

Department of Labor's New Overtime Rules¹

On May 18, 2016, the U.S. Department of Labor announced changes to the White Collar Exemption Regulations of the Fair Labor Standards Act ("FLSA"). The FLSA addresses which employees are entitled to minimum wage and overtime. Those changes will take effect in approximately 6 months on December 1, 2016. There is no exemption in the FLSA or its regulations for non-profit organizations. Therefore, all non-profits, including churches, presbyteries, and synods, need to assess the impact of the FLSA changes on their organization.

In order to determine if the recently announced FLSA changes impact your congregation or council (hereafter collectively "Council"), there are several questions and a few analyses you might consider.

Enterprise Coverage

In order to determine if your Council or any of its employees are covered by the FLSA (and thus potentially impacted by the recent changes), the first question to consider: does your Council engage in ordinary commercial activities with gross sales/business done of \$500,000? That calculation does **not** include charitable, religious or similar activities (ex. collecting and donating food for free). Also, it does not include income from contributions, dues, and donations of cash or non-cash items.

The calculation only applies to ordinary commercial activities in which your organization is in substantial competition with other businesses. So look at any non-religious business you conduct such as tutoring services or sales of products across state lines that are also sold commercially by non-religious companies.

Please note that church preschools, public or private, for-profit or non-profit, **are** covered enterprises under the FLSA without regard to the annual dollar volume of business. The FLSA does not define what the DOL considers a preschool. However, based upon items published by the DOL it considers a daycare to be a preschool that is covered by the FLSA.

If you operate a preschool, the DOL has confirmed that teachers in preschools may qualify for exemption from minimum wage and overtime pay if they are classified as professionals, an

¹ The information in this article is based upon information published by the Department of Labor and its Wage and Hour Division. The Legal Services Office of the Presbyterian Mission Agency does not represent the churches, presbyteries, and synods of the PCUSA and cannot provide legal advice to them, **but we strongly recommend that each congregation and council consult with its own lawyer to evaluate the impact of the FLSA changes on it.** In addition, each congregation and council should evaluate the impact of these changes in connection with the laws of the state(s) where it operates, **which is another reason to consult with local legal counsel.** Legal Services provides this information to the congregations and councils merely as guidance and information **and to alert congregations and councils that they should to evaluate the FLSA changes with their local legal advisor.**

exemption recognized under the FLSA. A teacher is exempt if their primary duty is teaching, tutoring, instructing or lecturing in an educational establishment.

If the answer to the enterprise coverage question is no, we do not engage in such business or if we do the volume is less than \$500,000, your organization might not be covered by the FLSA, but you must still examine individual coverage. If the answer to the enterprise question is yes, two or more of our employees perform work considered to be in interstate commerce and the annual gross volume of commercial sales or business done by our organization is at least \$500,000, then the FLSA may apply to your organization. But that is not the end of your analysis (see Individual Coverage).

To give a sense of why each Council should follow a multi-step analysis, your Council might face this situation: Your non-profit organization runs a commercial operation that has an annual gross volume of sales or business done of at least \$500,000; therefore you may be operating an enterprise subject to the FLSA. Any employees of your church who do not work in that commercial operation and work only in the non-profit religious and charitable operations are not likely covered by the FLSA (unless they are subject to individual coverage); employees who do work in the commercial operation are probably covered by the FLSA. Ministers who perform ministerial functions in your organization are likely not covered by the FLSA (see below). After the enterprise analysis, you may still need to evaluate the employees who are not covered by enterprise coverage under the individual coverage tests (see below).

Individual Coverage

Even if your organization is not subject to enterprise coverage under the FLSA, it is possible that one or more of your employees may be protected by the Act. So you should look at each employee and ask: does the employee regularly engage in work duties that include interstate commerce (these duties need NOT be for a business/commercial purpose)? Examples:

Does the employee produce goods sold in interstate commerce?

Does the employee transport people or products across state lines?

Does the employee regularly make or receive interstate telephone calls?

Does the employee ship items to another state or several states or receive items shipped in interstate commerce (ex. cook who purchases food products across state lines and uses a church kitchen to prepare meals)?

Employees who regularly engage in such activities may be protected by the FLSA. If an employee spends an insubstantial amount of time on such activities, the DOL claims it will not assert that this employee is engaged in interstate commerce, so the employee is not protected by the Act. In the Presbyterian Church (U.S.A.) (“PCUSA”) and with regard to churches near state borders, leadership of the church must pay particular attention to this analysis. Employees of

churches near state borders with members in other states are more likely to be scrutinized; one or more employees may regularly mail materials and make calls to church members in other states. The same applies to presbyteries and synods whose mission and work straddles states.

Ministers of Word and Sacrament/Teaching Elders

The history of the FLSA coverage of ministers of Word and Sacrament/Teaching Elders is murky. There is no specific statement in the FLSA or its regulations that state that ministers are exempt. Instead, the DOL points to two of its documents and to decisions made by courts which support the DOL's position that ministers are exempt from FLSA coverage. That position is also reiterated in DOL commentary that accompanies the new regulations. Courts assessing coverage often point to the ministerial exemption. At bottom, it seems that the DOL considers ministers to be exempt from FLSA coverage. However, discuss with your local counsel whether a minister in the employ of your Council is performing ministerial duties that exempt the minister from coverage.

Impact of the New Regulations on Exempt Employees

If your organization has classified an employee as exempt under one of the white collar exemptions (executive, administrative, etc.) and under the current salary test, the employee is exempt from minimum wage and overtime pay. The proposed FLSA regulation changes will increase the salary test to \$913 per week/\$47,476 per year and on December 1, 2016, exempt employees who earn less than \$47,476 will suddenly become non-exempt.

Another change in the FLSA is to increase the highly compensated workers salary test. This exemption will apply to salaried employees who annually earn \$134,148 or more, whose primary duties including performing office or non-manual work, and who customarily and regularly perform at least one of the exempt duties or responsibilities of an executive administrative or professional employee. The DOL interprets "customarily and regularly" to mean more than occasionally but less than constant. When the changes take effect those exempt employees who make less than \$134,148 will suddenly become non-exempt.

Next Steps in the Analysis

If your Council is not covered under the enterprise coverage or if individual employees are not subject to individual coverage, it is probable the changes in the FLSA do not impact your organization. If your Council is covered in whole or in part under enterprise or individual coverage, you should consult with local employment counsel concerning what, if any changes, you need to make to your policies, your compensation program, and your compensation of individual employees. There are a number of issues to consider after the new rules are implemented, such as:

1. Does it make sense to increase the compensation of employees whose annual salary is below \$47, 476 so that those employees continue to be exempt employees?
2. For exempt employees who will suddenly become non-exempt on December 1, 2016, how much “overtime” do they work at present (over 40 hours in a week)? Will your budget allow those employees who work over 40 hours per week to work overtime after December 1, 2016? If not, if that work must continue, who can do that work or can the employee shed some duties or work more efficiently to eliminate the need for overtime?
3. How will you control overtime costs? If your employment policies do not say so, consider adding a policy that states that no overtime can be worked without permission of a supervisor. Then inform all employees of this new policy and document how the policy was shared with employees and how it was explained. Have supervisors lift up this new policy at department meetings and have them document how/when they did it.
4. Make sure employees are carefully and accurately tracking and recording hours worked.

Failure to Comply with the FLSA Changes

Employers who fail to comply with the changes to the FLSA may be subject to a lawsuit from the DOL or from the victimized employee. If an employer is found to have violated the FLSA, it might be ordered to give back-pay and other damages to a prevailing plaintiff. Willful violations might subject an employer to the same penalties plus a criminal prosecution and a \$10,000 fine.

Conclusion

On December 1, 2016, the final rules that will change the Fair Labor Standards Act will take effect. All employers should immediately evaluate those changes with their local counsel and determine if the changes will impact their staff and their organization.