

PRESBYTERIAN CHURCH (U.S.A.)
MID-COUNCIL FINANCIAL NETWORK
NOVEMBER 17-18, 2016
HOLIDAY INN AND SUITES
521 S. GULFVIEW BLVD., CLEARWATER BEACH, FLORIDA

Legal and Tax Update

Developments (and Some Refreshers) in Tax-Exemption Issues, Employment Law, Ministers and the Law, and Other Legal Considerations Affecting Religious Organizations

PRESENTED BY:

Cory Halliburton

ATTORNEY AT LAW

WEYCER, KAPLAN, PULASKI & ZUBER, P.C.

challiburton@wkpz.com

www.wkpz.com



DISCLAIMER AND
CIRCULAR 230 DISCLOSURE

DEAR RECIPIENT,

THIS COMMUNICATION IS ONLY FOR GENERAL INFORMATIONAL PURPOSES; IT IS NOT INTENDED TO CONSTITUTE LEGAL ADVICE OR A RECOMMENDED COURSE OF ACTION IN ANY SITUATION. THIS COMMUNICATION IS NOT INTENDED TO BE, AND SHOULD NOT BE, RELIED ON BY A RECIPIENT IN MAKING DECISIONS OF A LEGAL NATURE WITH RESPECT TO THE TOPICS AND ISSUES REFERENCED HEREIN. EACH RECIPIENT IS ENCOURAGED TO CONSULT INDEPENDENT LEGAL COUNSEL BEFORE MAKING ANY DECISIONS OR TAKING ANY ACTION CONCERNING THE MATTERS IN THIS COMMUNICATION. THIS COMMUNICATION DOES NOT CREATE A LAWYER-CLIENT RELATIONSHIP BETWEEN WEYCER, KAPLAN, PULASKI & ZUBER, P.C. OR CORY HALLIBURTON, AND A RECIPIENT.

CIRCULAR 230 DISCLOSURE: TO COMPLY WITH TREASURY DEPARTMENT REGULATIONS, THIS IS TO INFORM YOU, THE READER, THAT ANY TAX ADVICE CONTAINED IN THIS COMMUNICATION IS NOT INTENDED OR WRITTEN TO BE USED, AND CANNOT BE USED, FOR THE PURPOSE OF (1) AVOIDING PENALTIES THAT MAY BE IMPOSED UNDER THE INTERNAL REVENUE CODE OR OTHER APPLICABLE TAX LAW OR (2) PROMOTING, MARKETING, OR RECOMMENDING TO ANOTHER PARTY ANY TRANSACTION, ARRANGEMENT, OR OTHER MATTER.

THANK YOU.

CORY

Legal Update

Developments in Tax-Exemption Issues, Employment Law, and Other Legal Considerations Affecting Religious Organizations

TAX EXEMPTION ISSUES

- a. PLR 201626025. *Inurement/Private Benefit* – Motorcycle club formed to promote motorcycle safety lost its tax exemption because it operated a campground and recreational facilities for members. The campground and recreation provided a private benefit to club members.
- b. PLR 201610025 -- *Inurement/Private Benefit* – Providing low income housing to agricultural migrant workers not exempt because it was controlled by owners of the farms where the residents worked.
- c. PLR 201605019 -- *Inurement/Private Benefit* – Church cemetery organization qualified for 501(c)(3) though it allowed members to be buried in the cemetery. No private benefit.
- d. PLR 201541013 – *Inurement/Private Benefit* - Exemption revoked where the Foundation paid for the expenses of the founder’s telemarketing company and entered into an exclusive contract with founder’s telemarketing company for fundraising services. Additionally, the Foundation failed to conduct any exempt activities since its only activities were raising funds that were paid to the telemarketing company engaged.
- e. PLR 201534014 – *Inurement/Private Benefit* – Payment of funds to pay personal expenses of the organization’s president and comingled payment of expenses with another organization with the same president was inurement of benefit and the exemption was revoked.
- f. PLR 201523022 - *Inurement/Private Benefit* - Organization formed for religious activities of a minister, including preaching engagements, revivals, Bible studies and worship services, not exempt because the true purpose was to support the minister's candidacy for office of bishop.
- g. PLR 201505039 -- *Inurement/Private Benefit* - Organization did not qualify for tax exemption under IRC § 501(c)(3) because it was formed and operated to raise funds for the benefit of a designated individual. See PLR 201519035 with same result, though the child beneficiary was handicapped and needed substantial assistance that the family could not afford.
- h. PLR 201609006 – *Church Activities/Exempt Activities* – Organization was granted exempt status as a church, but as a result of a church tax inquiry it was determined there were no church operations and the other operations did not qualify as exempt activities but were rather activities were more aligned with for profit operations.

- i. PLR 201603038 – *Exempt Activities* -- Organization failed the operational test when it failed to start school as represented in Form 1023.
- j. PLR 201609007 – *Exempt Activities* – Exempt organization formed to transport humanitarian aid to remote parts of the world for other exempt organizations lost its tax exemption when it ceased operations and did not conduct any charitable activities for several years.
- k. PLR 201603035 – *Exempt Activities/Books & Records* - Day care failed to prove its operations differed from a for-profit day care and failed to provide adequate books and records as required by IRC §6001. It provided bank statements and a general ledger, but failed to provide cancelled checks, credit card statements, mortgages, invoices, rental agreements and receipts for the majority of expenses.
- l. PLR 201603040 - *Exempt Activities/Books & Records* – Organization filed bankruptcy and ceased operation and allowed its corporate status to be involuntarily dissolved. Additionally, the organization failed to provide supporting documents including minutes, general ledgers, invoices, receipts, bank statements and cash receipts and disbursement journals.
- m. PLR 201603041 – *Books & Records* – Food bank’s exemption revoked where they were either unwilling or unable to provide records to support and substantiate the noncash donations reported on its Form 990 and failed to demonstrate that the donated food was properly distributed to needy individuals as opposed to being used for the benefit of the officers, managers & volunteers that run the organization. The organization was also unable to provide records to substantiate its other financial activities.
- n. PLR 201539032 – *Expenditure Responsibility* - Exemption revoked for being a conduit for funds to go to foreign organizations. Service also deems unreported compensation payments a “nonexempt” activity. Funds transferred to foreign organization for tuition and for grants without expenditure responsibility.
- o. PLR 201523021 – *Political* - Organization's mission to educate the public about political candidates not exempt because all its speakers for the "Meet the Candidate" forum came from the same political party.
- p. *Parks v. Comm’r*, 145 T.C. No. 12 (2015). – *Political* - A private foundation organized to preserve game fish violated the lobbying activity prohibition by running radio spots during the state legislature’s consideration of new game fishing regulation.
- q. PLR 201540019 – *Commercial Activities*. Exemption denied. Organization was formed to take over the operations of the founder’s sole proprietorship that had been operating at a loss. Activities held to inure to her benefit and were conducted in a commercial manner.
- r. PLR 201535019 – *Commercial Activities* - Organization organized to provide various services to the elderly and veterans. Predominately these activities are the provision of consulting

services to assist veterans' hospitals. Exemption denied since a substantial part of the activities was operated in a commercial manner. The IRS also deemed a compensation system that included performance bonuses and revenue based payments to be private benefit.

- s. *Gamehearts v. Comm'r*, T.C. Memo 2015-218. – *Commercial Activities* - Organization not exempt because it offers gaming activities in a sober environment.

PAYROLL ISSUES

- a. IRS internally directs its agents to proceed with church payroll examinations under the provisions of IRC Section 7611.
- b. *Powell v. Comm'r*, T.C. Memo 2016-111. Mileage estimates recorded daily and used for business expenses disallowed. Mileage entered once a month in the expense report also disallowed because it failed the documentation requirements.
- c. *Haag v. Comm'r*, T.C. Summary Op. 2016-29. Mileage from home to temporary work locations was personal because the taxpayer did not have a home office or other place of business. The taxpayer's tax home was wherever he delivered services and earned his income.
- d. *Amadi v. Comm'r*, T.C. Memo. 2016-120. Business expenses incurred in Nigeria disallowed due to handwritten receipts and receipts that were written out of receipt books that can be purchased at an office supply.

CHARITABLE CONTRIBUTIONS

- a. PLR 201610026 – *Private Benefit* – Organization loses exempt status when it is deemed that it has participated in a fraudulent contribution scheme involving property donations with high values and subsequent property sales at substantially discounted prices.
- b. *Brown v. Commissioner*, T.C. Memo 2016-39. Court denied deduction to pastor who claimed cash deductions to church, though the church secretary (niece of pastor) verified the contributions. No receipts or bank verification.
- c. *Garcia, et ux. v. Commissioner*, T.C. Memo 2016-21. *Receipts Issues* - Taxpayer loses deduction for \$3,560 for clothing donated to AMVETS because the letter from AMVETS wasn't obtained until the audit was in progress. The deduction was denied regardless of the detailed list kept by donors and the valuation done through his tool contained in his tax software.
- d. *Wesley v. Commissioner*, T.C. Memo 2015-200. *Receipts Issues* – Taxpayer acknowledged that he has manufactured the receipts in 2014 rather than receive them timely in 2011. Also, one of the donations listed a contribution for an item paid for with a ministry credit card rather than the Taxpayer's credit card.

A FEW CONSIDERATIONS FOR DECIDING WHO IS A MINISTER, AND WHAT DO WE DO WITH THEM?

I. Minister for Tax Purposes?

The tax law does not define the term “minister of the gospel” and the regulations only describe what are considered to be ministerial duties. However, a church must decide who is a minister in order to correctly treat the individual for payroll purposes.

The Tax Court has set forth a balancing test for determining whether or not an individual is a minister. *Knight v. Comm’r*, 92 T.C. 199, 204 (T.C. 1989). Those factors, of which a majority must be met for the determination to be that an individual is a minister, are:

- (1) whether the individual administers sacraments;
- (2) whether the individual conducts worship services;
- (3) whether the individual performs services in the control, conduct, and maintenance of a religious organization;
- (4) whether the individual is ordained, commissioned, or licensed; and
- (5) whether the individual is considered to be a spiritual leader by his religious body.

The only mandatory factor is that the individual must be “duly ordained, commissioned, or licensed.” *See id.* Failure to meet one or more of the other factors is something to be considered, but will not preclude a finding that the individual is a minister. *See id.*

DOL Distinctions: The above test is not the same test as is used for determination of ministerial status for issues falling under the realm of the Department of Labor. For DOL purposes it is not required that the minister have appropriate credentials, but it is more important what duties the minister is performing for the church. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

II. Ministerial Duties

In order to be treated as a minister for federal tax purposes, the minister must be performing ministerial duties. In general, ministerial duties are defined by the regulations under Sections 107 and 1402 to be as follows:

- the performance of sacerdotal functions;
- the conduct of religious worship services;
- the administration and maintenance of religious organizations (generally defined to be churches) and their integral agencies relating to the directing, managing or promoting the activities of the organization;

- the performance of teaching and administrative duties at a seminary or parochial school; and
- services performed under an assignment or designation by a religious body constituting the minister's church.
- The following criteria help to establish a valid assignment:
 - o Sufficient relationship between the church and the minister assigned;
 - o Sufficient relationship between the church and the organization which will employ the minister;
 - o The employing organization operates in a manner which furthers the exempt purposes of the church;
 - o The church maintains some sort of supervisory relationship with the minister;
 - o The assignment happens before the employment begins.

If the minister is working for an organization which is not a church, the only service which is considered to be ministerial is the conduct of religious worship services and the administration of the sacerdotal functions, unless the minister is at the organization on a valid assignment from a church.

It is possible for someone who is properly credentialed as a minister to work for a nonprofit organization and not be performing ministerial services. In these instances the minister is not considered to be a minister for tax purposes and may not receive a housing allowance and will be in the FICA system.

III. Important Ministerial Tax Issues

- Self-employed status for social security purposes
- possible exemption from self-employment taxes
- exemption from mandatory federal income tax withholding
- ability to receive a housing allowance

Once determined to be or not to be a minister, the individual must be reported consistently in all four of the above areas.

IV. Dual Tax Status for Ministers

Because of the special withholding rules and the unique status of ministers for purposes of social security taxes, there is a common misconception that ministers are self-employed for all purposes. This is not necessarily true. Except for the truly self-employed minister, such as the traveling evangelist, a minister who spends time primarily at one work place is considered to be a common law employee despite being self-employed for the purposes of social security taxes.

V. Federal Income Tax

Ministers are not exempt from paying federal income taxes on their earnings. Ministers are exempt from mandatory withholding of federal income taxes from their salary. They may elect to have withholding of their federal income taxes by completing either a Form W-4 or by giving written instructions to their employers. If a minister does not elect withholding, then the minister should be prepared to make estimated tax payments using Form 1040-ES vouchers or the IRS EFTPS system. See 2016 Form 1040-ES at <https://www.irs.gov/pub/irs-pdf/f1040es.pdf>.

VI. Social Security and Medicare Taxes

Ministers do not participate in the FICA/Medicare program. This is not an elective decision for the minister, but a decision mandated by law. Ministers do pay self-employment income tax due to the definitions under IRC Section 1402. The minister must report earnings on Schedule SE with his Form 1040 and pay social security taxes through the SECA program. See IRS information on Schedule SE (Form 1040) at <https://www.irs.gov/uac/about-schedule-se-form-1040>.

VII. Exemption from Self Employment Tax

Form 4361 is available for those properly credentialed clergy to use to opt out of Self Employment taxes. See IRS Form 4361 at <https://www.irs.gov/pub/irs-pdf/f4361.pdf>.

- The minister must be opposed to public insurance based on his religious beliefs. This opposition is defined in the Treasury Regulations.
- The minister must file Form 4361 in triplicate in a timely manner. The form is due by the due date of his tax return, including extensions, for the second year in which he had self employment earnings of \$400 or more, any part of which are from his duties as a minister.
- Election only applies to ministerial earnings and not to other secular income.
- Minister must keep copy of approved election and should keep strong evidence of proof of filing. Do not file the 4361 election as an attachment to Form 1040.
- See IRS Publication 517. <https://www.irs.gov/publications/p517/ar02.html>

VIII. Compensation Packages for Ministers

Religious organizations like to use terms such as love gifts, honorariums, offerings, discretionary funds, and housing allowances, in addition to more traditional reimbursement plans, wages, and salaries. Dealing with the benefits received by key employees in religious organizations is very important. Churches have a tendency to not properly review all forms of payments with the result being an underreporting of income on the minister's Form W-2.

General Rule: Unless the Internal Revenue Code specifically states something is not taxable, a person must consider it as taxable. This means that if you benefit from the item, then it is probably taxable. The following is a small list of items that should be considered as compensation and be determined if the item is taxable or not taxable:

- Salary
- Love Gifts
- Insurance Plans
- Deferred Comp Plans
- Educational Benefits
- Housing Allowance
- Auto Allowances
- Laptop computers
- Child Care
- Clothing
- Cell Phones
- Meal Allowances

IX. Housing Allowance

The legal authority for the housing allowance can be found in section 107 of the Internal Revenue Code, which provides that “In the case of a minister of the gospel, gross income does not include –

- (1) the rental value of a home furnished to him as part of his compensation; or
- (2) the rental allowance paid to him as part of his compensation, to the extent used by him to rent or provide a home.”

The Treasury Regulations require that:

- (1) the home or rental allowance be provided as remuneration for services which are ordinarily the duties of a minister of the gospel (26 C.F.R. § 1.107-1(a));
- (2) that prior to payment of this rental allowance, the employing church or other qualified organization must designate the rental allowance in an employment contract or by any other appropriate instrument (26 C.F.R. § 1.107-1(b)); and
- (3) that the designation must be sufficient in that it clearly identifies a portion of the minister’s salary that is the rental allowance (26 C.F.R. § 1.107-1(b)).

Examples of services considered duties of a minister include: (1) performance of sacerdotal functions, (2) conduct of religious worship, (3) administration and maintenance of religious organizations and their integral agencies, and (4) performance of teaching and administrative duties at the theological seminaries. *Id.* at § 1.107-1(a).

Section 1.107-1(a) of the Regulations also provides that the rules outlined in Treasury Regulation 1.1402(c)-5(b)(2) apply to the determination of “duties of a minister.” *See id.* at § 1.107-1(a). Treasury Regulation 1.1402(c)-5(b)(2) states that services performed by a minister in the exercise of his ministry include: (1) The ministration of sacerdotal functions, (2) the conduct of religious worship, and (3) the control, conduct, and maintenance of religious organizations under the authority of a religious body constituting a church or church denomination. 26 C.F.R. § 1.1402(c)-5(b)(2).

The housing allowance is excluded from federal income tax to the extent it does not exceed certain limits. The housing allowance is subject to self-employment tax. The following rules apply to the employing religious organization:

- the minister must be performing ministerial duties;

- the housing allowance must be formally designated prior to the payment of the housing allowance; and
- the housing allowance should not be included in gross wages when Form 941 is prepared nor should it be included in Box 1 on Form W-2

Note: The minister must determine the amount of housing allowance which may be excluded each year. It is not the organization's obligation to make sure the minister excludes the correct amount on his Form 1040. Therefore, the organization should not ask for a documentation of the minister's housing expenses. It is also possible for 100% of the compensation package to be designated as housing allowance. The exclusion is the lesser of 3 items:

- The amount designated by the church;
- The amount spent on housing expenses; or
- The fair rental value of the home as furnished plus utilities.

Housing expenses may include the following:

- Mortgage payments/rent
- Base rate of telephone (not cellphone)
- Decorating items
- Cleaning services which perform no personal services such as laundry
- Pool care/maintenance
- Purchase costs such as closing costs or down payments
- Payments on home equity loans where initial loan proceeds were used on valid housing expenses
- Property taxes
- Utilities
- Furniture (not exercise equipment)
- Cleaning supplies
- Repairs & maintenance
- Homeowner's association dues
- Insurance both real and contents

For the fair rental value of the residence, the minister must obtain some evidence of considering these limitations. Suggestions include comparable information from newspapers or rental agencies or requesting a written opinion from a real estate agent.

X. Love Offerings and Gifts

Any amounts received from an organization or a person that are related to ministerial services are taxable income even if they are labeled as gifts. IRC Section 102 specifically prohibits from the definition of a gift any amount given to an employee from their employer. Thus, churches and other religious organizations cannot give their employees gifts, unless *de minimis* (e.g., a turkey at Thanksgiving or a bouquet of flowers for a special occasion).

EMPLOYMENT LAW DEVELOPMENTS

1. Department of Labor, Wage & Hour Division Update.

On May 24, 2016, the Department of Labor announced new Fair Labor Standards Act (FLSA) regulations governing the exemptions applicable to executive, administrative, and professional employees (white collar workers). The new regulations will become effective **December 1, 2016**.

With these regulatory changes, the Department seeks to update the salary level required for exemption to ensure that the FLSA's intended overtime protections are fully implemented, and to allegedly simplify the identification of nonexempt employees, thus making the executive, administrative and professional employee exemption easier for employers and workers to understand and apply.

a. Overview of Regulations.

Effective December 1, 2016, the salary test applicable to exempting executive, administrative, or professional employees from the minimum wage requirements of the FLSA will be increased from \$23,660 per year (\$455 per week) to \$47,476 per year (\$913 per week).¹ Thus, if the salary paid to an employee who otherwise qualifies as an executive, administrative, or professional employee does not meet the new salary threshold, the employer must compensate and manage the employee as a non-exempt employee under the FLSA.

b. Key Provisions of the Regulations:

- i. **set the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers (\$913 per week, or \$47,476 annually);**
- ii. **increase the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers (\$134,004 annually); and**
- iii. **establish a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption.**

c. Brief History of the FLSA.

¹ The new regulations indexes the \$913 weekly rate to inflation and will be adjusted every third year. The first update will take effect on January 1, 2020.

The FLSA became effective on October 24, 1938. The FLSA was designed to essentially protect employees from the then-existing inequitable work environments caused by excessive work hours and substandard wages that proliferated mainly the industrial workforce. At the time of its enactment, the FLSA applied to industries whose combined employment represented only about one-fifth of the labor force in the U.S.² The FLSA banned certain child labor, and set a minimum wage of twenty-five cents per hour. The maximum workweek was 44 hours. The initial salary test for exempt positions was about \$100 per week.

Now, the FLSA applies to a substantial majority of employees within the U.S. because most employers are “covered” by the FLSA. Over the years, labor unions and others have petitioned Congress to increase the level of the minimum wage; however, the FLSA’s salary test has been updated just once since the 1970s. In 2004, the salary test was increased to \$455 per week from \$155 per week established in 1975. According to the DOL, the changes to take effect on December 1, 2016 are intended to “restore the effectiveness of the salary level test”.³

The Department’s new regulations seek to set the salary level at the 40th percentile of weekly earnings for full-time salaried workers, and, according to the DOL, represents the most appropriate line of demarcation between exempt and nonexempt employees. According to the DOL, this salary level minimizes the risk that employees legally entitled to overtime will be subject to misclassification based solely on the salaries they receive, without excluding from exemption an unacceptably high number of employees who meet the duties test.⁴

d. Coverage Under the FLSA Blanket.

There are two methods whereby an employee may be covered by the FLSA: Enterprise Coverage and Individual Coverage. Enterprise coverage exists for employers (i) who employ at least two employees engaged in interstate commerce and (ii) whose annual gross volume of sales made or business done is not less than \$500,000, or are engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or individuals with intellectual disabilities who reside on the premises; a school for intellectually or physically disabled or gifted children; **a preschool, elementary or secondary school, or an institution of higher education.**⁵

For individual coverage, an employee may be protected by the FLSA if the employee’s individual work regularly involves interstate commerce, regardless of the amount of sales the employer may transact.⁶

² *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, Jonathan Grossman, <https://www.dol.gov/oasam/programs/history/flsa1938.htm>.

³ <https://www.dol.gov/whd/overtime/final2016/faq.htm#4>.

⁴ See FEDERAL REGISTER, pg. 38515-38612 (FR Doc#2015-15464), July 6, 2015, *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*; <https://www.gpo.gov/fdsys/pkg/FR-2015-07-06/pdf/2015-15464.pdf>.

⁵ 29 U.S.C. § 203(s)-(s)(1(A)(ii); see *id.* at § 206(a), 207(a)(1)-(2).

⁶ See *id.* at §§ 206(a), 207(a)(1)-(2).

Unless a particular employee is exempt from the FLSA, the FLSA requires employers to pay employees covered by the act at least the federal minimum hourly wage (currently, \$7.25 per hour) as well as overtime wages of at least one and one-half times the employee's regular rate of pay.⁷ **Some states have higher minimum wage requirements, and some states mandate payment of overtime even if the employer is not a covered employer under the FLSA. If so, the employee is entitled to the higher of the two wages.**⁸

"Regular rate" of pay includes all remuneration for employment paid to, or on behalf of, the employee, but does not include items of compensation such as:

- Sums paid as gifts or on special occasions;
- Payments made for occasions when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or similar cause;
- Reasonable traveling and other business expenses; and
- Contributions irrevocably made by an employer to a third person pursuant to a bona fide plan of insurance, retirement, etc.⁹

e. FLSA Exemptions – Executive, Professional and Administrative.

The FLSA exempts certain categories of employees from the minimum wage and overtime requirements. These exemptions, however, "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit."¹⁰ **An employee's primary duty is the focal point.** An employee's "primary duty" is "the principal, main, major or most important duty that the employee performs."¹¹ Employment for FLSA purposes is a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances.¹²

i. Executive Exemption.

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

- Compensated on a salary basis at a rate of not less than **\$913 a week (effective 12/1/2016)**;¹³

⁷ See *id.* at § 207; 29 C.F.R. § 778.107.

⁸ See 29 U.S.C. § 218(a).

⁹ See *id.* at § 207(e)-(e)(8).

¹⁰ *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960).

¹¹ 29 C.F.R. § 541.700(a); see *id.* at § 541.708; *Lovelady v. Allsup's Convenience Stores, Inc.*, 304 Fed. Appx. 301, 305 (5th Cir. Tex. 2008).

¹² See *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008); *Hendricks v. J.P. Morgan Chase Bank, N.A.*, 677 F. Supp. 2d 544, 551 (D. Conn. 2009); *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078, 1081 (8th Cir. 2000) (disputes regarding the nature of an employee's duties are questions of fact).

¹³ Note: For the soon-to-be-effective salary test threshold, the regulations allow certain mandatory bonuses to be included in applying the minimum salary test. An employer may include nondiscretionary bonuses to cover up to 10% of the employee's compensation, but the bonuses must be paid at least quarterly.

- Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- Who customarily and regularly directs the work of two or more other employees; and
- Who has the authority to hire or fire other employees.¹⁴

ii. **Professional Exemption.**

The professional exemption requires that the employee meet the following tests:

- The **primary duty** must be performing work that **requires advance knowledge**;
- The advanced knowledge **must** be in a field of science or learning; and
- The advanced knowledge **must** be customarily acquired by a prolonged course of specialized intellectual instruction.
- Compensated on a salary or fee basis at a rate of not less than **\$913 a week (effective 12/1/2016)**.¹⁵

The phrase “**work requiring advanced knowledge**” means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.¹⁶

The phrase “**field of science or learning**” includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, . . . and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.”¹⁷

¹⁴ 29 C.F.R. §§ 541.100(a)-(a)(4). The factors to consider in this analysis include: the amount of time spent performing management duties; the relative importance of the management duties as compared with other duties; the frequency with which an employee may exercise discretionary powers; the employee’s relative freedom from direct supervision; and the relationship between the employee’s salary and the wages paid to other employees for the kind of non-management work performed by the employee. See *Barreto v. Davie Marketplace, LLC*, 331 Fed. Appx. 672, 674 (11th Cir. 2009); *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1264 (11th Cir. 2008) (citing 29 C.F.R. § 541.103).

¹⁵ 29 C.F.R. §§ 541.300(a)(1)-(a)(3).

¹⁶ *Id.* at § 541.301(b); see *id.* at § 541.301(e)(5); see *Hendricks*, 677 F. Supp. 2d at 551 (distinguishing between data entry-type duties from true analytical accounting work).

¹⁷ 29 C.F.R. § 541.301(c).

The phrase “**customarily acquired by a prolonged course of specialized intellectual instruction**” *restricts* the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best . . . evidence that an employee meets this requirement is possession of the **appropriate** academic degree.¹⁸

iii. **Administrative Exemption.**

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

- The **primary duty** must be to perform office work or non-manual labor related to the management of the organization.
- The primary duty must include the **exercise of discretion and independent judgment with respect to matters of significance to the organization.**
- Compensated on a salary or fee basis at a rate of not less than **\$913 a week (effective 12/1/2016)**.¹⁹

iv. **Primary Duty - - Directly related to management or general business operations.**

The employee “must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.”²⁰ This “production versus administrative” dichotomy is intended to distinguish between “those employees whose primary duty is administering the business affairs of the enterprise from those whose primary duty is producing the commodity or commodities, whether goods or services, that the enterprise exists to produce and market.”²¹

Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

An employee may qualify for the administrative exemption if the employee’s primary duty is the performance of work directly related to the management or

¹⁸ *Id.* at §§ 541.301(b)-(d).

¹⁹ *Id.* at §§ 541.200(a)(1)-(3).

²⁰ *Id.* at § 541.201(a).

²¹ *Dalheim v. KDFW-TV*, 918 F.2d 1220, 1230 (5th Cir. 1990).

general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.²²

v. **Exercise of Discretion/Independent Judgment.**

"In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered."²³

There is no requirement that the employee operate free from oversight, but "the exercise of discretion and independent judgment implies that, the employee has authority to make an independent choice, free from immediate direction or supervision."²⁴ The exercise of discretion and independent judgment must be more than "(1) the use of skill in applying well-established techniques, procedures or specific standards, or (2) clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive recurrent or routine work."²⁵

The analysis of the Administrative Exemption considers whether the employee:

- has authority to formulate, affect, interpret, or implement management policies or operating practices;
- carries out major assignments in conducting the operations of the business;
- performs work that affects business operations to a substantial degree, even if the employee's assignments are related to the operation of a segment of the business;
- has authority to bind the employer in matters that have significant financial impact;
- has authority to waive or deviate from established policies and procedures without prior approval;
- has authority to negotiate and bind the company on significant matters;
- provides consultation or expert advice to management;
- is involved in planning long- or short-term business objectives;
- investigates and resolves matters of significance on behalf of management;
- represents the company in handling complaints, arbitrating disputes or resolving grievances;²⁶

²² *Id.* at § 541.201(b)-(c); see *Piscione v. Ernst & Young, L.L.P.*, 171 F.3d 527, 535-36 (7th Cir. 1999) (noting that the human resources work performed by the employee was of substantial importance to Ernst & Young, L.L.P. and "clearly impacted" the firm's business operations).

²³ 29 C.F.R. § 541.202(a).

²⁴ *Id.* at § 541.202(c).

²⁵ *Id.* at § 541.202(e).

²⁶ *Id.* at § 541.202(b).

- has supervisory and training responsibilities;²⁷ and
- has the ability or freedom to improve employer-methodologies is also considered in favor of the exemption.²⁸

f. Executive Assistant.

Assistants to an executive must hurdle a fairly high bar to meet the administrative exemption. Under the FLSA Regulations, “[a]n **executive assistant** . . . to a . . . senior executive of a **large business** generally meets the duties requirements for the **administrative exemption** **IF** such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.”²⁹

One federal circuit court of appeals found that the following fact-pattern established an executive assistant as being exempt under the administrative exemption:

- Sole administrative assistant to the CEO of a company with over 400 employees.
- The assistant managed the executive’s calendar, made all travel arrangements, screened phone calls, coordinated board meetings, prepared slides and handouts for meetings, and assisted the executive with his participation in external boards, and performed tasks necessary to ensure the administration of the CEO’s office.
- The assistant was also the sole executive assistant to the General Counsel and COO of the company, and the assistant scheduled quarterly Trustees meetings, assembled Trustees meetings materials, and filed documents in corporate files.
- Although the assistant claimed that she spent 75 to 80 percent of her time performing personal tasks for the executive, she does not allege that her personal work for him supplanted her administrative tasks or that she diverted administrative tasks to other assistants.
- The assistant’s salary was much higher than other non-exempt employees.³⁰

g. Computer Employees.

Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals.³¹ Salary requirements must be met. The recently-adopted DOL Regulations did not change the hourly salary for computer professional exemption (\$27.63 per hour), but the weekly standard salary amount will increase to \$913 per week, effective December 1, 2016.

²⁷ *Piscione*, 171 F.3d at 535-36.

²⁸ *Id.* at 536.

²⁹ 29 C.F.R. § 541.203(d); see *McKee v. CBF Corp.*, 299 Fed. Appx. 426, 429 (5th Cir. 2008).

³⁰ *Altemus v. Fed. Realty Inv. Trust*, 2012 U.S. App. LEXIS 15917, *12-13 (4th Cir. July 31, 2012).

³¹ See 29 C.F.R. § 541.400(a).

The exemptions apply only to computer employees whose primary duty consists of:

- (1) The application of systems analysis techniques and procedures;
- (2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs;
- (3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
- (4) A combination of the aforementioned duties, the performance of which requires the same level of skills.³²

A computer employee within the scope of the exemption may also have executive and administrative duties which qualify the employee for those exemptions as well.³³

2. Exception: Teachers.

To classify a teacher as exempt from overtime, the particular school must meet the requirements to be classified as an "educational establishment" and the teacher must individually meet the requirements to be classified as a teacher, as defined by the DOL. In the alternative, if the school does not qualify as an educational establishment, the teacher may qualify for an exemption from overtime if they individually qualify as a "learned professional."

a. Educational Establishment.

The FLSA defines as school as "a day or residential school which provides elementary education, as determined under State law." The FLSA regulations expand on this definition by allowing "educational establishments" to be classified as a school for purposes of the FLSA. "Educational establishment" is defined as follows:

"(b) The term "**educational establishment**" means an **elementary or secondary school system**, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term "other educational establishment" includes special schools for mentally or physically disabled or gifted children,

³² *Id.* at § 541.400(b)-(b)(4).

³³ *Id.* at § 541.402.

regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit."³⁴

To be classified as an educational establishment, the applicable State must recognize the school as a private elementary school. If not recognized as such, the school's employees may not be classified as teachers for purposes of an exemption under the FLSA.

A teacher in child care may qualify as an exempt employee under the "learned professional" exception to the FLSA if three requirements are met: 1) The teacher must be paid on a salary basis not less than \$913 a week (effective December 1, 2016); 2) The teacher's primary duty must be either imparting knowledge, or some other type of work which is intellectual rather than manual in nature; and 3) The job being performed by the teacher must require "advanced knowledge in the field of science or learning" which is "customarily acquired by a prolonged course of specialized intellectual instruction." *See discussion above regarding exemption for learned professionals.*

In Fact Sheet #46, the Department of Labor addresses this topic: **Daycare Centers and Preschools Under the Fair Labor Standards Act**; a copy of the Fact Sheet may be found at the link provided in the footnote below.³⁵ The Fact Sheet indicates the following:

Preschool Teachers: Bona fide teachers in preschool and kindergarten settings may qualify for exemption from the minimum wage and overtime pay requirements as "professionals" under the same conditions as a teacher in an elementary or secondary school. Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in this activity as a teacher in educational establishment. **It should be noted that, although a preschools may engage in some educational activities, preschool employees whose primary duty is to care for the physical needs for the facility's children would ordinarily not meet the requirements for exception as teachers under the applicable regulations.**³⁶

3. Exception: Ministers.

In January 2012, the United States Supreme Court, in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, unanimously found that a teacher at a religious school and

³⁴ 29 U.S.C. § 541.204(b) (emphasis added).

³⁵ <http://www.dol.gov/whd/regs/compliance/whdfs46.pdf>.

³⁶ *Id.* (emphasis added).

synod could not sue her employer for violating the Americans with Disabilities Act because the teacher qualified as a “minister” for purposes of the minister exception or ecclesiastical exception to employment laws.³⁷

In The Court applied the historical concept of religious autonomy, also known as the ecclesiastical exemption in employment law, which has been summarized as follows:

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church. *McClure v. Salvation Army*, 460 F.2d 553, 559 (5th Cir. 1972).

Courts have applied the ministerial exception to many employment law situations, including scenarios involving application of the FLSA. Below is a summary list of situations where the exception was applied:

- a. Music director who was not clergy.
- b. University chaplain serving in a secular University.
- c. Mashgiach (an inspector for kosher dietary products).
- d. Chaplain working for a church controlled hospital regarding his claim under the Americans with Disabilities Act.
- e. Minister seeking minimum wage and overtime under the FLSA.
- f. Chair of the Social Work Department at a church owned university.
- g. Director of music who claimed the church violated the Family Medical Leave Act.
- h. Seminarian who was primarily performing maintenance on church property and claimed violations of FLSA.
- i. Employment contract between a church and a minister.
- j. Applied to a claim of religious discrimination by the softball coach.³⁸

³⁷ See *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S. Ct. 694 (2012).

³⁸ See a. *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000); b. *Schmoll v. Chapman University*, 70 Cal. Ct. App. 4th 1434 (Cal. Ct. App. 1999); c. *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004); d. *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223 (6th Cir. 2007); e. *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008); f. *Adams v. Indiana Wesleyan University*, 2010 U.S. Dist. LEXIS 71403 (N.D. Ind. 2010); g. *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, 2006 U.S. Dist. LEXIS 22546 (E.D. Pa. 2006); h. *Alcazar v. Corp. of Catholic Archbishop*, 627 F.3d 1288 (9th Cir. 2010); i. *Williams v. African Episcopal Methodist Church*, 2011 U.S. Dist. LEXIS 108117 (W.N.Y. 2011); j. *Ginsberg v. Concordia University*, 2011 U.S. Dist. LEXIS (D.C. Neb. 2011).

Essentially, courts apply the ministerial exception to almost all employment laws. The pivotal question is: Is the employee a “minister” for purposes of the exception?

The United States Supreme Court affirmed that this question is decided based on a “totality of the circumstances” test. This test looks at whether the employee must perform essential religious duties as part of their employment. If the employee performs essential religious duties, the ministerial exception likely applies even if a majority of the employee’s time is spent on non-religious duties. Courts have considered the following factors in this analysis:

- The level of religious training required for the position.
- Past secular and sacred work for the employer.
- The formal title given by the church to the employee.
- Whether job duties reflect theological beliefs and standards of the church.
- Whether job duties reflect a role in conveying the church’s message and mission.
- Whether the employee selects or creates religious content.
- Is employee charged to lead others towards faith or teach the religion.
- Is the employee reviewed for skills in ministry and ministerial responsibilities.
- Does the church provide continuing religious education to the employee.

The ecclesiastical exemption or religious autonomous governance exemption provides the basis for the ministerial exception. The courts review both the employer’s status as a religious institution and the employee’s duties. If a religious organization’s employee is a “minister” as defined for purposes of the ministerial exemption, the organization is exempt from the FLSA with regard to the minister’s wages. Whether the employee is a “minister” depends on a totality of the circumstances.

4. Recent Judicial Opinions re: Ministers (or Proposed Ministers).

SELECT 2016 JUDICIAL OPINIONS

- ***Sterlinski v. Catholic Bishop of Chi.*, 2016 U.S. Dist. LEXIS 112021, (N.D. Ill. Aug. 23, 2016).**

Music Director here was ministerial. Music is “an integral part of many different religious traditions,’ including the Catholic tradition.”

- ***Curl v. Beltsville Adventist Sch.*, 2016 U.S. Dist. LEXIS 108372 (D. Md. Aug. 15, 2016).**

Ministerial exception applied to music teacher at Adventist School. Teacher’s lawsuit, including claims for age discrimination, workers’ compensation retaliation, violation of the Americans with Disabilities Act, and violation of the Family Medical Leave Act, dismissed.

- ***Collette v. Archdiocese of Chi.*, 2016 U.S. Dist. LEXIS 99886 (N.D. Ill. Jul. 29, 2016).**

Reliance on employee's title alone is insufficient. "A factual record focused on Collette's functional role as Director of Worship and Music Director is therefore needed to determine whether that role was ministerial."

- ***Fratello v. Roman Catholic Archdiocese of N.Y.*, No. 12-CV-7359, 2016 U.S. Dist. LEXIS 41483 (S.D.N.Y. Mar. 29, 2016).**

Principal of Catholic elementary school was a minister where she was "held out" by the Archdiocese and the School as a minister "with a role distinct from that of most of its members."

- ***Goodman v. Archbishop Curley High Sch., Inc.*, 149 F. Supp. 3d 577 (D. Md. Feb. 26, 2016).**

Ministerial exception did not apply to school librarian whose position did not include any religious function.

- ***Penn v. N.Y. Methodist Hosp.*, 2016 U.S. Dist. LEXIS 7126 (S.D.N.Y. Jan. 20, 2016).**

Chaplin at a Methodist Hospital filed suit alleging race and religious discrimination as well as retaliation for a failure to promote. In light of the Chaplan's "exceedingly ministerial role", the exception applied and summary judgment was granted.

- ***Moreno v. Episcopal Diocese of Long Island*, 2016 U.S. Dist. LEXIS 16543(E.D. N.Y. 2016).**

Ministerial Exception - Ministerial exception requires dismissal of suit by pastor against Diocese for violating Title VII.

SELECT 2015 JUDICIAL OPINIONS

- ***Bohnert v. Roman Catholic Archbishop of San Francisco*, 136 F. Supp. 3d 1094 (N.D. Cal. Sept. 25, 2015).**

Biology teacher at a high school operated by the Archdiocese was sexually harassed by "upskirt" photos and videos taken by male students. Archdiocese failed to adequately remediate the harassment, and the teacher filed suit. Archdiocese moved for a summary judgment, in part, on grounds of the ministerial exception. The court found that the exception did not apply.

- ***Rogers v. Salvation Army*, 2015 U.S. Dist. LEXIS 61112 (E.D. Mich. May 11, 2015).**

In this lawsuit of age discrimination and sexual harassment filed by a 67-year old white female and spiritual counselor of the Salvation Army, the Salvation Army sought a summary judgment, asserting that the ministerial exception barred review of its employment decision. Court: Minister exception applies. She "was fulfilling important religious functions at [the Salvation Army] throughout the duration of her career."

- ***Conlon v. Intervarsity Christian Fellowship/USA*, 777 F.3d 829 (6th Cir 2015).**

Ministerial exception barred a former spiritual director's gender-discrimination suit against an evangelical campus mission. The spiritual director's duties included "leading others toward Christian maturity" and "teaching faithfully the Word of God..." The court held that where both formal title and religious function are present, the ministerial exception clearly applies.

- ***Kane v. Roman Catholic Church of St. Raymond*, 2015 U.S. Dist. LEXIS 91398 (S.D. N.Y. 2015).**

Title VII - School counselor at church school suit is dismissed because she failed to complain to the school administration about sexual harassment. She also failed to file a timely complaint with the EEOC.

- ***Barrett v. Fontbonne Academy*, 2015 Mass. Super. LEXIS 149 (2015).**

Title VII - Catholic school liable for unlawful discrimination when it withdrew job offer (Food Services Director) to homosexual.

- ***McIver, et al, v. Imani Christian School*, 2015 U.S. Dist. LEXIS 128550 (W.D. Pa. 2015).**

Title VII -- School that separated from its church was no longer eligible for the religious exemption from Title VII.

- ***Sloan v. Community Christian School*, 2015 U.S. Dist. LEXIS 166911 (M.D. Tenn. 2015).**

ADA - Since the school was not controlled by a church, it was not exempt from ADA.

- ***Puckette v. The Board of Trustees of the First Baptist Church of Gainesville, GA*, 2015 U.S. Dist. LEXIS 19319 (N.D. Ga. 2015).**

ADA – Church's motion for summary judgment denied in ADA case brought by janitor who was fired by the church for insubordination. The janitor presented testimony from psychiatrist that he was schizophrenic. Church could be held liable though the diagnosis occurred after termination and had no knowledge of whether he was mentally ill. The church did nothing to determine whether his behavior was caused by mental illness.

- ***Hillenbrand v. Christ Lutheran Church of Birch Run*, 2015 Mich. App. LEXIS 1744 (Mi. App. 2015).**

Ecclesiastical Abstention Doctrine - The court cannot hear pastor's appeal from termination by a church due to the Ecclesiastical Abstention Doctrine. Further, the church's withdrawal from the denomination made the Synod's opinion advisory and not binding on the local church. The local church was not required to pay damages to the former pastor as suggested by the denominational panel.

- *Preece v. The Covenant Presbyterian Church*, 2015 U.S. Dist. LEXIS 52751 (D. Neb. 2015).

Ministerial Exception -- Youth minister not ordained by the church was a minister for the ministerial exception. Youth minister fired because he filed for divorce.

5. Records.

a. Records Required for Non-Exempt Employees.

- i. Name in full, as used for Social Security
- ii. Home address, including zip code
- iii. Date of birth, if under 19
- iv. Sex and occupation in which employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss., or Ms.)
- v. Time of day and day of week on which the employee's workweek begins. If the employee is part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice.
- vi. *Regular hourly rate of pay for any workweek in which overtime pay is due:*
 1. *Explain basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and*
 2. *the amount and nature of each payment which is excluded from the "regular rate"*
- vii. *Hours worked each workday and total hours worked each workweek*
- viii. *Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation*
- ix. *Total premium pay for overtime hours.*
- x. *Total additions to or deductions from wages paid each pay period.*
- xi. Total wages paid each pay period, and
- xii. Date of payment and the pay period covered by payment.³⁹

b. Records Required for Bona Fide Executive, Administrative and Professional Employees (including Teachers).

For these exempt employees, the employer must maintain and preserve records containing all the information and data listed above in Part 5.a. of this paper, except paragraphs

³⁹ 29 C.F.R. § 516.2(a)-(a)(12).

iv. – x. (italicized above) and, in addition, the basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee’s total remuneration for employment including fringe benefits and prerequisites.⁴⁰

c. Preservation of Records.

The FLSA requires each employer to preserve payroll records for at least 3 years and the following records for at least 2 years:

- i. *Basic employment and earnings records.* From the date of last entry, all basic time and earning cards or sheets on which are entered the daily starting and stopping time of individual employees, or of separate work forces, or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis when those amounts determine in whole or in part the pay period earnings or wages of those employees.
- ii. *Wage rate tables.* From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time earnings, wages, or salary, or overtime pay computation
- iii. Records of additions to or deductions from wages paid.⁴¹

d. Place for Storage of Records.

The records should be kept “safe” and accessible at the place or places of employment, or at one or more established central recordkeeping offices where such records are customarily maintained. Where the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records must be made available within 72 hours following notice from the DOL.⁴²

6. Deductions from Exempt Employee’s Compensation.

Under the FLSA, an employer may deduct from an exempt employee’s compensation only in limited circumstances. Otherwise, if the exempt employee performs any work in the applicable workweek, the employee is entitled to be paid the employee’s full weekly pay for the workweek. Below are situations that the FLSA permits an employer to deduct pay from an exempt employee who may perform work in a particular workweek:

(1) **Absence for Personal Reasons.** Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than

⁴⁰ *Id.* at § 516.3.

⁴¹ *Id.* at § 516.6(a)-(c)(2).

⁴² *Id.* at § 516.7(a)-(b).

sickness or disability, unless such personal days are otherwise compensable according to the employer's policy on personal days.

(2) **Absence for Sickness/Disability.** Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with any bona fide plan, policy or practice of the employer that provides compensation for loss of salary occasioned by such sickness or disability.

a. In this regard, the employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder.

b. Thus, for example, if the employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits.

c. Similarly, the employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) **Jury Duty.** While the employer does not make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer may offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week.

(4) **Safety Rules Infractions.** Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees. A deduction from pay as a penalty for violations of major safety rules may be made in any amount.

(5) **Disciplinary Suspensions.** Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions are imposed pursuant to the written policies applicable to all employees.

(6) **Beginning/End of Employment.** The employer is not required to pay the full salary in the initial or terminal week of employment. Rather, the employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of

employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement.

(7) **FMLA Leave.** The employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the FMLA, the employer may pay a proportionate part of the full salary for time actually worked.

Calculation of Deductions. When calculating the amount of a deduction from pay as described herein, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee.

7. Posting FLSA Notice.

Every employer employing any employees subject to the FLSA's minimum wage provisions must post and keep posted a notice explaining the FLSA, as prescribed by the Wage and Hour Division, in conspicuous places in every establishment where such employees are employed so as to permit them to observe readily a copy. The applicable posters may be found at the DOL website here: <https://www.dol.gov/whd/regs/compliance/posters/flsa.htm>.



Thank you.

Cory Halliburton

ATTORNEY AT LAW

WEYCER, KAPLAN, PULASKI & ZUBER, P.C.

(817) 795-5046

challiburton@wkpz.com

www.wkpz.com