

New Overtime Rules Will Affect Churches By Frank Sommerville, J.D., CPA

After much study, the Labor Department adopted new overtime regulations designed to help employers determine which employees are entitled to overtime pay. The new rules are scheduled to take effect Aug. 23, 2004. Since virtually all churches are subject to overtime rules, these new regulations will require many churches to amend their policies and procedures on overtime pay. If your state's overtime rules mandate overtime pay, the state rules apply even though a federal exemption may apply.

These changes represent the first major rewrite of the overtime rules in over 40 years. Some employers were getting hit with large class-action judgments for overtime, and so they called for the revision because the old rules became confusing when applied in our modern context. In fact, the Employment Standards Administration's Wage and Hour Division (WHD) admitted that its enforcement varied greatly from examiner to examiner. The new rules are designed to define certain bright line tests so employers may correctly classify its workers.

Types of exemptions

The new regulation retains the familiar exemption names, but changes the requirements for the exemption. The workers are classified as exempt if they are (1) an executive (sometimes called the management exemption), (2) an administrative worker, or (3) a worker in a recognized profession. A new classification, computer worker exemption, has been added in the new regulations.

The biggest change relates to the minimum salary required to be exempt from overtime pay. The new rule raises the minimum wage for an exemption from \$155 per week to \$455 per week (about \$24,000 per year). This means that workers who earn less than \$455 per week must receive overtime pay even if they may qualify for an exemption.

Minister exemption

Before discussing the specific exemptions, I should note that ministers are not listed in the statute as exempt from overtime rules. They are also not mentioned in the new regulations. Historically, the courts have exempted ministers from overtime rules because of the legislative history. During a Congressional debate, the sponsor of the overtime bill told Congress that overtime rules did not apply to ministers because they were not considered employees. Of course, this was also the position of the Internal Revenue Service (IRS) at the time.

In 1981, the IRS changed its position and declared that ministers were employees for income tax purposes. The courts have mostly approved the IRS position.

No court has considered minister overtime since the IRS changed its position on minister-employees. However, the courts use the IRS tests for determining who is an employee when addressing overtime issues. If so, the minister exemption may no longer exist. To retain the minister exemption, one could argue that ministers are not subject to overtime rules under the original legislative history. One could also argue that the so-called blanket clergy exclusion prevents the Wage and Hour Division from applying the overtime regulations to ministers. But the only safe step for churches will be to fit its ministers within one of the enumerated exemptions.

Executive exemption

The executive exemption requires that the worker meet the following tests:

- Their primary duty must include managing the church or some distinct department or division of the church, and they must meet the minimum salary requirement mentioned above.
- They must direct the work of at least the equivalent of two full-time employees.
- Either they have the authority to hire or fire employees or their input on a decision carries significant weight.

Generally, the senior pastor and heads of ministry departments will fit within this exemption. Please note that volunteer supervision is not included in the test. If the hiring and firing decisions are made by a committee, then the church should amend its committee charge to name the positions whose input is needed in any employment decisions.

Administrative exemption

The administrative exemption requires that the worker meet the following tests:

- Their primary duty must be to perform office work or non-manual labor related to the management of the church, and they must meet the minimum salary requirement.
- The primary duty must include the exercise of discretion and independent judgment with respect to matters of significance to the church.

This exemption will apply to workers with decision making authority but do not have the same amount of worker supervision the executive exemption requires. The administrative exemption would typically apply to a worker who supervises many volunteers and their activities.

Professional exemption

The professional exemption requires that a worker meets the following tests:

- Their primary duty must be performing work that requires advance knowledge; the work must be primarily intellectual in character and requires consistent exercise of discretion and judgment; and the worker must meet the minimum salary requirement.
- Their work must be in a recognized science or field of advanced learning.
- The knowledge they acquired must be from an extensive, specialized intellectual instruction over a long period of time.
- If the field of advanced learning relates to a creative profession, such as music or art, then the work must be characterized by imagination, creativity, originality or exceptional talent.

The regulation contains specific examples of jobs that meet or fail this test, including health care professionals and teachers. It does not contain examples of any religious jobs. This regulation generally requires a four-year college degree or its equivalent. Ministers will meet this definition if the ordaining body requires them to possess a college degree, or its equivalent in advanced Bible studies. A church may require a combination of college-level course work and internships. Assuming that a minister meets the exemption requirements, the exemption will not apply until the minister completes the educational and internship requirements. Churches should revise their minister recognition rules to fit within the new overtime professional exemption rules.

Computer professional

The computer worker exemption requires the worker to meet the following tests:

- They must earn at least \$455 per week, or \$27.63 per hour if compensated on an hourly basis.
- They must work as a systems analyst, programmer, software engineer, or similar position.
- Their primary duty must consist of application of systems analysis; design development; creation, testing or modification of systems or programs; testing design, development or creation; or modification of operating systems.

This exemption will apply to managers of IT departments, but not to those maintaining the church's networks.

Conclusion

The rules do not contain a transition period. They will apply Aug. 23, 2004. Before that date, the church should study all its positions to determine the applications of the new rules. In a few cases, workers may become exempt under the new rules and non-exempt under the old rules. Also, remember that state overtime rules have not changed. If the state rules mandate paying overtime, then the church must continue paying overtime hours. All revisions to your policies and procedures should be reviewed by an employment lawyer before they are adopted.

@bio:Frank Sommerville, JD, CPA, is a shareholder with the law firm Weycer, Kaplan, Pulaski & Zuber, P.C. in Dallas, TX, and board certified in tax law by the Texas Board of Legal Specialization. He may be reached at fsommerville@nonprofitattorney.com.