



CHANGES TO OVERTIME PAY

New Rule Makes More Employees Eligible

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Some ministries were caught up in a whirlwind of activity after the federal government proposed rule changes to the minimum salary level in 2016. Ultimately, the rules were struck down before they took effect.

In September 2019, The U.S. Department of Labor issued new rules that govern how employees are classified and paid. These new requirements take effect January 1, 2020.

Employers generally know that employees who are exempt from FLSA rules don't earn overtime pay. But the rule is more complicated than that, and ministry employers must consider some issues unique to them. The new minimum salary level may change how your ministry currently classifies some of its workers. Employees previously classified as exempt by a ministry may now be eligible for overtime if their salary is less than \$35,568.

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OVERTIME PAY: WHO QUALIFIES

Five questions help your ministry answer the exempt vs. non-exempt employee classification dilemma.

The Fair Labor Standards Act (FLSA) is a federal law that establishes minimum wage, overtime pay, record-keeping, and child labor standards. In particular, the law's rules surrounding who's eligible for overtime pay require a good understanding of some confusing concepts like exempt and non-exempt, the enterprise test, and the duties test.

"The FLSA was created primarily for businesses, but it does apply to many ministries," explains Kathleen Turpin, vice president, human resources, at Brotherhood Mutual. "The law covers minimum wage, overtime, paying minors, and other issues."

Employees whose jobs are governed by the FLSA are either "exempt" or "non-exempt." **Non-exempt employees** are entitled to minimum wage and overtime pay. **Exempt employees** are not. Some organizations are not subject to the FLSA. However, these organizations may have individual employees subject to the FLSA.

Misapplying the FLSA could lead to costly consequences. To help reduce your ministry's liability, take steps to understand and follow the law's requirements.

1. Does the FLSA apply to my ministry?

Many ministries employ at least one person who may be subject to the FLSA. To find out if the FLSA law applies to your ministry, evaluate based on two tests:

The Enterprise Test. Certain businesses and organizations are considered "enterprises" under the FLSA. In determining whether a non-profit organization is an enterprise, the federal government will consider only activities performed for a business purpose. Activities necessary to support a non-profit's charitable, religious, or educational purpose do not apply.

Organizations that meet the enterprise test are required to follow the FLSA for all their employees, unless exemptions apply to individual employees (see pages 4, 6, and 7). Several types of organizations always meet the enterprise test, like hospitals, medical and nursing facilities, schools, and preschools.

Other organizations meet the enterprise test if they meet the following requirements:

- Have at least two employees engaging in interstate commerce (see definition below).
- Generate at least \$500,000 per year in sales or receipts.

Generally, the federal government doesn't consider churches to be enterprises. Church employees usually aren't performing a "business purpose" within the law's meaning. In most cases, non-profit organizations' income from contributions, membership fees, dues, and donations used for charitable activities don't count toward the \$500,000 threshold. However, some churches can qualify as enterprises if they operate a "named enterprise," such as a school or preschool.

Even if a ministry does not qualify as an enterprise, FLSA requirements may still apply to employees individually.

The Individual Test. Courts evaluate whether an individual is covered by FLSA rules on a case-by-case basis. Regulators determine whether the individual employee is "engaged in interstate commerce" on a "regular and recurrent" basis. Courts interpret the phrase "interstate commerce" very broadly. If ministry employees participate in any of the following activities regularly, they probably engage in interstate commerce:

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- Ordering teaching materials or other supplies from out of state
- Mailing newsletters or other information to people out of state
- Traveling to other states for work purposes
- Maintaining a website from which people from out of state may order items

There's no clear definition of what "regular and recurrent" means. The U.S. Department of Labor Wage and Hour Division indicates that it will investigate each situation individually. To protect your ministry against FLSA-related lawsuits, it's best to assume that individuals are covered by the FLSA unless an exemption applies.

2. Are there individual exemptions?

Yes. Clergy members are not specifically exempted from the FLSA, but many courts have recognized a "ministerial exception" from wage and hour laws. The FLSA explicitly exempts school teachers. For more information on who qualifies as ministers and teachers, see the article on page 7.

In addition, the FLSA exempts other types of employees. Many of these exemptions are referred to as "white-collar exemptions."

To qualify for a white-collar exemption, an individual generally must pass all three of the following tests. If an employee fails any one of them, the person likely is a non-exempt worker who is entitled to earn the minimum wage and overtime pay. The three tests are:

THE SALARY BASIS TEST

Employees must earn a salary—a guaranteed minimum amount of money that will be paid in any week that the person performs any work, regardless of the quality or quantity.

THE SALARY LEVEL TEST

Beginning January 1, 2020, employees must earn at least \$684 per week (\$35,568 for a full-year worker). The federal government intends to update the earnings threshold more regularly.

THE DUTIES TEST

Employees must perform certain job duties to qualify for an exemption. Job titles are irrelevant to the duties test.

Unraveling the Duties Test. The tests for salary basis and salary level are fairly straight forward. However, the duties test involves careful consideration of each individual employee. Several types of duties can qualify an employee for a white-collar exemption. Common exempt duties include executive, administrative, learned professional, creative professional, and computer professional.

To qualify as an **executive employee**, the position must require the employee to:

- Primarily perform management duties.
- Regularly supervise at least two full-time equivalent employees (not volunteers).
- Have authority or significant influence in hiring, firing, discipline, and promotion decisions affecting employees.

To qualify as an **administrative employee**, the position must require the employee to:

- Primarily perform office or non-manual work related to the ministry's management or business operations. Examples may include business administrators, day care directors, and bookstore managers.
- Use "discretion and independent judgment" in making decisions regarding significant matters. Most support staff and clerical workers don't meet this standard.

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To qualify as a **learned professional**, the position must require the employee to:

- Do work requiring advanced knowledge in a field of science or learning, such as theology, teaching, accounting, or law.

To qualify as a **creative professional**, the position must require the employee to:

- Do work involving invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Examples may include musicians, writers, and actors.

There also is an exemption for **computer employees**. See the article on page 6 to learn more about this exemption.

Employees who pass all three tests—salary basis, salary level, and duties—can be classified as “exempt” and do not need to be paid overtime rates for working more than 40 hours in a week.

Consult a locally licensed attorney before concluding that your organization and its employees need not comply with wage and hour rules.

3. What does the FLSA require?

To help your ministry follow FLSA requirements, classify employees into one of two categories and pay them accordingly:

- **Non-exempt.** These employees must be paid at least the minimum wage for the first 40 hours in one week. They also must be paid overtime rates worth at least 1.5 times their regular hourly wage if they work more than 40 hours in any 7-day work week. To better understand how to calculate a regular rate of pay, see page 9.
- **Exempt.** These employees fit the legal criteria for an exemption. They don't need to be paid overtime, regardless of how many hours they work.

Some states and communities have even stricter minimum wage and overtime rules. For example, many states have a higher minimum wage than the one required by the federal government, and some require an overtime rate to be paid after the first eight hours of work on any given day. Your state labor office can provide information about these rules.

4. What are the consequences for violations?

Employers who violate the FLSA could be ordered to pay unpaid overtime wages, liquidated damages, and attorney fees, as well as penalties. If a court concludes that an employer skirted the law intentionally, penalties could include fines of up to \$10,000 for each violation.

Most wage and hour claims are excluded from insurance coverage, so employers could be responsible for paying not only a judgment, but also legal expenses.

5. How can I reduce my liability?

It's a good idea to seek assistance from a local attorney before making a final determination about applying any exemptions to workers in your ministry. When in doubt, it's safer to classify employees as non-exempt.

Also, if someone brings a compensation-related lawsuit against your ministry, accurate records can help confirm what happened. To learn more about which records to keep, see the article on page 12.

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THE COMPUTER EMPLOYEE EXEMPTION

This exemption is unique among the FLSA's white-collar exemptions.

To qualify, an employee must meet the following three tests:

1. Hourly Wage or Salary Basis Test.

A skilled computer employee can earn either an hourly wage or a salary. If salaried, the employee must receive a predetermined amount of pay for any 7-day work week in which work is performed, regardless of the quality or quantity of the work.

2. Hourly Wage or Salary Level Test.

As of January 1, 2020, a skilled computer worker must earn an hourly wage of at least \$27.63 or a weekly salary of at least \$684 to qualify for the exemption. Compensation may be paid biweekly, semi-monthly, or monthly. Check with your state's labor office to see if your state has rules that govern pay frequency.

3. Duties Test.

To qualify for this exemption, the employee's primary duty must consist of:

- The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications.
- The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications.
- The design, documentation, testing, creation, or modification of computer programs related to machine operating systems.

Computer systems analysts, computer programmers, software engineers, or similarly skilled workers in information technology may qualify for this exemption.

Employees who manufacture or repair computer hardware and related equipment don't qualify for this exemption. Nor do those whose work is highly dependent upon, or facilitated by, computers or software programs.

An employee must pass all three tests to qualify for the computer employee exemption. The consequences of misapplying this exemption can be costly. Seek a local attorney's assistance when considering these questions and before making a final determination.

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EXCEPTIONS AND EXEMPTIONS: MINISTERS AND TEACHERS

When it comes to wage and hour laws, classifying workers as ministers or teachers may not be as simple as it seems. Here's what your ministry should know.

Ministers

Several courts have created a "ministerial exception" that exempts clergy from wage and hour laws, including minimum wage and overtime pay requirements. Generally, the ministerial exception is intended to apply to pastors, ministers, or other employees who are ordained or who function in a similar religious capacity.

Courts have used different criteria to evaluate who should be considered a minister for purposes of the exception. Criteria that courts have considered include:

- Whether the religious institution made its decision to hire the individual based largely on religious criteria.
- Whether the individual is authorized to perform ceremonies of the church.
- Whether the ministry recognizes the individual as a clergy member.
- Whether the person engages in ecclesiastical or religious activities and attends to the religious needs of the faithful as part of the job function.
- Whether the position requires the individual to complete a formal process such as ordination, licensure, divinity degree, etc., in order to perform the position.

This is not an exhaustive list. Courts have considered additional criteria when evaluating whether a person should be considered a minister for the purposes of the exception.

Based on the above criteria, custodial staff, secretarial staff, and others whose jobs primarily support ministry work (as opposed to performing the ministry work itself) likely won't be considered ministers for purposes of the exception. Employees who don't qualify for the ministerial exception should be classified as exempt or non-exempt, according to FLSA rules.

Teachers

Teachers are exempt from the FLSA minimum wage and overtime requirements if their primary duty is teaching, tutoring, instructing, or lecturing as an employee at an educational establishment. The U.S. Department of Labor (DOL), lists the following as exempt teachers: ¹

- Regular academic teachers
- Kindergarten or nursery school teachers
- Teachers of gifted or disabled children
- Professors
- Adjunct instructors
- Teachers of skilled and semi-skilled trades and occupations
- Home economics teachers
- Vocal or instrument music teachers
- Athletic coaches and assistant coaches (under certain circumstances)

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Note: This list is not exhaustive. To determine a teacher's primary duty, the relevant inquiry in all cases is the teacher's actual job duties. Job titles or full/part-time status alone do not determine exempt status.

Classifying preschool employees may be more difficult, but the employee's duties are the deciding factor. According to the DOL, "Although a preschool may engage in some educational activities, preschool employees whose primary duty is to care for the physical needs of the facility's children would not meet the requirements for the exemption as a bona fide teacher."

Remember, the FLSA salary level and salary basis requirements do not apply to teachers. However, some states have their own salary requirements that do apply to teachers.

Consult a locally licensed attorney for help in understanding and following the laws that apply to your ministry, and which ministry employees qualify for the ministerial exception.

"Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)."

U.S. Department of Labor, Wage and Hour Division, July 2008, https://www.dol.gov/whd/overtime/fs17d_professional.pdf. Accessed 9 July 2019.

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CHANGES TO CALCULATING THE REGULAR RATE OF PAY

On March 28, 2019, the U.S. Department of Labor (DOL) announced a proposed rule to clarify regular rate requirements under the Fair Labor Standards Act (FLSA).

According to the DOL Wage and Hour Division,¹ the FLSA generally requires overtime pay of at least one and one-half times the regular rate of pay for hours worked in excess of 40 hours per work week. Regular rate requirements define what forms of payment employers include and exclude in the “time and one-half” calculation when determining workers’ overtime rates.

Currently, the rules surrounding perks and pay are unclear, specifically what can and cannot be included in calculating an employees’ regular rate of pay. Because these regulations have not been updated in decades, the proposed rule would better define the regular rate for today’s workplace practices.²

The proposed rule confirms that employers may exclude the following from an employee’s regular rate of pay:

- The cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services
- Payments for unused paid leave, including paid sick leave
- Reimbursed expenses, even if not incurred “solely” for the employer’s benefit
- Reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and that satisfy other regulatory requirements
- Discretionary bonuses
- Benefit plans, including accident, unemployment, and legal services
- Tuition programs, such as reimbursement programs or repayment of educational debt

The proposed rule also includes additional clarification about other forms of compensation, including payment for meal periods, “call back” pay, and others.

¹“Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA).”

U.S. Department of Labor, Wage and Hour Division, July 2008, https://www.dol.gov/whd/overtime/fs17d_professional.pdf. Accessed 9 July 2019.

²“Notice of Proposed Rulemaking: Regular Rate.”

U.S. Department of Labor, <https://www.dol.gov/whd/overtime/regularrate2019.htm>. Accessed 28 June 2019.

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WHY CAN'T WE PAY A SALARY TO EVERY EMPLOYEE?

You could be making a common, and costly, misclassification mistake.

Paying a salary to a non-exempt employee can be complicated. Many organizations—including ministries—often are unaware that employees who fit the non-exempt definition set by the FLSA are entitled to minimum wage and overtime, even if the worker is paid a salary. To see if you have an employee who qualifies as exempt, see page 4.

The job duties and salary of support staff and clerical workers often do not meet the standard.

Job titles do not create an exemption

It's a common mistake to classify a worker as exempt in order to pay the worker on a salaried basis. Be aware that a title alone—such as “administrative assistant”—does not create an exemption. As you read earlier (“Overtime Pay: Who Qualifies”), the job duties and salary of support staff and clerical workers often do not meet the standard.

For non-exempt employees, hourly pay is the safer compensation method—it's a straightforward way to track regular and overtime hours and may offer protection against pay disputes. However, if your ministry is strongly committed to paying non-exempt employees a salary, there are certain FLSA rules you must follow.

For non-exempt employees paid a salary, ministries should:

- **Check local minimum wage.** Your area's minimum wage requirements may be higher than federal standards—your local Wage and Hour Division office can offer guidance specific to your area. Consult with a local attorney when setting rates of pay.
- **Determine the hourly rate of pay.** If your ministry chooses to pay a salary to a non-exempt employee, you'll still need to track the employee's work hours. For every work week, the employee must make at least the federal minimum wage as required by the FLSA and any local minimum wage that may be applicable. To calculate the hourly rate of pay each week, divide the salary amount by the number of hours worked in that seven-day period.
- **Calculate overtime.** Generally, overtime is paid at one and a half times the regular rate for all hours worked over 40 in a seven-day, 168-hour work week. Note that the rate of overtime, and how it is calculated, can vary by state.
- **Know exceptions to the rule.** There are several exceptions to minimum wage standards, including full-time students and workers with disabilities. Consult with a local attorney to see if you have a worker who qualifies.
- **Avoid off-the-clock volunteering.** Ministries should avoid the practice of allowing non-exempt employees—whether paid a salary or an hourly wage—to volunteer to work unpaid job-related hours. Even if this is well-intentioned and the worker is willing, the ministry could end up owing back pay, tax withholdings, and steep penalties if an employee's pay falls below minimum wage.

FLSA Risk Assessment Chart

Determining whether a position should or can be classified exempt is a complicated process that must be applied to each individual position. While no concrete test exists to determine whether an exemption is met, this tool can help you assess the risk involved when classifying an employee as exempt.

To weigh the risk, answer the statements in each column as true or false. Count the number of “true” statements in the column and compare to the meter near the bottom of the column.

Does the position qualify for the ministerial exception?	Is the position specifically exempted from FLSA requirements?	Does the position fail to require regular and recurrent participation in interstate commerce?	Does this position meet both the Salary Basis* and Salary Level* tests AND:
The individual was hired based “largely on religious criteria.” T F	The individual is a teacher, academic advisor, or admissions counselor employed by an elementary school, secondary school, or institution of higher education. T F	The position does not require the employee to make interstate phone calls on at least a weekly basis. T F	The position meets the “executive” exemption qualifications under FLSA regulations. T F
The ministry authorizes the individual to perform ceremonies (baptism, weddings, communion) of the church. T F	The individual is a preschool or kindergarten teacher whose primary duty is teaching, not caring for the physical needs of children. T F	The position does not require regular travel outside of the state. T F	The position meets the “administrative” exemption qualifications under FLSA regulations. T F
The ministry holds the individual out as a member of clergy (more than just title). T F	The employee serves in a medical position requiring a valid medical license or certificate. T F	The position does not require the employee to send or receive interstate mail at least weekly. T F	The position meets the “learned professional” exemption qualifications under FLSA regulations. T F
The individual regularly engages in religious or ecclesiastical activities and “attends to the religious needs of the faithful” as part of their job function. T F	The position pays a minimal annual compensation of \$107,432 and may include non-discretionary bonuses and incentive payments. Primary duty is exempt-level work. T F	The position does not require the employee to order materials from another state regularly. T F	The position meets the “creative professional” exemption qualifications under FLSA regulations. T F
The position requires the individual complete a formal process such as ordination, licensure, divinity degree, etc. in order to perform the position. T F	The position requires either a CPA or a JD (law degree) to perform the job. T F	The position does not require the employee to interact with people in other states via the internet on at least a weekly basis. T F	The position meets the “computer employee” exemption qualifications under FLSA regulations. T F
SCORE RISK 0-1 True = Higher 2-3 True = Moderate 4-5 True = Lower	SCORE RISK 0 True = Higher 1-5 True = Lower	SCORE RISK 0-1 True = Higher 2-3 True = Moderate 4-5 True = Lower	SCORE RISK 0 True = Higher 1-5 True = Lower
If you determine the position meets the ministerial exception, the FLSA would not apply. T F	If you determine that the position qualifies under at least one of the above tests, the FLSA likely would not apply. T F	If you determine that the position does not require regular and recurrent participation in commerce, the FLSA likely would not apply. T F	If you determine that the position qualifies for one of the white-collar exemptions, and the employee exceeds the salary level, the FLSA likely would not apply. T F

If a position does not pass any of the above assessments, it likely should be classified as non-exempt and the FLSA rules should be applied. When in doubt, it’s best to err on the side of non-exempt. Consult a locally licensed attorney before classifying an employee as exempt.

*The Salary Basis test requires that the worker earn a salary regardless of quantity or quality of work. The Salary Level test requires that the worker earn at least \$35,568 and may include bonuses and incentive payments paid at least annually to satisfy up to 10 percent of the standard salary level.

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WHAT ABOUT RECORD KEEPING?

While it's a good idea to keep records for all employees, the FLSA requires¹ employers to maintain at least the following information for all non-exempt employees:

- Employee's full name, Social Security number, and address
- Birth date (if younger than 19), gender, and occupation
- Time and day of week when employee's work week begins
- Hours worked each day
- Total hours worked each work week
- Basis on which employee's wages are paid (e.g., hourly, weekly, etc.)
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the work week
- 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

There's no government-mandated form for these records, but the law requires that the data be accurate.

In addition, certain records must be kept for specific amounts of time. For example, employers must retain payroll records, collective bargaining agreements, and sales and purchase records for at least three years. A longer retention period could be required by state or local laws, so ask a locally licensed attorney for guidance. Be sure to store these records in a secure location to protect employees' personal information.

¹"Recordkeeping & Reporting." *U.S. Department of Labor*, <https://www.dol.gov/general/topic/wages/wagesrecordkeeping>. Accessed 28 June 2019.

