TO: United Church of Christ Conferences

FROM: Office of General Counsel

DATE: Updated May 19, 2016

RE: Fair Labor Standards Act Final Amendments

MEMORANDUM

This memorandum replaces a memorandum released by the Office of General Counsel on May 10, 2016, addressing the proposed amendments. The amendments have now been finalized by the government. This memorandum addresses the final amendments. The primary changes are to the standard salary level, which was finalized at $47,476 (instead of the anticipated $50,440) and the automatic adjustment timeline, which was finalized at three years (instead of the anticipated annual adjustment). The amendments are effective December 1, 2016.

I. INTRODUCTION

On June 6, 2015, the Department of Labor ("DOL") issued 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.[1] The amendments change which employees are entitled to overtime pay. The final amendments were released on May 18, 2016. This memorandum is intended to prepare Conferences and Local Churches to comply, if they are covered under the FLSA. **Employers must be in compliance with the new overtime rules by December 1, 2016.**

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[1] 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).

II. BACKGROUND

The amendments are to the federal Fair Labor Standards Act only. These amendments do not change state wage and hour laws. The FLSA provides the minimum protection that must be given to workers. Some states may have 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.[2] 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 an employer that is considered an "enterprise engaged in commerce or in the production of goods for commerce" under 29 U.S.C. § 203.[3] This defined term relies on included defined terms for "enterprise" and "engaged in commerce or in the production of goods for commerce." An employer is an "enterprise" if its employees conduct "related activities

[2] *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).
[3] 29 U.S.C. § 203(s).

performed by persons for a common business purpose, which can be a religious purpose."[4] An enterprise, if determined to be such, is "engaged in commerce or in the production of goods for commerce" if it 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 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, including a preschool, regardless of whether such hospital or school is public or private or non- or for-profit.[5] "Commerce," for the purpose of the FLSA, means interstate or foreign commerce.[6] 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.[7] 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, or, alternatively, the employer must operate a hospital or school to qualify for enterprise coverage under the above.

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, may be covered as enterprises, regardless of the whether the gross annual volume of business done is $500,000, under the second prong of the definition of an "enterprise" "engaged in commerce, or in the production of goods for commerce, above. Whether a Local Church is covered because it operates a preschool

[4] *Id.*; 29 CFR 779.214.
[5] 29 U.S.C. § 203(r)–(s).
[6] 29 U.S.C. § 203(b).
[7] 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).

depends upon the business structure of the preschool and whether the preschool is separately incorporated with a separate board of directors. Local churches that operate preschools should seek the advice of an attorney for more information.

Second, 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.[8] 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.[9] 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 covers them on an individual basis under this provision.[10] 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.[11]

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[8] 29 U.S.C. § 203(e); 29 U.S.C. § 206; 29 U.S.C. § 207.
[9] 29 C.F.R. § 779.103.
[10] *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.
[11] 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); Marshal 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.

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, namely, whether the employee has regular and significant interstate contacts, and the geographical location of the church—for instance, whether it has members that attend from different states.

To summarize, employees of a non-profit organization are covered by the overtime and minimum wage provisions of the FLSA: 1) all of the employees, if the organization is considered an "enterprise" and if it is "engaged in commerce or in the production of goods for commerce, and if it grosses an amount greater than $500,000 annually, or, alternatively, if it operates a hospital or school, including a preschool; or 2) individual employees, if they have regular and significant interstate or foreign contacts (which they may have based on the nature of the organization or the organization's geographic location).

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 ordained minister of a religion.[12] The basis of the ministerial exemption is that, under the

[12] *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

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.[13]

A strong argument exists that the FLSA would not apply to ministers who engage in ministerial duties for a religious organization.[14] 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…").[15] 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).

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.

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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).

[13] *See Schleicher*, 518 F.3d at 475.

[14] 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.

[15] 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.").

III. OVERTIME RULES UNDER THE FLSA

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

An employer must pay an 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.[16] 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), whether on an hourly or salary basis, and fulfill certain responsibilities.[17] 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 *and* perform the applicable duties under the exemption. **On December 1, 2016, the standard salary level will increase to $913 per week ($47,476 annually).**

1. Executive Exemption

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.[18]

2. Administrative Exemption

For the Administrative Exemption, an employee 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

[16] 29 U.S.C. § 206; 29 U.S.C. § 207. Some states and municipalities have higher wage requirements, however.
[17] 29 U.S.C. § 213(a)(1).
[18] 29 C.F.R. § 541.100.

of "the exercise of discretion and independent judgment with respect to matters of significance."[19]

3. Professional Exemption

The Professional Exemption exempts employees whose 1) work 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."[20] 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.[21] 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.[22] "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 prolonged work in the field (*e.g.* the self-taught professional).[23] Finally, a field of artistic or creative endeavor is normally writing, music, acting, creative journalism, graphic arts, and other similar occupations.[24]

B. What is the new rule that takes effect December 1, 2016?

Starting December 1, 2016, the DOL is increasing the amount that an employee must earn to be exempt from overtime pay (the "standard salary level"). The standard salary level is increasing to $913/week ($47,476 annually) for 2016. The standard salary level applies whether the employee is paid hourly or on a salary basis. The standard salary level will automatically

[19] 29 C.F.R. § 541.200 ; s*ee also* 29 C.F.R. § 541.201 *et seq.* (for further explanation of these terms).
[20] 29 C.F.R. § 541.300. *See also* 29 C.F.R. § 541.301 *et seq.*
[21] 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).
[22] 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.
[23] WAGE AND HOUR DIVISION, U.S. DEP'T OF LABOR, FACT SHEET #17D, 2.
[24] *Id.*

adjust every three years and will be posted by the DOL 90 days in advance. The employee must still meet the requirements of the applicable duties test (see III.A.1-3), along with being paid the standard salary level.

C. I have determined that I have employees who are covered under the FLSA. Now what should I do?

1. Review each employee's salary, working hours, and job duties, and determine appropriate changes.

You should review each employee's salary, working hours, and job duties. If the employee is paid an amount that is significantly below the standard salary level, and typically works 40 hours a week or less, you should plan to change that employee's classification to nonexempt on or before the effective dates of the amendments, which is December 1, 2016. The FLSA requires that employers keep records of hours worked for all nonexempt employees. Thus, if the status of an employee is going to change from exempt to nonexempt when the proposed amendments become effective, the employer will need to begin to track the employee's hours, which can be by a time clock, time sheet, or software program.

If the employee is paid an amount that is close to the standard salary amount, and the employee typically works some overtime hours, it may make more sense to raise the amount that the employee is paid to the standard salary level when the amendments become effective, keep the employee classified as exempt, and not be required to pay the employee overtime. Note that the standard salary level is expected to increase every three years, so an employee who is paid at or near the standard salary level will require a periodic raise to maintain the exempt classification. Be sure the employee's job duties meet one of the duties tests for exemption (see III.A.1-3).

If the employee is paid more than the standard salary level and is classified as exempt, you need do nothing when the amendments become effective. Be sure the employee's job duties meet one of the duties tests for exemption (see III.A.1-3).

2. Inform the employee that the employee's status will change.

Be sure that employees are informed of any change in status. Explain to employees that the law has precipitated the change.

3. Adopt a no-overtime policy.

Employers with non-exempt employees should adopt a policy forbidding overtime without prior authorization, and circulate it to employees. Note that employees who violate this policy are still entitled to be paid overtime, but may be disciplined for failing to follow company policies. Requiring an employee to check or answer emails or telephone calls when not working may result in the employee incurring overtime hours. The policy should be clear on these issues. Additionally, employees may not "volunteer" their time to do the same jobs for which they are paid; employees must be paid for all hours worked.

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 or an hourly basis does not affect 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 and qualify under the duties test described above are exempt from overtime, regardless of whether they are paid a salary or by the hour.

The FLSA requires that employers keep records of hours worked for all nonexempt employees. Thus, if the status of an employee is going to change from exempt to nonexempt

when the proposed amendments become effective, the employer will need to begin to track the employee's hours, which can be by a time clock, time sheet, or software program.

B. I have an employee whose classification is going to change from exempt to nonexempt under the amendments. Can I still pay the employee a salary or do I have to pay the employee at an hourly rate?

You can continue to pay a person a salary even though they are categorized as non-exempt and eligible for overtime pay. You must keep track of the employee's hours, as described in IV.A.

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

A person who is paid a salary makes the same amount each week regardless of how many hours she actually works (unless she is entitled to overtime pay and works overtime). If a person makes a salary, and she works less than 40 hours a week, her pay cannot be docked for the time that she did not work. 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 she did not work.

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

D. What about part-time employees? I have an office administrator who works 20 hours a week. He makes $25,000 per year. Up to now, I have classified him as exempt under the Administrative Exemption. Now what do I do?

The office administrator should be reclassified as nonexempt, because he makes less than $47,476 annually. You will need to keep track of the hours that he works. If he works more than 40 hours in a week, he will be entitled to overtime pay for the hours that he works over 40. Note that neither the standard salary level nor the "hours over 40" requirement is adjusted for part-time employees; an employee who works 20 hours per week is NOT subject to a lower standard salary level than an employee who works 40 hours per week, nor does a 20-hour per week employee start to earn overtime until he has reached more than 40 hours.

E. If we have a busy week, can I give a nonexempt employee "comp time" instead of paying her overtime?

You can give "comp time" *in the same week* to ensure that an 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.

F. 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.[25] Under this exemption, the FLSA excludes from compliance with the minimum wage and overtime provisions employees of such an establishment, but only if the establishment qualifies by one of two methods. The first method is if the establishment does not operate for more than seven months out of the year.[26] If a camp or similar establishment "operates" for seven months or less out of the year, its employees are exempt from the overtime and wage FLSA provisions.[27] For the purpose of this method, an establishment is not "operating" if it is only engaged in maintenance and ordering supplies during the non-operating five months or less.[28] The second method by which a camp establishment may qualify for this exemption is if during the preceding calendar year, the establishment's average receipts for any six month period of the year did not

[25] 29 U.S.C. § 213(a)(3).
[26] *Id.*
[27] *Id.*
[28] 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).

total more than 33.3% of its average receipts for the other six months of the year. This method applies if the revenue total of any six months (not necessarily consecutive) of the establishment's operating year do not equal one-third of the other six months revenue. For example, if an outdoor recreation establishment operates for nine months out of the year, is closed from December through February, and May, June, July, August, September, and October are its highest grossing months, at an average of $45,000 per month, while the other six months, the average revenue is $12,000 (less than one-third), then the establishment qualifies for this exemption.[29] Under this method, the establishment's employees are exempt from the overtime and wage provisions of the FLSA.[30] 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.

[29] *Id.*
[30] 29 U.S.C. § 213(a)(3).