Department of Labor's New Overtime Rules[1]

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On September 24, 2019, the U.S. Department of Labor ("DOL") announced changes to the White-Collar Exemption Regulations to the Fair Labor Standards Act ("FLSA"). The FLSA is the federal law that addresses which employees are entitled to minimum wage and overtime. The announced changes will take effect on January 1, 2020. 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 council. One obvious impact may be on your council's budget. Employees who are now classified as exempt and not entitled to overtime may become non-exempt and entitled to overtime as of January 1, 2020. This means they are entitled to time-and-a-half or 1.5 times their hourly wage for every hour they work over 40 hours per week. Your budget may not account for overtime that may be claimed by newly-eligible employees.

In order to determine if the 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? If so, you are subject to enterprise coverage under the FLSA. 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 Council 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.

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[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 Administrative Services Group of the Presbyterian Church (U.S.A.), A Corporation 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 new overtime rules**. 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 evaluate the Fair Labor Standards Act changes with their local legal advisor**.

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 exemption recognized under the FLSA. A teacher is exempt if their primary duty is teaching, tutoring, instructing, or lecturing in an educational establishment. If they are not exempt, they are entitled to overtime pay.

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 Council 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 Council is at least $500,000, then the FLSA may apply to your Council. But that is not the end of your analysis (see Individual Coverage section, below).

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 Council 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 Council 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. For example, 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 borders or 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 says 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. Courts assessing coverage often point to the ministerial exception. At bottom, it seems that the DOL considers ministers to be exempt from FLSA coverage, and thus exempt from minimum wage and overtime pay. However, discuss with your local legal 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 Council 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 $684 per week/$35,568 per year and on January 1, 2020, exempt employees who earn less than $35,568 will suddenly become non-exempt and entitled to overtime pay for all hours work over 40 hours in a workweek.

Another change in the FLSA is to increase the highly compensated workers salary test. This exemption will apply to salaried employees who annually earn $107,432 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 highly compensated exempt employees who make less than $107,432 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 Council. If your Council is covered in whole or in part under enterprise or individual coverage, you should consult with local employment legal 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 (and can your Council afford) to increase the compensation of employees whose annual salary is below $35,568 so that those employees continue to be exempt employees?

2. For exempt employees who will suddenly become non-exempt on January 1, 2020, 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 continue to work overtime after January 1, 2020? 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. Consider revising hours worked to keep employees at or under 40 hours per week. For example, if an employee works on Sundays (Sunday School, youth group, supporting worship, etc.) make sure the employee works fewer hours during the week to account for weekend hours worked.

5. Make sure employees are carefully and accurately tracking and recording hours worked on timecards or in an online payroll system and that supervisors are reviewing and confirming hours worked. If there is a dispute concerning hours worked or an investigation by the Department of Labor, you want clear and accurate time records to show that your employee(s) was correctly compensated. Keep all time records for at least 7 years.

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 who is not properly paid for overtime hours worked. 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 fine.

Conclusion

On January 1, 2020, the final rules that amend the Fair Labor Standards Act will take effect. All employers should immediately evaluate those changes with their local legal counsel and determine if the changes will impact their staff and their Council.

Useful information can be found on the Department of Labor's website:

https://www.dol.gov/whd/overtime_pay.htm

https://www.dol.gov/whd/overtime2019/