

TO: United Church of Christ Conferences  
FROM: Office of General Counsel  
DATE: August 8, 2018  
RE: Fair Labor Standards Act, Minimum Wage, and Overtime Pay

MEMORANDUM  
ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL

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**I. INTRODUCTION**

In mid- 2016, the Office of General Counsel released two versions of a memorandum regarding the Department of Labor’s (“DOL”) proposed amendments to the overtime and minimum wage provisions of the Fair Labor Standards Act (“FLSA”) and how these rules are affected by various exemptions to the FLSA.<sup>1</sup> The amendments were expected to change which employees are entitled to overtime pay. The final amendments were enjoined by a federal court, which means that the amendments have not taken effect. The DOL is currently projecting a January 2019 date to propose a new standard salary level for overtime exemptions. Until more information becomes available, the Office of General Counsel is providing this memorandum to replace the two previous memoranda and to answer most of the common questions about the FLSA and its application to Conferences and Local Churches.

**II. BACKGROUND**

The FLSA provides the minimum protection that must be given to workers. Some states may have

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<sup>1</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. 38,516 (July 6, 2015) (to be codified at 29 C.F.R. pt. 541).

higher minimum wages or more stringent overtime protections than the FLSA. Some states have different requirements for exemption from overtime than the FLSA. This guidance applies to the FLSA only. You should seek additional guidance if you have questions about your state’s wage and hour laws.

**A. What is the FLSA?**

The FLSA is Depression-era employment legislation that established uniform minimum wage, maximum hour, reporting, and workplace safety standards in the U.S. The FLSA has been modified many times since its passage in 1938, but it remains the primary federal governing law for employee rights. The DOL is the federal agency responsible for enforcement of the FLSA.

**B. Does the FLSA apply to my lay employees?**

The FLSA may apply to Conference lay employees and it may also apply to Local Church lay employees.<sup>2</sup> It depends on the facts for each organization and may depend upon each employee’s job duties. *Please read this section carefully.*

The FLSA can apply to employees of a company in one of two ways. First, it applies to all of the employees of a company that is considered an “enterprise engaged in commerce or in the production of goods for commerce” under 29 U.S.C. § 203.<sup>3</sup> To qualify as such, a business must be an “enterprise” (related activities performed by persons for a common business purpose, which can be a religious purpose) and that enterprise must be “engaged in commerce or in the production of goods for commerce.”<sup>4</sup> This “enterprise engaged in commerce” is one that 1) 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 2) is an enterprise whose annual gross volume

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<sup>2</sup> See *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (U.S. 1985) (a religious non-profit’s status under the First Amendment Free Exercise and Establishments Clauses did not put the organization outside the reach of the minimum wage, overtime, and recordkeeping requirements of the FLSA); see also *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1401 (4th Cir. Va. 1990); *Big Sky Colony, Inc. v. Mont. Dep’t of Labor & Indus.*, 2012 MT 320 (Mont. 2012); *Steffen v. VCY Am.*, 2008 WI App 17 (Wis. Ct. App. 2007).

<sup>3</sup> 29 U.S.C. § 203(s).

<sup>4</sup> *Id.*; 29 CFR 779.214.

of sales made or business done is \$500,000 or more (exclusive of excise tax at the retail level); or, that operates a hospital or school regardless of whether such hospital or school is public or private or non- or for-profit.<sup>5</sup> For non-profits like UCC organizations, enterprise coverage only applies if that UCC organization is involved in ordinary commercial activities, such as selling items (as in a bookstore or gift shop), or providing services for a fee (such as education services), but does not include any membership fees, dues, or charitable contributions or donations used in furtherance of the UCC's charitable purpose.<sup>6</sup> The gross volume of this commercial activity must be at least \$500,000 annually for the FLSA to apply to a non-profit as an enterprise.

“Commerce,” for the purpose of the FLSA, means interstate or foreign commerce.<sup>7</sup>

Most UCC Conferences and Local Churches will not be covered as enterprises, because they do not meet the requirement of having \$500,000 in ordinary commercial activities. Local Churches that operate schools (including preschools), however, are covered, regardless of the whether the gross annual volume of business done is \$500,000.

If the FLSA does not cover an employer as an “enterprise,” the FLSA may still cover employees on an individual basis. The FLSA includes “employees engaged in commerce” in its minimum wage and maximum hour provisions.<sup>8</sup> Under the regulations, if an employee engages in any interstate or foreign commerce, including selling or packaging goods made in another state, or even regularly sending mail, making telephone calls or other communication, or travelling to other states, they are “engaged in commerce” for the purpose of the FLSA.<sup>9</sup> In a situation where an enterprise is not covered, but individual employees regularly interact with goods that are products of interstate or foreign commerce, or persons in another state, the FLSA

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<sup>5</sup> 29 U.S.C. § 203(r)–(s).

<sup>6</sup> WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FACT SHEET #14A: NON-PROFIT ORGANIZATIONS AND THE FAIR LABOR STANDARDS ACT (FLSA), 1 (August 2015).

<sup>7</sup> 29 U.S.C. § 203(b).

<sup>8</sup> 29 U.S.C. § 203(e); 29 U.S.C. § 206; 29 U.S.C. § 207.

<sup>9</sup> 29 C.F.R. § 779.103.

covers them on an individual basis under this provision.<sup>10</sup> Courts have interpreted the interstate commerce threshold of the FLSA to be very low, according to Congressional intent, but more than occasional interaction with commerce activities is required.<sup>11</sup>

Thus, Conferences that span more than one state may have employees who may be covered, because they regularly interact with persons in other states. Conferences that cover only one state may still have employees who may be covered, if they have employees who regularly interact with persons in other states. Local Churches may or may not have employees who are covered, depending on the particular job duties of the employee and the geographical location of the church.

### **C. Does the FLSA apply to clergy employees?**

Some courts have considered the question of whether clergy are exempt from the FLSA. While an exemption for ministers does not exist in the FLSA statutes, many courts have held that the Free Exercise and Establishment Clauses of the First Amendment to the U.S. Constitution create a ministerial exemption from the FLSA for employees who are and have duties of an

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<sup>10</sup> See *The Fair Labor Standards Act And Religious Organizations*, LAW & CHURCH (Center for The Study of Law & The Church, Samford University, Birmingham, Ala.), Spring 1992, available at [http://cumberland.samford.edu/files/lc/LC\\_V3\\_N2.pdf](http://cumberland.samford.edu/files/lc/LC_V3_N2.pdf).

<sup>11</sup> *Mitchell v. Lublin*, 358 U.S. 207, 212 (U.S. 1959) (a construction company's workers were engaged in interstate commerce as they built and renovated government structures); *Wirtz v. Wardlaw*, 339 F.2d 785, 787-8 (4th Cir. N.C. 1964) (a company engaged in interstate commerce when it mailed advertisements in multiple states to attract new, interstate business); *Wirtz v. Melos Construction Corporation*, 408 F.2d 626 (2d Cir. 1969) (a construction company engaged in interstate commerce by virtue of purchasing concrete mix that was produced intrastate, but with some materials that were produced outside the state); *Marshall v. Bruner*, 668 F.2d 749, 751 (3d Cir. 1982) (a garbage company that operated entirely intrastate engaged in interstate commerce and had enterprise coverage by virtue of the "trucks, truck bodies, tires, batteries and accessories, 60 gallon containers, shovels, brooms, oil and gas that had been manufactured out of the state and had moved in interstate commerce"); *Donovan v. Scoles*, 652 F.2d 16 (9th Cir. 1981) (a gas station, which purchased only from intrastate suppliers, engaged in interstate commerce by virtue of the gas being interstate, and thus, its employees were individually covered, at the very least); *Dole v. Odd Fellows Home Endowment Board*, 912 F.2d 689 (4th Cir. 1990) (in a home for infirmed individuals, employees have enterprise coverage based on the employees regularly handling materials that were transported in interstate commerce). Courts also have chipped away at the definition of "Goods" in 29 U.S.C. § 203(i), which states that the ultimate consumer of a good is not engaged in interstate commerce. See Donald J. Spero, *Coverage of the Fair Labor Standards Act: What Connection with Commerce Brings an Employee within the Coverage of the Fair Labor Standards Act?*, Part 2, 81 THE FLORIDA BAR JOURNAL, 77, available at <https://www.floridabar.org/divcom/jn/jnjournal01.nsf/Author/135CFA969BC01834852572E6006CA743>.

ordained minister of a religion.<sup>12</sup> The basis of the ministerial exemption is that, under the provisions of the First Amendment, religious institutions have the sole authority to make hiring and firing decisions of its ordained clergy, as they are the agents that are to carry the institution's religious expression and message to the masses, and this is purely an ecclesiastical matter.<sup>13</sup>

A strong argument exists that the FLSA would not apply to ministers who engage in ministerial duties for a religious organization.<sup>14</sup> While the DOL has not explicitly adopted the ministerial exemption as it applied to the FLSA, it has given some indication that it is open to the exemption's application in its Field Operations Handbook, and in the newly proposed rule for the FLSA ("the [DOL] first excluded workers who are not protected by the FLSA... These workers include... clergy and other religious workers...").<sup>15</sup> Clergy employed in ministerial functions for churches are thus likely exempt from the overtime provisions of the FLSA, even if they do not meet the salary and duties requirements of one of the statutorily-provided exemptions (discussed below).

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<sup>12</sup> See, e.g., *Shenandoah Baptist Church*, 899 F.2d at 1389–1401 (the court recognized the ministerial exemption but held that it did not apply to the non-clergy employees of the school in question); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. Md. 2004) (applying the ministerial exemption to a Jewish mashgiach, one responsible for adherence to Jewish dietary laws, and noted the applicability of Title VII ministerial exemption precedent to FLSA cases); *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. Ind. 2008) (applying the ministerial exemption in FLSA wage dispute from ordained ministers working for the Salvation Army); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996) (applying the ministerial exemption to an FLSA claim from a Catholic nun working as a Canon Law professor at a Catholic university); *DeArment v. Harvey*, 932 F.2d 721, 722 (8th Cir. Ark. 1991) (recognizing the ministerial exemption, but adopting *Shenandoah* in finding that a church-run school is an enterprise under the FLSA definition); *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. Wash. 2010) (applying the ministerial exemption to a wage overtime claim based on Washington state law).

<sup>13</sup> See *Schleicher*, 518 F.3d at 475.

<sup>14</sup> It is important to note that this ministerial exemption is not explicitly the same as the ministerial exemption that applies in many jurisdictions to Title VII employment discrimination claims, though some courts have held the two to be so similar in basis and effect that they are essentially the same, see *Shaliehsabou*, *supra* note 49. It is also important to note that the FLSA does not require clergy to be given paid time off by an employer. David Middlebrook, *Payroll Audits, What Every Church Should Know*, CHURCH LAW & TAX REPORT (Christianity Today, Boone, IA, November/December 2015) 21.

<sup>15</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 80 Fed. Reg. at 38,552; *Field Operations Handbook*, WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, § 10b03(b) ("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.' However, the fact that such a person is a member of a religious order does not preclude an employee-employer relationship with a State or secular institution.").

Accordingly, Conferences and Local Churches need not apply the FLSA overtime provisions to clergy, so long as those clergy have ministerial functions. In most instances, this means that if the FLSA applies to the employees of a Conference or Local Church at all, it will apply to the lay employees. Whether the FLSA applies to any given employee will depend upon the circumstances of that particular employee, and employers should seek additional guidance if they are unclear whether the law applies.

### **III. OVERTIME RULES UNDER THE FLSA**

#### **A. What is the current rule for paying an employee overtime?**

An employer must pay a FLSA-covered employee at least the federal minimum wage of \$7.25 per hour and time-and-a-half pay for any hours the employee works over 40 hours in a week.<sup>16</sup> This extra pay is called “overtime” pay. Employees who are entitled to overtime pay are called “nonexempt” employees.

The FLSA exempts some employees from overtime pay. Employees who are exempt from overtime are called “exempt” employees. To qualify for an exemption, an employee currently must be paid at least the standard salary level of \$455 per week (\$23,660 annually), on a salary basis,<sup>17</sup> and fulfill certain responsibilities.<sup>18</sup> While there are a number of different duties-based exemptions in the rules, the most common exemptions in a church setting are the Executive, Administrative, and Professional Duties. For an exemption to apply to an employee, the employee must be paid at least \$455 a week on a salary basis *and* perform the applicable duties under the exemption as described below.

#### **1. Executive Exemption**

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<sup>16</sup> 29 U.S.C. § 206; 29 U.S.C. § 207. Some states and municipalities have higher wage requirements, however.

<sup>17</sup> A salary basis means “the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.” 29 CFR 541.602. A number of exceptions exist in this regulation that allow reductions of a full day's pay in circumstances such as sickness or disability. The regulations also allow payments to be made on a fee basis for certain exemptions, but the fee basis is presumed to be rare in the church setting and is thus not considered here.

<sup>18</sup> 29 U.S.C. § 213(a)(1); 29 CFR 541.600(a).

An employee covered under the Executive Exemption must 1) have the primary duty of management of the enterprise or a department or subdivision, thereof; 2) regularly direct the work of two or more other employees; and 3) have hiring and firing authority.<sup>19</sup>

## **2. Administrative Exemption**

An employee covered under the Administrative Exemption must 1) have the “primary duty of 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 2) have the primary duty of “the exercise of discretion and independent judgment with respect to matters of significance.”<sup>20</sup>

## **3. Professional Exemption**

An employee covered under the Professional Exemption must engage in 1) work that requires advanced specialized knowledge; 2) “in a field of science or learning;” 3) customarily acquired through “prolonged specialized intellectual instruction,” or work “in a recognized field of artistic or creative endeavor.”<sup>21</sup> For the Professional Exemption, work requiring advanced specialized knowledge includes work predominantly intellectual in character that requires consistent exercise of discretion and judgment, and is not routine or manual in nature, and cannot be performed at the high school education level.<sup>22</sup> Applicable fields for the Professional Exemption include law, medicine, theology, accounting, engineering, architecture, actuarial analysis, various sciences, pharmacy and other occupations with a recognized professional status.<sup>23</sup> “Prolonged specialized intellectual instruction” is customarily shown through obtaining an advanced degree in an above field, but, in certain cases, can also be evidenced through

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<sup>19</sup> 29 C.F.R. § 541.100.

<sup>20</sup> 29 C.F.R. § 541.200. *See also* 29 C.F.R. § 541.201 *et seq.* for further explanation of these terms.

<sup>21</sup> 29 C.F.R. § 541.300. *See also* 29 C.F.R. § 541.301 *et seq.*

<sup>22</sup> WAGE AND HOUR DIVISION, U.S. DEP’T OF LABOR, FACT SHEET #17D: EXEMPTION FOR PROFESSIONAL EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA), 2 (Revised July 2008).

<sup>23</sup> 29 C.F.R. § 541.304. We do not expand on the remaining exemptions listed in Section 213 and under the Part 541 regulations because they have less relevance for the UCC’s purpose, though please note that a person engaged in the practice of law or medicine (and some fields that support medicine) is generally not subject to the salary level test per 29 CFR 541.600(e).

prolonged work in the field (*e.g.* the self-taught professional).<sup>24</sup> Finally, a field of artistic or creative endeavor is normally writing, music, acting, creative journalism, graphic arts, and other similar occupations.<sup>25</sup>

**B. How are the rules going to change?**

The DOL is currently undertaking rulemaking to revise the regulations at 29 C.F.R. part 541, which govern the exemption of executive, administrative, and professional employees from the Fair Labor Standards Act's minimum wage and overtime pay requirements. We do not yet know when revised regulations will be proposed. Until the DOL issues its final rule, it will enforce the current regulations, including the \$455 per week standard salary level. Employers need take no action at present.

**IV. FREQUENTLY ASKED QUESTIONS**

**A. I pay all of my employees a salary—they are not paid hourly and are not required to clock in and out. Doesn't that mean that I don't have to pay them overtime?**

No. Whether an employee is paid on a salary basis does not determine whether that employee is exempt or nonexempt and therefore entitled to overtime. If an employee is covered by the FLSA and makes less than the standard salary amount, the employee is nonexempt and thus entitled to overtime for all hours worked over 40 in a week. If an employee makes more than the standard salary amount, but does not qualify under the duties tests described above, the employee is nonexempt and thus entitled to overtime for all hours over 40 worked in a week. Only employees who make at least the standard salary amount, are paid on a salary basis, and qualify under the duties test described above are exempt from overtime. The FLSA requires that employers keep records of hours worked for all nonexempt employees.

**B. What is the difference between paying someone a salary and paying someone an hourly rate?**

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<sup>24</sup> WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FACT SHEET #17D, 2.

<sup>25</sup> *Id.*

A person who is paid a salary makes the same amount each week regardless of how many hours they actually work (unless they are entitled to overtime pay and work overtime). If a person is paid a salary, and they work less than 40 hours a week, their pay cannot be docked for the time that they did not work except in accordance with the applicable regulations, which generally allow deductions only for a full day of missed work.<sup>26</sup> Any applicable leave time that she has accrued (such as vacation, personal days, or sick time) can be reduced by the number of hours that they did not work.

A person who works on an hourly basis is paid only for the hours they work in a week. They may still receive vacation time, sick time, and personal leave.

**C. If we have a busy week, can I give a nonexempt employee “comp time” instead of paying them overtime?**

You can give “comp time” *in the same week* to ensure that a nonexempt employee does not work more than 40 hours in a week. You may not give the employee time off the following week in lieu of overtime earned the previous week. The entitlement to overtime is based on a nonexempt employee working more than 40 hours in one week. If an employee works three 12-hour days at the beginning of the week, the employee can be instructed to work only four hours on the fourth day of the week and not to come back to work until the following week. But an employee cannot be instructed to work 50 hours in a week and then 30 hours the following week in lieu of being paid 10 hours of overtime.

**D. We have a camp that employs workers only when the camp is open. Sometimes our camp workers work more than 40 hours a week. Do I have to pay them overtime?**

The FLSA includes a separate exemption for employees of an amusement or recreational establishment, organized camp, or religious or non-profit educational center.<sup>27</sup> Under this exemption, the FLSA exempts employees of such an establishment from the minimum wage and

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<sup>26</sup> See 29 CFR 541.602. See also WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FACT SHEET #17G: SALARY BASIS REQUIREMENT AND THE PART 541 EXEMPTIONS UNDER THE FAIR LABOR STANDARDS ACT (FLSA), 1

<sup>27</sup> 29 U.S.C. § 213(a)(3).

overtime provisions if they meet one of two tests. First, if the establishment does not operate for more than seven months out of the year, its employees are exempt from these FLSA provisions.<sup>28</sup> For the purpose of this test, an establishment is not “operating” if it is only engaged in maintenance and ordering supplies in its “off-season.”<sup>29</sup> Second, if during the preceding calendar year, the establishment’s average receipts for any six month period of the year did not total more than 33.3% of its average receipts for the other six months of the year, then the establishment’s employees are exempt from these provisions of the FLSA.<sup>30</sup> Camps, retreats, and other similar organizations may qualify for an exemption from the FLSA under this provision.

## **V. PENALTIES FOR NONCOMPLIANCE**

An employer can be sued by the DOL or by the employee for violations of wage and hour laws. The employer may be ordered to pay back pay plus liquidated damages and other penalties. Willful violators can be criminally prosecuted and fined up to \$10,000 for the first violation and may be fined or imprisoned for the second violation.

## **VI. CONCLUSION**

An employer’s analysis of whether lay employees are entitled to minimum wage and overtime is not complete until the employer has performed an analysis under state law as well as the Fair Labor Standards Act. Many states have wage and hour laws that are more favorable to an employee than the FLSA; the law that is more favorable to the employee is the law that will control. Please consult with an attorney if you need more information.

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<sup>28</sup> *Id.*

<sup>29</sup> WAGE AND HOUR DIVISION, U.S. DEP’T OF LABOR, FACT SHEET #18: SECTION 13(A)(3) EXEMPTION FOR SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS UNDER THE FAIR LABOR STANDARDS ACT (FLSA), 1 (Revised July 2008).

<sup>30</sup> 29 U.S.C. § 213(a)(3).