



Brotherhood Mutual®

10 Things YOU SHOULD KNOW ABOUT **FLSA**

WHAT IS THE FLSA AND HOW DOES IT APPLY TO MY MINISTRY?

The Fair Labor Standards Act (FLSA) is a federal law, originally passed in 1938, that governs minimum wage, overtime pay, and other pay-related issues. The FLSA can apply in two ways: on an enterprise basis and on an individual basis. Even when a church does not qualify as an enterprise under the FLSA, the law's requirements may still apply to employees individually.

ENTERPRISE COVERAGE

Organizations that meet the enterprise test are required to follow the FLSA for all of their employees, unless exemptions apply to individual employees. Several types of organizations, such as hospitals, medical and nursing facilities, schools, and preschools are always subject to enterprise coverage.

In addition, other types of organizations meet the enterprise test if they:

- Have at least two employees engaging in interstate commerce, and
- Generate at least \$500,000 per year in sales or receipts.

Generally, the federal government doesn't consider churches to be enterprises, since non-profit organizations' income from contributions, membership fees, dues, and donations used for charitable activities generally are not included in the \$500,000 threshold. Also, church employees generally aren't performing a "business purpose" within the law's meaning. However, some churches can qualify as enterprises if they operate a "named enterprise" (such as a school or preschool).

INDIVIDUAL COVERAGE

Courts evaluate individual coverage on a case-by-case basis. In each case, regulators determine whether or not the individual employee is "engaged in interstate commerce" on a "regular and recurrent" basis. Courts interpret the phrase "interstate commerce" very broadly. If ministry employees participate in any of the following activities regularly, they probably engage in interstate commerce:

- **ORDERING** teaching materials or other supplies from out of state.
- **MAILING** newsletters or other information to people out of state.

- **TRAVELING** to other states for work purposes.
- **MAINTAINING** a website from which people from out of state may order items.

There's no clear definition of what "regular and recurrent" means. The U.S. Department of Labor's Wage and Hour Division indicates that it will investigate each situation individually.

To protect your ministry against FLSA-related lawsuits, it's best to assume that individuals are covered by the FLSA unless an exemption applies. Consult a locally licensed attorney before concluding that your organization and its employees are exempt from wage and hour rules.

WANT MORE INFORMATION?

See the U.S. Department of Labor's *fact sheet* regarding nonprofit organizations and the FLSA.

FLSA REQUIREMENTS

Many ministries employ at least one person who may be subject to the FLSA. This makes it critical to understand and follow the law's requirements. Employers who violate the FLSA could be ordered to pay overtime that would have been due for the past few years, as well as civil and criminal penalties. If the employer skirted the law intentionally, penalties could include fines of up to \$10,000 for each violation.

Most wage and hour claims are excluded from insurance coverage, so employers could be responsible for paying not only a judgment, but also legal expenses.

To help your ministry follow the FLSA, classify employees into one of two categories:

- **NON-EXEMPT.** These employees must be paid at least the minimum wage for normal working hours, and overtime rates after working 40 hours in a week.
- **EXEMPT.** These employees fit the legal criteria for an exemption, and do not need to be paid overtime rates for work hours beyond the 40-hour threshold.

There are a number of exemptions to FLSA requirements. The next several pages of this resource include information that can help you classify ministry employees. As a general rule, consult a locally licensed attorney before concluding that your organization and its employees need not comply with wage and hour rules.

Employers that are subject to the FLSA are required to:

- Pay non-exempt employees at least the federal minimum wage.
- Pay non-exempt employees overtime after they work 40 hours in a workweek.
- Pay non-exempt employees overtime worth at least 1 1/2 times their regular hourly wage.

Some states and communities have even stricter minimum wage and overtime rules. For example, many states have a higher minimum wage than the one required by the federal government. Your *state labor office* can provide information about these rules.

WANT MORE INFORMATION?

Read the article *Rules Changing for Overtime Pay* on BrotherhoodMutual.com.

THE THREE-FACTOR TEST

The FLSA specifically excludes certain types of employees from its requirements. Some common exemptions are often referred to as “white collar exemptions.”

To be exempt from federal overtime rules, an individual typically must pass all three of the following tests. If an employee fails any one of them, the person is a non-exempt worker who is entitled to earn the minimum wage and overtime pay. The three tests are:

- **THE SALARY BASIS TEST.** Employees must earn a salary—a guaranteed minimum amount of money that will be paid in any week that the person performs “any” work, regardless of the quality or quantity.
- **THE SALARY LEVEL TEST.** As of December 1, 2016, employees must earn at least \$913 per week (\$47,476 for a full-year worker). This salary level will be adjusted every three years.
- **THE DUTIES TEST.** Employees must perform certain job duties to qualify for an exemption. Job titles are irrelevant to the duties test.

There are several types of duties that can qualify an employee for an exemption. For ministries, the most common exempt duties include executive, administrative, learned professional, and creative professional. See the next page for more information about these duties.

WANT MORE INFORMATION?

Read *Who's Exempt From Wage and Hour Laws?*, an article on BrotherhoodMutual.com.

THE DUTIES TEST: WHITE-COLLAR EXEMPTIONS

If employees meet the Salary Basis and Salary Level Tests, the third test they must pass to be classified as exempt employees is the Duties Test. For ministries, the most common duties that qualify for an exemption are executive, administrative, learned professional, and creative professional.

To qualify as an **EXECUTIVE EMPLOYEE**, an employee must:

- Primarily perform management duties.
- Regularly supervise at least two full-time equivalent employees (not volunteers).
- Have authority or significant influence in hiring, firing, discipline, and promotion decisions affecting employees.

To qualify as an **ADMINISTRATIVE EMPLOYEE**, an employee must:

- Primarily perform office or non-manual work related to the ministry's management or business operations. Examples: business administrators, daycare directors, school principals.
- Use "discretion and independent judgment" in making decisions regarding significant matters (most support staff and clerical workers don't meet this standard).

To qualify as a **LEARNED PROFESSIONAL**, an employee must:

- Do work requiring advanced knowledge in a field of science or learning, such as theology, teaching, accounting, or law.

To qualify as a **CREATIVE PROFESSIONAL**, an employee must:

- Do work involving invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. Examples: musicians, writers, actors.

In addition, certain employees may qualify for the **COMPUTER PROFESSIONAL** exemption. To learn more, follow the link below.

Employees who pass all three tests—Salary Basis, Salary Level, and Duties—can be classified as "exempt" and do not need to be paid overtime rates for working more than 40 hours in a week.

It's a good idea to seek assistance from a local attorney when making a final determination about whether any exemptions apply to people within your ministry.

WANT MORE INFORMATION?

Read our *Legal Q&A* about the "computer professional" exemption on BrotherhoodMutual.com.

THE FLSA FOR MINISTERS

Courts have created a “ministerial exception” that exempts clergy from wage and hour laws, including minimum wage and overtime pay requirements. Generally, the ministerial exception is intended to apply to pastors, ministers, or other employees who are ordained or who function in a similar religious capacity.

Different courts have used different criteria to evaluate who should be considered a minister for purposes of the exception. Criteria that courts have considered include:

- Whether the religious institution made its decision to hire the individual based “largely on religious criteria.”
- Whether the individual is authorized to perform ceremonies of the church.
- Whether the ministry holds the individual out as a member of clergy.
- Whether the person engages in ecclesiastical or religious activities and “attends to the religious needs of the faithful” as part of the job function.
- Whether the position requires the individual complete a formal process such as ordination, licensure, divinity degree, etc. in order to perform the position.

Based on these criteria, custodial staff, secretarial staff, and others whose jobs primarily support ministry work (as opposed to performing the ministry work itself) likely won’t be considered ministers for purposes of the exception. Seek assistance from a local attorney before deciding whether the ministerial exception applies to employees in your ministry.

WANT MORE INFORMATION?

Watch Brotherhood Mutual’s free webinar,
*How Changes to Overtime Rules Could Affect
Your Ministry.*

THE FLSA FOR TEACHERS

Teachers are exempt from the FLSA minimum wage and overtime requirements if their primary duty is teaching, tutoring, instructing, or lecturing as an employee at an educational establishment. According to the *U.S. Department of Labor (DOL)*, teachers include, but are not limited to:

- Regular academic teachers.
- Kindergarten or nursery school teachers.
- Teachers of gifted or disabled children.
- Professors.
- Adjunct instructors.
- Teachers of skilled and semi-skilled trades and occupations.
- Home economics teachers.
- Vocal or instrument music teachers.
- Athletic coaches and assistant coaches (under certain circumstances).

Classifying preschool employees may be more difficult, but the employee's duties are the deciding factor.

According to the DOL, "Although a preschool may engage in some educational activities, preschool employees whose primary duty is to care for the physical needs of the facility's children would not meet the requirements for the exemption as a bona fide teacher."

Remember, the FLSA salary level and salary basis requirements do not apply to bona fide teachers. However, some states do have their own salary requirements that apply to teachers. Consult a local attorney to see if your state has its own wage requirements for teachers.

WANT MORE INFORMATION?

See a *FLSA Q&A* by the U.S. Department of Labor's Wage and Hour Division.

RECORDKEEPING

If someone brings a compensation-related lawsuit against your ministry, accurate records can help confirm what happened. While it's a good idea to keep records about all employees, the FLSA requires employers to maintain at least the following information for all non-exempt employees:

- Employee's full name, Social Security number, and address
- Birth date (if younger than 19), gender, and occupation
- Time and day of week when employee's workweek begins
- Hours worked each day
- Total hours worked each workweek
- Basis on which employee's wages are paid (e.g., \$9 per hour or \$440 per week)
- Regular hourly pay rate
- Total daily or weekly straight-time earnings
- Total overtime earnings for the workweek
- All additions to or deductions from the employee's wages
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

There's no government-mandated form for these records, but the law requires that the data be accurate.

In addition, certain records must be kept for specific amounts of time. For example, employers must retain payroll records, collective bargaining agreements, and sales and purchase records for at least three years. A longer retention period could be required by state or local laws. Because these records contain employees' personal information, be sure to store these records in a secure location.

WANT MORE INFORMATION?

Download Brotherhood Mutual's sample [Document Retention Schedule](#).

CALCULATING HOURS FOR NON-EXEMPT WORKERS

Non-exempt ministry workers are often willing to go above and beyond the call of duty when helping others. Though well-intentioned, this dedication can lead to questions about how to calculate work hours, and how ministries can continue carrying out their missions while following the FLSA's requirements.

Here are suggestions to help avoid three common mistakes:

- **KNOW WHAT COUNTS AS “WORK.”** All time that employees spend doing job-related activities potentially can count as work time, whether the work is done “on the clock” or not. This includes work done from home, work performed outside of normal working hours, and work done “voluntarily.” All hours that you “suffer or permit” an employee to work—even if you don’t request it—count as work time.
- **CONSIDER USING FLEX TIME WHERE PERMITTED.** The law says you can’t give employees future “comp time” instead of overtime pay, but you can adjust schedules within a workweek. For example, if a church bookkeeper works 10 hours on Wednesday, instead of his normal eight, federal law allows you to send him home an hour early on Thursday and Friday, so he works only 40 hours in a week. Some state laws are more restrictive. Consult a local attorney to learn about the laws in your area.
- **AVOID AVERAGING HOURS OVER MULTIPLE WEEKS.** While the government allows some flexibility, it doesn’t permit employers to average work time over multiple weeks. A common mistake is to pay employees straight time if they average 40 hours per week during a pay period.

Example: The church janitor works 45 hours in the first week of a pay period and 35 in the second. Although the janitor worked only 80 hours in two weeks, the FLSA says you owe him five hours of overtime pay, since he worked more than 40 hours in the first week.

Ministry can require long hours, but there are steps you can take to help ensure employees’ workloads abide by FLSA requirements. By following wage and hour laws, you can help your ministry avoid costly back wages, legal fees, and fines.

WANT MORE INFORMATION?

See the U.S. Department of Labor’s *Reference Guide to the Fair Labor Standards Act*.

EMPLOYING MINORS

Employees under the age of 18 receive unique treatment under the FLSA. In addition to standard minimum wage and overtime protections, some minors are prohibited from working certain hours and from doing dangerous jobs.

If your ministry employs workers under age 18, keep the following in mind:

- **MINIMUM WAGE AND OVERTIME RULES APPLY.** Classify minors as “exempt” or “non-exempt” employees and pay them according to FLSA requirements, just like any other employee.
- **WORK HOURS MAY BE RESTRICTED.** While the FLSA does not place specific restrictions on the work hours of minors age 16 and over, it does set guidelines for younger children. Those aged 14 to 15 can work:
 - Only during non-school hours.
 - As many as three hours on a school day (or eight hours on a non-school day).
 - Up to 18 hours during a school week.
 - Up to 40 hours on a non-school week.
 - Between the hours of 7 a.m. and 7 p.m. (June 1 through Labor Day, hours extend until 9 p.m.)
- **HAZARDOUS JOBS ARE FOR ADULTS ONLY.** Employees under the age of 18 are not permitted to perform hazardous jobs. These jobs include operating motorized vehicles and heavy machinery, operating circular saws and other powered cutting devices, working on roof operations, and working on ladders or scaffolds higher than 20 feet. See the U.S. Department of Labor’s [requirements](#) for more information. If a ministry allows a minor to work under hazardous conditions, it could be required to pay hefty fines. If you’re in doubt as to whether a job would be considered “hazardous” for purposes of an employed minor, hire an adult instead.

Many states have broader requirements than the FLSA when it comes to employing minors. For example, some states require work permits to be issued before a minor can be hired. Consult a locally licensed attorney for guidance in employing those under the age of 18.

NEED A CHECKLIST?

Download our free [Employment Practices Checklist](#) from BrotherhoodMutual.com.

PAYING PART-TIME EMPLOYEES ON A SALARIED BASIS

Paying part-time, non-exempt employees a salary is one way to make payroll costs more consistent, but this practice could lead to FLSA violations. Regardless of whether employees are paid on a salaried or hourly basis, they should be evaluated to determine how the FLSA applies to them individually, and treated accordingly.

When evaluating employees, remember to:

- **VERIFY THAT THE FLSA APPLIES TO THE EMPLOYEE.** Use the Enterprise Test and the Individual Test to determine whether the employee is subject to the FLSA. To protect your ministry against FLSA-related lawsuits, it's best to assume that individuals are covered by the FLSA unless an exemption applies.
- **CLASSIFY EACH EMPLOYEE AS EXEMPT OR NON-EXEMPT.** Salaried employees pass the Salary Basis Test, but do they also pass the Salary Level Test and the Duties Test? Typically, only employees that pass all three tests should be classified as exempt. Remember, employers may not prorate the minimum Salary Level for part-time employees. Generally, part-time employees are non-exempt.
- **FOLLOW THE FLSA'S REQUIREMENTS.** Non-exempt employees must be paid at least the minimum wage, plus overtime rates for overtime hours, even when paid a salary. Be sure to follow local wage standards, as well. A locally licensed attorney can help you understand the laws that apply to your situation.
- **KEEP ACCURATE RECORDS.** Timecards and other forms of recordkeeping can help ensure your ministry complies with the FLSA, especially when workloads change from week to week. Calculate the employee's weekly salary and divide it by the number of hours worked in the week. If a non-exempt employee's hourly pay rate falls below the minimum wage, or the employee works more than 40 hours in a week, compensation should be adjusted to bring the employee's pay into FLSA compliance.

Managing the hours and pay for a non-exempt employee paid a salary can be difficult and time-consuming. Ministries can simplify their payroll process by converting the employee to an hourly wage, tracking hours worked, and paying overtime when appropriate.

WANT MORE INFORMATION?

Check out [Can a Part-Time Employee Be Paid a Salary?](#), a free article on MinistryWorks.com.