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# Changes to the Fair Labor Standards Act go into effect on December 1, 2016. Are you prepared?

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## What Exactly are the New Regulations?

On May 18, 2016, the United States Department of Labor released its final rule regarding changes to the overtime threshold for the FLSA. In doing so, the Labor Department doubled the minimum salary needed to be exempt from overtime pay—the previous amount of \$455 per week (or \$23,660 per year) increases to \$913 per week (or \$47,476 per year)—with increases scheduled for every three years after that.

## An Example

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*Betty Jones is employed by First Church as the First Church Child Development Center Director. As a salaried employee, Betty is paid \$42,000.00 per year. Under the previous regulations, Betty did not have to track her hours, nor was she eligible to receive overtime pay when she worked more than 40 hours per week. However, under the new regulations, Betty's salary no longer exceeds the threshold to qualify for the exemption. Instead, she falls \$5,476 below the \$47,476 threshold, and is now eligible for overtime pay at 1.5 times her hourly rate for every hour she works past 40 in a given week.*

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## Why Such a Substantial Increase?

When Congress passed the FLSA in 1938 (“the Act”), its intent was to protect employees engaged in interstate commerce from substandard wages and excessive hours. The Act established the forty-hour week and overtime pay of 1.5 times the hourly rate for all hours exceeding forty. Not all employees were covered by the overtime requirements, however. The Act did not apply to white-collar workers who worked as executive, administrative, or professional employees—so long as their salary exceeded a set minimum amount.

*Churches and non-profit ministries are not exempt from the overtime requirements of the new regulations. However, some church employees may be exempt.*

The minimum salary to qualify for an exemption from overtime has been adjusted only once since the 1970s. That was in 2004 when the minimum reached the current level of \$455 per week (or \$23,660 per year).

In March 2014, President Obama signed a Presidential Memorandum instructing the Secretary of Labor to “propose revisions to modernize and streamline the existing overtime regulations.”

The new regulations that take effect December, 1 2016 are the result of that review by the Department of Labor.

## What Do the New Regulations Mean for Churches?

As already noted, churches and non-profit ministries are not exempt from the overtime requirements of the new regulations. However, some church employees may be exempt. But, how do you tell? Here’s a series of questions to guide the analysis.

To begin, you’ll want to determine whether your employees are generally covered by these federal regulations. This requires you to ask two questions: (1) Is the employee part of the “enterprise activities” at your church or non-profit that produce more than \$500,000 in annual gross sales? OR (2) Does the employee affect interstate commerce? If the answer to either question is “yes,” then the employee is generally subject to these federal regulations regarding overtime pay.

But that’s not the end of the matter. Even if the employee is generally subject to these regulations, there are still two important exceptions to consider. (1) Is the employee a “minister” and therefore exempt from the requirements of the Act? OR (2) Is the employee a teacher and therefore exempt?

**All of these questions will be discussed in more detail below:**

**Q:** *Does your church or non-profit engage in “enterprise activities” that produce more than \$500,000 in annual gross sales?*

**A:** *If it does, the employees that are part of those activities are generally subject to the new overtime requirements.*

The Act is primarily written for businesses with annual gross sales of at least \$500,000. The Act refers to what is normally understood as business activity as “enterprise activity.” Under the Act, churches and non-profits engage in “enterprise activities” in the same way as a business does—by selling goods or services. For example, many churches operate coffee shops, sell sermons and resources, or operate bookstores. If these commercial or “enterprise” activities result in less than \$500,000 in gross sales or income, then the overtime requirements of the Act do not apply. On the other hand, if your coffee shop competes with the local Starbucks, bringing in over \$500,000 in annual gross sales, the Act applies to all church employees working at the coffee shop.

**Here is another example:**

**A non-profit animal shelter provides free veterinary care, adoption services, and shelter for homeless animals (charitable activities). In addition, the shelter provides veterinary care for a fee to customers (commercial activities). If the revenue generated from the organization’s commercial activities is at least \$500,000 in a year, the employees engaged in the commercial activities are covered by the overtime requirements of the Act. Employees of the organization’s charitable activities are not covered on an enterprise basis since those activities do not have a business purpose.**

**Q:** *Does the employee engage in interstate commerce?*

**A:** *If he or she does, the employee will generally be subject to the new overtime requirements.*

Don’t answer this question too quickly. The Act defines “interstate commerce” very broadly—so broadly that people who send mail to other states or shop on the internet qualify. Let’s go back and take a look at Betty.

It might seem at first blush that Betty, as the director of the Child Development Center, does not qualify as a person engaged in interstate commerce or in the production of goods for interstate commerce; therefore, these federal regulations would not apply to her. After all, Betty is not an over-the-road truck driver, train engineer, or airline pilot. However, as mentioned before, the test is very broad. The Department of Labor provides several examples of employees who are individually covered because of their involvement in interstate commerce. Betty is covered if she makes or receives interstate telephone calls, ships materials to another state, transports persons or property to another state, types letters to be mailed out of state, handles records of interstate transactions, or travels to other states for her job. It is likely that if Betty uses the phone, internet or mail to order a product from another state, she is engaged in interstate commerce and the new federal regulations about overtime apply to her (unless one of the other exceptions apply).

**But remember, just because an employee is generally subject to the Act does not end the inquiry. You still need to determine if either of the two following exceptions apply:**

**Q:** *Is the employee a minister?*

**A:** If yes, the overtime requirements do not apply. Generally, churches have two types of employees: ministerial and non-ministerial employees. Ministers are exempt for the new regulations. While there is no explicit exemption for ministers in the regulations themselves, federal case law has typically carved out a ministerial exception regarding federal interference in ministerial selection, compensation, and dismissal based on Constitutional concerns. Assuming that the courts apply that principle in this context, ministers may work over 40 hours per week without being paid 1.5 times the regular rate regardless of the minister's salary. However, the church should be very careful regarding which employees it classifies as a minister—being a church employee is not enough.

**Q:** *Is the employee a teacher at a daycare or preschool?*

**A:** If yes, the overtime requirements do not apply. If the church or non-profit operates a daycare or preschool, employees who engage completely in teaching, tutoring, and instructing children (not providing care) are exempt from the Act. Employees who have as their primary job description caring for a child, rather than teaching a child, are not exempt.

## What Are Your Options?

***Implement a strict no-overtime policy, i.e. no one except ministers may work more than forty hours per week.***

Your church or non-profit ministry has three options in responding to the new regulations. First, implement a strict no-overtime policy, i.e. no one except ministers may work more than forty hours per week. The church policy and procedures manual may be updated to include language that implements a strict policy stating that overtime hours for non-ministerial (and non-teaching) employees must first be approved by the appropriate supervisor. Back to the example with Betty. In this scenario, Betty would be prohibited from working overtime unless she had the express permission of her supervisor.

Second, raise the employee's salary above the new minimum threshold. Here, if First Church raises Betty's salary from \$42,000 to \$47,500 per year then the church is in compliance with the new regulations and is not required to pay Betty for overtime.

***Raise the employee's salary above the new minimum threshold.***

***Pay 1.5 times the hourly rate for overtime work for non-ministerial employees.***

Third, pay 1.5 times the hourly rate for overtime work for non-ministerial (and non-teaching) employees. In this scenario, Betty would be required to keep track of her hours and would receive 1.5 times her hourly rate for every hour worked after forty. For example, at \$42,000 per year, Betty's hourly rate is \$20.19.

If Betty worked 41 hours each week, she would need to be paid \$20.19 for the first 40 hours and \$30.29 for the hour of overtime.

***The church needs to communicate the "why" behind the "what" to employees.***

Whichever option is chosen, the church will need to push the pencil hard on the numbers and communicate the "why" and the "what" to employees to make sure each affected employee understands the new regulations and the church's response to them.

## What Options Are Off the Table?

First, the employee may not volunteer his or her time. An employee may not circumvent the rule by “volunteering” the hours worked over forty if the employee is volunteering for the same duties for which he or she is being paid.

*An employee may not circumvent the rule by “volunteering” the hours worked over forty.*

Betty can still volunteer as a greeter or choir member, but she may not volunteer time as the director of the Child Development Center.

Second, compensatory (or comp) time is not allowed. The church may not get around the overtime rules by offering time off next week in exchange for overtime worked this week.

*Compensatory time and averaging hours is not allowed.*

Third, averaging hours is not allowed. Similar to the comp time rule, the employer is not allowed to average the employee’s hours to ensure that the average is less than 40. The calculations are made for a single work-week consisting of seven consecutive days.

## Next Steps

So, where does your church or non-profit ministry go from here? If you have additional questions or concerns, it is always wise to consult a lawyer who practices in the area of church and non-profit law. Labor laws are difficult enough to understand on their own without the added complexity of the church setting.

1 <https://www.fastcompany.com/3060032/heres-how-the-new-overtime-law-will-affect-you>, last checked 09/09/16.

2 <https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf>, last checked 09/09/16.

3 <https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations>, last checked 09/09/16.

4 *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012).

5 <https://www.irs.gov/pub/irs-utl/ministers.pdf>, last checked 09/09/16.

6 <https://www.dol.gov/whd/regs/compliance/whdfs46.pdf>, last checked 09/09/16.