

**OVERTIME, FAIR PAY REGULATIONS & RELIGIOUS**  
**DISCRIMINATION**

**MID-SOUTH CHAPTER OF THE NATIONAL ASSOCIATION OF CHURCH BUSINESS**

**ADMINISTRATORS**

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## Overtime Regulations: "The Fair Pay Rules"

### I. Overtime Limitations - Overview

Section 13(a) (1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide:

- Executive;
- Administrative;
- Professional

### II. Three Tests for Exemptions:

- Salary level test – Minimum \$455 per week (\$23,660 annually)
- Salary basis test – Method of computation and deductions
- Job duties:

#### ➤ Executive Duties Test

- a. The employee's primary duty must be the management of the enterprise or of a customarily recognized department or subdivision;
- b. The employee must customarily and regularly direct the work of two or more other employees; and
- c. The employee must have the authority to hire or fire other employees, or have her suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status be given particular weight.

#### ➤ Administrative Duties Test

- a. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- b. The employee must exercise discretion and independent judgment with respect to matters of significance.

#### ➤ Professional Duties Test: Learned and Creative

a. Learned Professional:

- The employee's primary duty must be the performance of:
  - Work requiring advanced knowledge;
  - In a field of science or learning; and
- The employee must acquire the knowledge by a prolonged course of specialized intellectual instruction.
- *This applies to clergy since they are considered professional employees.*

b. Creative Professional

- The employee's primary duty must be the performance of:
  - Work requiring invention, originality or talent; and
  - In a recognized field of artistic or creative endeavor.

➤ **Additional Exemptions**

- a. Ministerial Exception has been expanded to certain persons who perform duties that are key to the institution's pastoral and spiritual mission.<sup>1</sup>
- b. Churches that are not engaged in commercial or business activities may not be subject to the FLSA minimum wage, overtime compensation and equal pay requirements because of the definition of *enterprise* in the FLSA:
  - "Enterprise engaged in commerce or in the production of goods for commerce" means that it has employees engaged in commerce or production, or has employees handling, selling, or otherwise working on goods or materials that have been produced for commerce; and is an enterprise whose annual gross volume of sales made is not less than \$500,000.
  - This often turns on the individual duties of the employees.

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<sup>1</sup> Shaliesabou v. Hebrew Home of Greater Washington, 363 F.3d 299 (4<sup>th</sup> 2004).

### III. Calculating Overtime

#### A. Regular rate of pay

If a salaried employee is not exempt, then the employer must compute and pay the employee overtime wages for all hours worked in excess of 40 hours in a workweek. To accomplish this, the employer must convert the employee's weekly or monthly salary into an hourly wage.

#### B. Work week

An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day.

#### C. Hours worked

The Supreme Court recently held that employers must compensate their employees for the time the employees spend donning protective gear if the gear is integral and indispensable to the principal activity that the employee performs.<sup>2</sup> Employers must also compensate the employee for time spent walking to work areas after donning the protective gear. An employer is not required to compensate employees while they are waiting to put on protective gear; however, the Court suggested that an employer must pay employees for waiting time if the employees were required to arrive at a specific time and had to wait to dress in the protective clothing.

#### D. Travel time

##### ➤ Ordinary travel

Ordinary home-to-work travel by employees will not count as hours worked; however, once employees start the workday at a location, all time spent traveling on the job will count as hours worked.

##### ➤ Overnight travel

As an enforcement policy, the Wage and Hour Division of the DOL will not be consider as hours worked the time spent in travel away from home as a passenger on an airplane, train, boat, bus, or automobile outside of the employee's regularly scheduled hours of work.

##### ➤ Special one-day trips

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<sup>2</sup> IBP, Inc. v. Alvarez, 126 S. Ct. 514 (U.S. 2005)

Travel time for special one-day trips often will count as hours worked when the employee departs from his normal work location to the destination of the special assignment.

#### E. On-call time

➤ Waiting time or layover time

An employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes, is "engaged to wait" and entitled to compensation for the time.

➤ Show-up time

Sometimes when an employee arrives at work, the employer sends the employee home before the performance of any work. The FLSA does not require the employer to consider any of that time as hours worked or to give the employee show-up pay.

#### F. Training time

The general rule of the workplace is that training time should be included as working time. To exclude training time from the hours worked, four criteria must be met:

- Attendance must be outside of the employee's regular working hours;
- Attendance must be voluntary;
- The course, lecture, or meeting must not be directly related to the employee's job; and
- The employee must not perform any productive work during such attendance.<sup>3</sup>

#### G. Meals/Break time

"Bona fide" meal or lunch periods are not counted as work time. An employee must be completely relieved from duty for the meal period to be excluded from time worked.

#### H. Medical Examinations

Time spent by an employee seeking medical attention during his or her working hours at the employer's direction or on the employer's premises for a work-related illness or injury is hours worked.

The Seventh Circuit recently held that an employee's time spent during non-working hours receiving medical treatment for a work-related injury was

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<sup>3</sup> 29 C.F.R. § 785.27(1994).

compensable when the employer required the treatment and received the ultimate benefit of the treatment.<sup>4</sup>

## **Religious Discrimination**

### **A. Overview**

- Religion and religious beliefs are protected by Title VII of the Civil Rights Act of 1964.
- Tennessee employees are afforded additional protections by the Tennessee Human Rights Act.
- The Supreme Court has defined religion as a “sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God.” The belief must be sincerely held by the individual.
- Religious discrimination claims are on the rise.

### **B. The First Amendment**

- “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the right of the people peaceably to assemble and petition the government for a redress of grievances.”
- **Ministerial Exemption**
  - Prevents governmental encroachments, via the federal courts, into areas of religious freedom which it is forbidden to enter under the Establishment Clause.
  - Government may not become entangled in church or religious entity affairs by deciding sectarian issues.

### **C. Title VII Ministerial Exemption**

- Prohibition on religious discrimination does not apply to religious corporations, associations or educational institutions with respect to employment of individuals of a particular religion to perform work connected with the carrying on of their activities.<sup>5</sup>
- It shall not be an unlawful employment practice for an employer to employ an individual based on his/her religion in those circumstances where religion is a

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<sup>4</sup> *Sehie v. City of Aurora*, 2005 U.S. App. LEXIS 28781 (7th Cir. 2005).

<sup>5</sup> 42 U.S.C. Sec. 2000e-1(a).

bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.<sup>6</sup>

- Theory: these employees have dedicated themselves to religious service and placed themselves under religious governance.
- Recent case expands the scope of Ministerial Exemption:
  - Title VII ministerial exemption “permits religious organizations to advance their religious missions by discriminating on the basis of religion in employment.
- The Equal Employment Opportunity Commission states that the exemption applies to all employment positions within the religious organization. However, the exemption only permits discrimination based on religious discrimination.
  - Title VII still prohibits religious organizations from discriminating based on race, gender, national origin, and color.
- The Ministerial Exemption only applies to decisions relating to hiring and terminating employees and does not apply to an employee’s wages or benefits.

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<sup>6</sup> 42 U.S.C. Sec. 2000e-2(d).