 4) increase their pay to more than \$47,476 (satisfying FLSA)
- 5) classify them as an hourly employee and offer overtime pay for +40 hours (satisfying FLSA)

Other Employees. Where churches are going to be most affected is in relation to office employees and facilities staff. These employees might fulfill the job duties test to be exempt but they also have to fulfill the salary minimum. The church is going to have to raise their salary, reduce them to part time, or make them hourly and pay them overtime.

What you need to do

1. Determine whether your ministry is excluded from FLSA, or what parts of your operation are excluded from FLSA (due to the non-profit exclusion.)
2. Determine which individual employees are excluded from FLSA.
 - a. Is the employee qualified by federal tax law to be considered clergy? (If yes, then the employee is excluded and not subject to the remaining questions.)
 - b. Does the employee work 40 hours a week? (If NO, then the employee is part time and is excluded, and not subject to the remaining questions. If YES, then continue.)
 - c. Does the employee fulfill the duties test? (If NO, then the employee is not excluded and must be paid hourly. If YES, then continue.)
 - d. Is the employee's position involved in an enterprise or interstate commerce? (If No, then the employee is excluded. If YES, then the employee is subject to the salary minimum.)
 - e. Does the employee earn more than \$47,476? (If yes, then FLSA is fulfilled. If NO, then proceed to the options below.)
3. For employees that fulfill the job duties test to be exempt must don't fulfill the salary minimum, the ministry has three options:
 - a. Raise their salary to \$47,476
 - b. Reduce their work hours below 40.
 - c. Convert their salary to hourly pay, and offer overtime pay for over 40 hours.

Ministries also need to be careful about hourly employees who volunteer additional time. Most ministry employees are also ministry volunteers. Ministries needs to adopt policies to differentiate paid

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hours from volunteer hours. If this is not clear, employees could claim that they are due overtime pay for their volunteer time.

We suggest that ministries adopt (and enforce) a statement in their employment manual, *“Hourly employees may volunteer their time for the ministry when such volunteering is unrelated to their employed department and responsibilities. Hourly employees are due normal pay or overtime pay for any work done on behalf of their employed department or employed responsibilities.”*