2019 NEW OVERTIME RULES

By Frank Sommerville, JD, CPA
fsommerville@nonprofitattorney.com
Elaine Sommerville, CPA
elaine@nonprofit-tax.com

Since virtually all churches are subject to overtime rules, these proposed regulations will require many organizations to amend their policies and procedures on overtime pay if made effective. If your state's overtime rules mandate overtime pay, the state rules apply even though a federal exemption may apply.

The 2019 regulation changes the minimum salary level to $679.00 per week, or $35,308.00.

The Fair Labor Standards Act (the statute that mandates minimum wage and overtime) applies to all enterprises that (1) have employees engaged in commerce or (2) in the production of goods for commerce and (3) have an annual gross volume of sales of at least $500,000; or are engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or individuals with intellectual disabilities who reside on the premises; a school for intellectually or physically disabled or gifted children; **a preschool, elementary or secondary school, or an institution of higher education** (without regard to whether such hospital, institution or school is public or private, or operated for profit or not); or are engaged in an activity of a public agency. There are two ways the provisions of the FLSA may cover an employee: (1) enterprise coverage, in which any employee of an enterprise covered by the FLSA is covered, and (2) individual coverage, in which even employees of non-covered enterprises may be covered if they are engaged in interstate commerce or in the production of goods for commerce, or are employed in domestic service. Many states have a state overtime statute that applies if the federal statute does not apply. Most churches are required to pay overtime under either the federal or state statutes.

TYPES OF EXEMPTIONS

In the original statute, workers had to meet three tests to be exempt from overtime: (1) the employee must be paid a predetermined and fixed salary that is not subject to reduction because of variations in the quality or quantity of work performed (the "salary basis test"); (2) the amount of salary paid must meet a minimum specified amount (the "salary level test"); and (3) the employee's job duties must primarily involve executive, administrative, or professional duties as defined by the regulations (the "duties test").

The new regulation retains the familiar exemption names. The workers are classified as exempt if they are (1) an executive (sometimes called the management exemption), (2) an administrative worker, (3) a worker in a recognized profession and (4) computer worker exemption.

The biggest change relates to the minimum salary required to be exempt from overtime pay. The projected effective date is January 1, 2020, unless Congress intervenes. The minimum salary will be reviewed every four years. Any future increases to the minimum salary will require a proposed regulation with time allowed for public comment.

Minister Exemption

Before discussing the specific exemptions, I should note that ministers are not listed in the statute as exempt from overtime rules. The regulation states: "To estimate the number of workers covered . . . the Department excluded workers who are not protected by the FLSA or are not subject to the Department's regulations . . . These workers include: . . . clergy and other religious workers . . ." It further states: "Religious workers were excluded from the analysis after being identified by their occupation codes: 'clergy' (Census occupational code 2040), 'directors, religious activities and education' (2050), and 'religious workers, all other' (2060)."

Historically, the courts have exempted ministers from overtime rules because of the legislative history. During a Congressional debate, the sponsor of the overtime bill told Congress that overtime rules did not apply to ministers because they were not considered employees. Of course, this was also the position of the Internal Revenue Service (IRS) at the time. The courts created the minister exception to prevent the Department of Labor from applying the overtime regulations to ministers.

Although there is no rigid formula in determining whether the ministerial exception applies, the courts consider various factors related to the nature of the duties of the employee and the importance of these duties to the church and its religious functions. Such factors include:

1. The level of religious training required for the position.
2. The formal title given by the Church to the employee.
3. Whether the employee is required to perform job duties according to the theological beliefs and standards of the church.
4. Whether the employee's job duties reflect a role in conveying the Church's message and carrying out its mission.
5. Whether the employee selects or creates religious content.
6. Whether the employee is charged with leading others towards maturity in their faith and teaching the Word of God.
7. Whether the Church periodically reviews the employee's skills of ministry and ministerial responsibilities.
8. Whether the Church provides continuing religious education to the employee, to support their ministry of the gospel.

In recent decisions, the courts have applied the ministerial exception to a former music director who played music during mass, monitored the sound system, and even performed some custodial work. The law was applied to an individual who held the title as a "spiritual director" and helped others cultivate "intimacy with God" even though the spiritual director did not hold herself out to the public as an ambassador of the faith or receive rigorous religious training. The ministerial exception did not apply, however, where a teacher at a Catholic School merely

because they attended and participated in religious services with her students in a supervisory capacity but otherwise failed to satisfy any of the factors. Frequently, the courts will give deference to the church's determination of who qualifies as subject to the ministerial exception. To qualify for the ministerial exception, the employee does not need any formal form of ministerial credential.

Salary Basis Test

This test requires that workers be paid on a salary basis, that is, a pre-determined amount that cannot be reduced because of variations in the quality or quantity of the employee's work. This means that the employer may not dock an employee for absences of less than one day. (An employer may provide for paid time off that is excluded from this test. The paid time off benefit may be utilized by the employee in any increment selected by the employer.)

Salary Level Test

The new regulation raises the minimum wage for an exemption from $ $455 per week (about $24,000 per year) to $679 (about $35,308 per year). The new regulation adjusts the highly compensated exemption to $147,414, annually. Salaried workers not subject to the salary test include **teachers**, academic administrative personnel, physicians, lawyers, judges, and outside sales workers.

The new regulation also allows certain mandatory bonuses to be included in applying the minimum salary test. An employer may include nondiscretionary bonuses to cover up to 10% of the employee's compensation, and the bonuses must be paid at least quarterly.

The EAP Exemptions

The statute includes executive, administrative and professional exemptions ("EAP Exemptions") from overtime. The new regulation does not include specific changes for these classifications.

Executive Exemption

The executive exemption requires that the worker meet the following tests:

- Their primary duty must include managing the organization or some distinct department or division of the organization, and they must meet the minimum salary requirement mentioned above.
- They must direct the work of at least the equivalent of two full-time employees.
- Either they have the authority to hire or fire employees, or their input on a decision carries significant weight.

Please note that volunteer supervision is not included in the test. If a committee makes the hiring and firing decisions, then the organization should amend its committee charge to name the positions whose input is needed in any employment decisions.

Administrative exemption

The administrative exemption requires that the worker meet the following tests:

- Their primary duty must be to perform office work or non-manual labor related to the management of the organization, and they must meet the minimum salary requirement.
- The primary duty must include the exercise of discretion and independent judgment concerning matters of significance to the organization.

This exemption will apply to workers with decision-making authority but do not have the same amount of worker supervision the executive exemption requires. The administrative exemption would typically apply to a worker who supervises many volunteers and their activities.

Professional Exemption

The professional exemption requires that a worker meets the following tests:

- Their primary duty must be performing work that requires advanced knowledge; the work must be primarily intellectual and require consistent exercise of discretion and judgment, and the worker must meet the minimum salary requirement.
- Their work must be in a recognized science or field of advanced learning.
- The knowledge they acquired must be from an extensive, specialized intellectual instruction over a long period.
- If the field of advanced learning relates to a creative profession, such as music or art, then the work must be characterized by imagination, creativity, originality, or exceptional talent.

The regulation contains specific examples of jobs that meet or fail this test, including health care professionals and teachers. This regulation generally requires a four-year college degree or its equivalent.

OVERTIME AND COMPENSATION ISSUES

1. All exempt employees must be compensated by a weekly salary that is guaranteed regardless of the number of hours actually worked. A worker cannot be compensated using an hourly rate and still be exempt from overtime.

2. An exempt employee cannot be docked for missing work in any week where the employee worked at any time. For paid time off, the employee must utilize paid time off in daily increments. For disciplinary purposes, an exempt employee can be docked in one half day increments.

3. An exempt employee cannot perform non-exempt duties more than 20% of the time they work.

4. If the nature of the work changes over time, the overtime exempt status must be reviewed to determine the correct status.

5. At all times, the weekly salary must equal the minimum wage regardless of the number of hours worked.

6. Comp time must be utilized during the same work as the overtime was worked.

WHEN IS AN EMPLOYEE ON THE CLOCK?

1. When Does Travel Time Count as Overtime Work?

Generally, travel time conducted for work during work hours is compensable, whereas ordinary home-to-work travel is not. Set forth below are some different travel circumstances:

- Working While Traveling: Time spent working while traveling is compensable. For example, the federal government's definition of travel time includes driving a government vehicle, at least outside of the employee's regular commute, and is considered compensable work time.
- Travel On Weekends: Travel on weekends is compensable even if no work is performed so long as the work hours cut across the administrative workday for the employee. For example, if the employee's administrative workday is 8:00 a.m. to 5:00 p.m. and the employee travels on a weekend during those hours, the travel time is compensable.
- Emergency Travel from Home to Work: This time can be compensable depending on the circumstances. For example, if a worker is called in the middle of the night and ordered to return to work, the time from the time the employee leaves the house until their return home is compensable. Interestingly, the Department of Labor takes no position on the compensability of this time.

2. When Does Training Time Count as Overtime Work?

Attendance at training, meetings, and lectures must be counted as work activities unless all four of the following criteria are met:

- Attendance is outside the employee's regular work hours;
- Attendance is voluntary;
- The course is not directly related to the employee's job; and
- The employee does not perform any productive work while attending the lecture.

Attendance is not voluntary if the employee is led to believe that his or her present employment would be adversely affected if he or she did not attend.

Certain DOL approved apprenticeship training programs are exempt from the FLSA.

3. When Does an Employer Have to Pay for On-Call Time, Waiting Time and Break Time?

Break Time is Compensable Unless the Breaks are Really Long

Although there is little case law on the issue of whether breaks are compensable, the U.S. Department of Labor's rule is that if a break or rest period is twenty minutes or less, the break time is compensable. Longer breaks, including meal breaks, may be compensable, as well, depending on the circumstances.

Waiting Time is Often Compensable

Time spent waiting while on-duty is compensable, particularly if it is on the employer's premises, is unpredictable and/or is of relatively short duration. For example, a restaurant worker who is required to report to work at a certain time, though he does not have to bus tables until a certain number of customers are present, is probably entitled to compensation for his waiting time.

Also, in certain occupations, employees are hired to be "engaged to wait" for something to occur. For example, firefighters and emergency workers are hired, in part, to be available to respond immediately to emergencies. Some people are hired to be available to repair expensive machinery immediately. Some truck drivers are hired to wait until assignments come in so that they can leave immediately. All of these employees are "engaged to wait" and, therefore, their waiting time is compensable.

When church workers attend children or youth camp, they may be considered on duty 24/7 unless the employee has time without responsibilities and is free to leave the camp. Further, some states have special rules that apply to camp employees.

4. Must an Employer Pay Employees for On-Call Time?

Some employees are required to remain available at home or on the employer's premises during meal periods to respond to calls in person, or through a telephone or pager. The time spent responding to calls, including time spent at home on the telephone or computer responding to calls or email, is compensable. Some states require the employer to pay the employee for a minimum amount of time if they respond to an email, text, or phone call.

Concerning waiting time, however, there is no bright-line rule as to whether or not on-call time is compensable or not.

In determining whether on-call time is compensable, the factors that courts have viewed include:

- the average number of calls the employee responds to during the on-call period;

- the required response time: in other words, the amount of time in which the employee has to be at the work site after being called in;
- whether an employee is subject to discipline for missing or being late to a call-back;
- the extent to which an employee can engage in other activities while on-call; and
- the nature of the employee's occupation (in some jobs, it is the nature of the job to be paid to be available to respond immediately to a situation).

Based on these criteria, firefighters and emergency medical personnel are entitled to overtime pay for the entire on-call period where the on-call period was spent at home.

5. Are meal periods and/or sleep time counted as overtime hours?

Meal periods and sleep time spent on the employer's premises are compensable under certain circumstances. Employers who require employees to remain on the employer's premises and to respond to calls and interruptions during an employee's meal periods and sleep time are required, in most circumstances, to pay the employees for their meal periods and sleep time.

On-Duty Meal Periods are Compensable

The Department of Labor's regulations require that meal periods be counted as compensable work time unless the employee is "completely relieved from duty for the purposes of eating regular meals." Thus, employers who impose work-related restrictions on employees during their meal periods, such as answering phones or responding to work-related requests should pay employees for their meal periods.

An example of how this test is applied is a case involving telephone line installation workers. Their employer required them to eat lunch at their worksite and to remain there throughout the meal period to ensure that the expensive equipment that they used was not stolen. The entire lunch period was found to be compensable work time.

Some courts apply a different test than the Department of Labor's meal period test. These courts have applied what is called the predominant beneficiary test. Under the predominant beneficiary test, courts determine whether the employer or the employee is the predominant beneficiary of the meal period. Under this test, employees who are required to remain on the employer's premises in a place which is not a dining room, or some other area which is not an eating facility, are usually found to be entitled to compensation for their meal periods. In these circumstances, the employer has been found to place substantial restrictions on the employee during the meal period for the employer's benefit.

For example, in cases in which police officers and firefighters have been required to monitor their radios and to remain on the employer's premises during a meal period, the employer is usually considered to be the predominant beneficiary of the meal period, and the employer must pay the employees for their meal periods. These cases are particularly strong if the police officers receive 1 or more calls on average during each meal period.

On-Duty Sleep Periods are Compensable Under Most Circumstances

As a general rule, employers must count on-duty sleep periods as compensable work time. On-duty sleep periods are occasions in which an employee is required to sleep on the employer's premises and may have his or her sleep interrupted by some incident to which the employee must respond.

Employers can avoid paying for on-duty sleep periods only if the employer has an express or implied agreement to exclude such periods, the employer has furnished adequate sleeping facilities, and the employee's workday is 24 hours or longer. Also, under no circumstances may an employer avoid paying for on-duty sleep time if the employee has not had the opportunity to receive 5 or more hours of sleep. Under no circumstances can an employer exclude more than 8 hours of on-duty sleep time per 24-hour shift when computing employees' overtime pay.

Missions Trips

Overtime rules apply unless the nonexempt employee works outside the United States for the entire seven day work week. The FLSA does not apply to workers outside the United States.

State Rules

Some states have overtime and minimum wage rules that differ from the federal rules. The rule that favors employees more applies. This means that if the state has a more employee favorable rule, that rule will apply in that state.

SAFE HARBOR FOR EMPLOYERS

If employers are serious about correctly classifying employees under the FLSA, the DOL regulations provide a safe harbor. First, the employer must exercise a good faith effort to classify its workers properly. Usually, this means preparing job descriptions that actually reflect the job duties and responsibilities. Next, the employer should have an HR professional or attorney review the job descriptions and assist with the proper classification of employees. This process should be conducted annually.

The Employee Handbook should specifically authorize the employee to challenge their classification for overtime purposes. If the employee challenges his or her classification, the employer should engage an attorney to review the facts and assist the employer in making the correct classification decision.

The above steps will demonstrate that the employer made the classification decisions in good faith. When the decisions are made after a good faith effort to comply with the FLSA, the FLSA allows the employer to avoid liability for double damages.

RECORDKEEPING REQUIREMENTS

1. Exempt Employee Recordkeeping

The FLSA's record-keeping requirements for exempt employees differ from those for nonexempt workers. Because you don't pay exempt employees by the hour, you shouldn't track the exact number of hours they work. Doing so could make it seem to a wage-and-hour Labor auditor that you are indeed basing pay on the number of hours worked, which might raise the question of whether the employee is truly exempt.

However, just because a worker is exempt doesn't mean your company is freed from keeping records on him or her. With exempt employees, you should keep records that describe the workweek and the wages paid for that period.

Specifically, you should keep these records on FLSA exempt employees:

- Personal information, including name, home address, occupation, gender (for equal pay laws), the birth date for workers under age 19 (for child labor laws) and the person's workplace identification number
- Time of day and day of the week when the employee's workweek begins
- Total wages paid each pay period
- Date of payment and the pay period covered by each payment

Your records for exempt employees can also track which days are used for sick days, vacation days, or personal days.

2. Nonexempt Employee Recordkeeping

Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

a. Employee's full name and social security number.

b. Address, including zip code.

c. Birthdate, if younger than 19.

d. Sex and occupation.

e. Time and day of the week when employee's workweek begins.

f. Hours worked each day.

g. Total hours worked each workweek.

h. The basis on which employee's wages are paid (*e.g.*, "$9 per hour", "$440 a week", "piecework")

i. Regular hourly pay rate.

j. Total daily or weekly straight-time earnings.

k. Total overtime earnings for the workweek.

l. All additions to or deductions from the employee's wages.

m. Total wages paid each pay period.

n. Date of payment and the pay period covered by the payment.

3. Retention and Destruction of Employment Records

Each employer must preserve for at least three years of payroll records, collective bargaining agreements, sales, and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by DOL auditors, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

Employment Law Updates

a. *Beil v. St. James*, 911 F.3d 603 (9th Cir. 2018). Catholic teacher at Catholic school not subject to the ministerial exception because she had no religious training for her position, and her position did not require that she have religious training. The school did not represent to parents and students that she had special expertise in religious doctrine, practice, or values. She did not teach, plan, or lead her class in devotions or prayer. The school did not evaluate her on her ability to communicate religion. She incorporated religion into her lessons and allowed students to plan and lead devotions and prayer, but this was insufficient to claim the ministerial exception.

b. *Yin v. Columbia International University,* 335 F.Supp.3d 803 (D. S.C. 2018). Professor at Christian University subject to the ministerial exception. University employed only Christians, required a degree from a Christian college, required participation in religious activities, subject to a code of conduct.

c. *Lee v. Sixth Mount Zion Baptist Church of Pittsburgh*, 903 F.3d 113 (3rd. Cir. 2018). Ministerial exception and ecclesiastical exception prevent a lawsuit against the church for wrongfully terminating Senior Pastor. Court refused to enforce a 20-year employment agreement that provided the Senior Pastor could be terminated only for enumerated reasons.

d. *Sterlinski v. Bishop of the Diocese of Chicago,* 2018 WL 3533313 (N.D. Ill. 2018). Lawsuit for Title VII and Age Discrimination by organist barred by a ministerial exception. Instrumentalists are integral to Catholic religious worship.

e. *Kelley v. Decatur Baptist Church*, 2018 WL 2130433 (N.D. Ala. 2018). Pregnant, single maintenance and child care worker claimed church terminated employment because she was pregnant. Church claimed the termination was because she engaged in sexual conduct outside of marriage, which was a violation of biblical standards. Court: she may sue the church for wrongful termination and violation of Title VII, subject to the church proving that the ministerial exception or ecclesiastical exemption applies to the employee. The ministerial exception precludes application of employment laws to claims concerning the employment relationship between a religious institution and its ministers. The case will proceed into discovery.

f. DOL announces changes to the qualifications needed for an intern who is exempt from FLSA. See https://www.dol.gov/whd/regs/compliance/whdfs71.htm. The new test examines factors to determine whether the company or worker is the primary beneficiary of the relationship. A non-exhaustive set of factors should include:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee — and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job after the internship.

g. *McCrany v. North American Missions Board of the Southern Baptist Convention*, 2018 WL 1041298 (N.D. Miss. 2018). Does ministerial exception apply only to the minister's "employer," or does it extend to an affiliated religious organization which allegedly influenced or caused the minister's termination of employment? The ministerial exception probably does not apply to non-employee relationships or non-employment law claims. The ministerial exception is a subset of the ecclesiastical exception doctrine.

h. *Schultz v. Congregation Shearith Israel of the City of New York*, 867 F.3d 298 (2d. Cir. 2017). Employee (Program Director) married 6/28/2015. She was pregnant at the time. Before departing on honeymoon, she informed employer (Jewish synagogue) that she was pregnant. Upon return (7/20/2015), she was visibly pregnant. She was informed that her employment would be terminated 8/14/2015 due to position elimination. 7/30/2015, Synagogue learned employee retained a lawyer. 8/5/2015, Synagogue reinstated the

position. Court: Synagogue may still be liable for damages and attorneys' fees under Title VII as well as for remedies afforded by the FMLA.

i. *Nolen v. Diocese of Birmingham in Alabama*, 2017 WL 3840267 (N.D. Ala. 2017). Whistleblowing principal of Catholic school cannot sue the Diocese for retaliatory termination due to the ministerial exception. She was terminated because she complained to the Diocese that the school was wrongfully discriminating against Hispanic students and applicants. Summary judgment for Church granted.

j. *Su v. Temple*, ___ Cal. App. 4th ___ (2nd 2019). Preschool teachers are not subject to ministerial exception though they taught religion and received instruction regarding religious topics from the Rabbi. They were not required to be Jewish and were not viewed as religious leaders by the synagogue.