



**Paytime Inc**  
**(800) 298-6431**

[marketing@paytimepayroll.com](mailto:marketing@paytimepayroll.com)


<mailto:aniswonger@paytimepayroll.com>

5053 Ritter Road

Mechanicsburg, PA 17055



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## Church Employees and the Recent Regulatory Changes Regarding Overtime Exemptions

As most of us have heard and are aware, the result of a 2014 White House Memorandum <sup>1</sup> and the Department of Labor's final rule issued in May of 2016 is that the salary level for "exempt" employees has increased effective December 1, 2016. The questions with which many of us have been wrestling are: does this apply to churches and their employees, and, if so, to which employees does it apply, and how does it need to be applied? The clear answer to all of these questions is that there are no clear answers. Following, however, are the regulations, information and data collected to assist you in making informed decisions based on your individual circumstances.

The United States Department of Labor (DOL), Wage and Hour Division (WHD) is the Federal Regulatory Agency that administers and enforces the regulations established by the Fair Labor Standards Act (FLSA). The recent changes announced primarily affect only the salary level of exempt employees. When reference is made to salaried exempt employees it applies only to the requirement of employers to pay overtime. Other FLSA requirements still apply.

The "duties tests" required to qualify an employee as salaried exempt have not changed. However, I recommend these be reviewed to ensure compliance as well.

There is an exemption for non-profits, which includes churches that are recognized as 501(c)(3)'s by Internal Revenue Service (IRS). However, there are also two ways by which that exemption may not apply - enterprise coverage and individual coverage. Enterprise coverage is not likely to be an issue for most churches, but the individual coverage may be applicable and establish the need to make a church employee an hourly employee who was previously believed to qualify as salaried exempt, even if that employee meets the duties test.

Enterprise coverage applies to all employees of an enterprise (church) with annual gross sales or business of at least \$500,000. This "gross sales or business" amount does not include contributions and donations. This applies to activities such as operating a gift shop, etc.

Individual coverage applies to employees of an exempt employer who engage in interstate commerce. The term "interstate commerce" as used here can be defined as something as simple as making a telephone calls across state lines.

There is also another, less clear, exemption - the ministerial exemption. This is one that is not necessarily identified or specifically mentioned in any FLSA or DOL documents, but there are court cases that have, in effect, established and maintained this exemption.

Although this area of the law is constantly evolving, there is authority based on existing cases to continue to have full time pastoral staff, those licensed or ordained, considered salaried exempt employees. Until more guidance is issued, or unless legal counsel advises otherwise, it is recommended that all other staff be classified as hourly non-exempt and afforded the benefits of state and federal law related to minimum wage and overtime, among

other aspects of the employment relationship. Nothing in this update should be considered legal advice, and please consult with your legal advisor if questions or concerns arise.

Please see and review the below references for additional information.

For more information go to:

<sup>1</sup> Presidential Memorandum - Updating and Modernizing Overtime Regulations

<https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-> (<https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations>) and-modernizing-overtime-regulations (<https://www.whitehouse.gov/the-press-office/2014/03/13/presidential-memorandum-updating-and-modernizing-overtime-regulations>)

Final Rule from the Federal Register

<https://www.federalregister.gov/articles/2016/05/23/2016-11754/defining-and-delimiting-the-> (<https://www.federalregister.gov/articles/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>) exemptions-for-executive-administrative-professional-outside-sales-and (<https://www.federalregister.gov/articles/2016/05/23/2016-11754/defining-and-delimiting-the-exemptions-for-executive-administrative-professional-outside-sales-and>)

Fact Sheet #14 from DOL

<https://www.dol.gov/whd/regs/compliance/whdfs14.pdf> (<https://www.dol.gov/whd/regs/compliance/whdfs14.pdf>)

Fact Sheet #14A from DOL

<https://www.dol.gov/whd/regs/compliance/whdfs14a.pdf> (<https://www.dol.gov/whd/regs/compliance/whdfs14a.pdf>)

Franczek Radelet, Attorneys & Counselors - *Lesser Known Exemptions: the "Ministerial" Exception to the FLSA*

<http://www.wagehourinsights.com/2015/04/lesser-known-exemptions-the-ministerial-exception-> (<http://www.wagehourinsights.com/2015/04/lesser-known-exemptions-the-ministerial-exception-to-the-flsa/>) to-the-flsa/ (<http://www.wagehourinsights.com/2015/04/lesser-known-exemptions-the-ministerial-exception-to-the-flsa/>)

Contained in the article above:

- United States Court of Appeals, Fifth Circuit - Starkman v. Evans
  - <http://caselaw.findlaw.com/us-5th-circuit/1136677.html> (<http://caselaw.findlaw.com/us-5th-circuit/1136677.html>)
- United States Court of Appeals for the Ninth Circuit - Alcazar and Rosas v. The Corporation of the Catholic Archbishop of Seattle, Horatio Yanez
  - <http://cdn.ca9.uscourts.gov/datastore/opinions/2010/03/16/09-35003.pdf> (<http://cdn.ca9.uscourts.gov/datastore/opinions/2010/03/16/09-35003.pdf>)
- Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC
  - [https://www.bloomberglaw.com/public/desktop/document/HosannaTabor\\_Evange](https://www.bloomberglaw.com/public/desktop/document/HosannaTabor_Evange) ([https://www.bloomberglaw.com/public/desktop/document/HosannaTabor\\_Evangelical\\_Lutheran\\_Church\\_\\_Sch\\_v\\_EEOC\\_No\\_10553\\_201?1466629166](https://www.bloomberglaw.com/public/desktop/document/HosannaTabor_Evangelical_Lutheran_Church__Sch_v_EEOC_No_10553_201?1466629166)) lical\_Lutheran\_Church\_\_Sch\_v\_EEOC\_No\_10553\_201?1466629166 ([https://www.bloomberglaw.com/public/desktop/document/HosannaTabor\\_Evangelical\\_Lutheran\\_Church\\_\\_Sch\\_v\\_EEOC\\_No\\_10553\\_201?1466629166](https://www.bloomberglaw.com/public/desktop/document/HosannaTabor_Evangelical_Lutheran_Church__Sch_v_EEOC_No_10553_201?1466629166))

Other References:

- Brotherhood Mutual Insurance Company
  - <http://www.brotherhoodmutual.com/index.cfm/resources/legalassistance/legalqanda/questions/fair-labor-standards-act/> (<http://www.brotherhoodmutual.com/index.cfm/resources/legalassistance/legalqanda/questions/fair-labor-standards-act/>)
- Word Press
  - <https://adamsnonprofitlaw.wordpress.com/2009/08/01/minimum-wage-requirements-as-they-apply-to-churches/> (<https://adamsnonprofitlaw.wordpress.com/2009/08/01/minimum-wage-requirements-as-they-apply-to-churches/>)
- Liebert Cassidy Whitmore, Labor, Employment and Education and Law Experts
  - <http://www.lcwlegal.com/82200> (<http://www.lcwlegal.com/82200>)

Contact Information:

James F. Brandt - Mirelle Associates, Inc. (<http://mirelleassociates.com>) - 717-367-6322 or [jimbrandt@mirelleassociates.com](mailto:jimbrandt@mirelleassociates.com) (<mailto:jimbrandt@mirelleassociates.com>)

Tricia Richardson - Paytime, Inc. (<http://paytimepayroll.com>) - 717-458-0021 x 205 or [trichardson@paytimepayroll.com](mailto:trichardson@paytimepayroll.com) (<mailto:trichardson@paytimepayroll.com>)

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This email was sent to: [trichardson@paytimepayroll.com](mailto:trichardson@paytimepayroll.com)

**Mailing address:** 5053 Ritter Road, Mechanicsburg, PA 17055