 Frequently Asked Questions

# The information contained in this Frequently Asked Questions document is only for Foursquare churches and is not to be relied upon by anyone else or for any other organization or person. This document is a resource to help educate on some best practices for Foursquare church employees, and nothing in this document should be construed as legal advice.

This document relates to federal labor laws pertaining to the Fair Labor Standards Act. State labor laws differ from state to state and, in some cases, may be stricter than federal law. In most cases you need to comply with labor laws that are more restrictive.

# **Fair Labor Standards Act (FLSA) in General**

# What is the FLSA? The FLSA was created in 1938 to establish a national minimum wage and guaranteed overtime (over 40 hours) for certain jobs and to eliminate the employment of minors in “oppressive child labor.” The implementation and enforcement of the FLSA are overseen by the U.S. Department of Labor (DOL).

1. Are churches exempt from the FLSA? No, there is no blanket exemption for churches. Generally speaking, organizations as a whole, i.e., all of their employees, are covered by the FLSA if the organization meets the “enterprise coverage” test, or individual employees are covered under the FLSA if they meet the “individual coverage” test. The rules for these tests are complex and derived from varied past court rulings. If the courts were to apply analysis of the FLSA to Foursquare churches based on our polity, then all Foursquare churches would be covered by the FLSA. While there may be possible defenses to this interpretation, it is unknown if those would be successful. Therefore, we are taking a conservative approach and assuming the FLSA applies to all Foursquare churches.
2. How does the FLSA affect my church? The FLSA requires employees to be paid at least the federal minimum wage and to receive overtime when their hours exceed 40 hours in a workweek. Remember that state laws are sometimes more restrictive than federal law, and you must comply with whatever is stricter. For example, in California non-exempt employees must be paid overtime for hours that exceed 40 hours in a week **or** 8 hours in a day.

## Do we have to apply the minimum wage and overtime rules to all employees? No, the FLSA provides a few exemptions from minimum wage and overtime rules for certain types of employees based on job duties and a salary test. The exempt categories are executive, administrative, computer, professional, and outside sales. For a further explanation of these exempt categories or to see if your employees might be exempt under these categories, please see the U.S. Department of Labor Fact Sheet #17A. In addition to the various categories that the DOL has deemed exempt from FLSA, there is a separate exemption for ministers that is based on religious liberty freedom (see the ministerial exception below).

1. What is the “salary test”? Many of the exempt categories mentioned above require the employee to be paid a minimum salary in addition to meeting the job duties test.

# **FLSA Wages**

1. What employee payments can be counted toward the salary calculation? Cash wages count. Also, non-discretionary bonuses, incentives, and commissions up to 10% of the salary paid, if paid quarterly or more frequently, can be counted for the salary basis. Payments for lodging and meals and employer contributions for premiums for employee benefits or retirement cannot be counted in computing the salary basis.
2. Does the administrative, executive, or professional exception require the weekly wage, or can it be met on an annual basis? Generally, the employee must meet the weekly requirement. Bonuses up to 10% of the employee’s income can be used to satisfy the salary test, provided the bonus is non-discretionary and paid at least quarterly. (See the Department of Labor Fact Sheet 17G for the most current salary basis requirements.)
3. What is meant by non-discretionary bonuses? Non-discretionary bonuses are payments promised to individuals as incentives. They are considered non-discretionary because the payment is preannounced; they are based on standards and not at the employer’s discretion.
4. Our church surprises our employees most years with a Christmas bonus. Could this bonus be considered in the calculation to meet the salary test for the executive, administrative or professional exemption? What about pastor appreciation month? No, bonuses paid at the discretion of the employer cannot be counted toward meeting the salary test. Since the Christmas bonus or any funds received for pastor appreciation month is paid at the discretion of the church and is not promised to employees, it cannot be used to satisfy the salary test. In addition, an annual bonus does not meet the requirement of being paid at least quarterly.
5. I have a part-time employee who meets all exemption requirements for the administrative exemption except the salary test. If their salary were prorated for full-time hours, the employee would meet the weekly salary test. May I exempt the employee under the administrative exemption? No, the exemption is based on the actual salary. If your employee meets the other qualifications for the administrative exemption but works 20 hours a week at a weekly salary of less than the required amount for exempt employees, that employee will not qualify for the administrative U.S. exemption.

# **The Ministerial Exception**

1. Are our ministers exempt under the ministerial exception mentioned earlier? Yes, although the FLSA does not include a specific ministerial exception, the DOL field handbook and accompanying documents state that the FLSA does not apply to clergy. There is also a United States Supreme Court case and other federal court cases that support a broad application of the ministerial exception and provide a legal basis of applying the ministerial exception to *federal* wage and laws hours. These cases coincide with a long-standing position that ministers are exempt from the FLSA.
2. Does the ministerial exception apply to individual state labor laws? The ministerial exception is based on the First Amendment of the U.S. Constitution and has been applied broadly by various federal court cases, including a U.S. Supreme Court case. Our position is that the ministerial exception *should* apply in all states. It should be noted, however, that this issue has not been tested in some states, and some uncertainty remains. But we believe the ministerial exception would hold up under scrutiny in any state.
3. Does this ministerial exception mean that ministers are exempt from the minimum wage and overtime rules? Yes, your church may pay a minister a salary without regard to the minimum wage and overtime rules. Please note that this has not been tested in some states, but we feel confident that the ministerial exception would be upheld in any state.
4. Does an employee have to be a credentialed Foursquare minister to be considered exempt from the FLSA under the ministerial exception? No. The court’s interpretation of the term “minister” is different from Foursquare’s definition of the term credentialed “minister.” In the examination of several court cases, the ministerial exception has been applied to employees who are not ordained, credentialed, or licensed. For a non-credentialed employee of the church to qualify for exemption from the FLSA under the ministerial exception, the employee should **regularly** be performing **essential religious duties**, even if a majority of their time is spent on non-religious duties. It is not required that the employee spend all, or even most, of their time on essential religious duties to qualify for the ministerial exception, but the courts do analyze how much of the employee’s time is spent on religious duties, so you want to ensure that a material amount of the employee’s time is spent on religious duties. We **strongly recommend** that churches who choose to apply the ministerial exception to employees who are not Foursquare credentialed ministers clearly outline in personnel documents, application materials, employee handbooks, the hiring process and job descriptions the essential religious functions the employee will perform and specifically state those duties are considered ministerial. The employees should regularly perform these essential religious duties (and it should be a material amount of their time) to qualify for a ministerial exception from the FLSA.
5. What activities are considered essential religious duties? Some examples of essential religious duties include preaching, teaching, discipling others, leading prayer, leading an evangelistic outreach, leading bible studies, directing children or youth ministry, and leading worship.
6. If a non-credentialed employee is considered exempt under the ministerial exception, should we publicly refer to the individual as a minister or as a “pastor”? No. Please note that while their duties may classify them as exempt from the ministerial exception because the law would consider them a “minister”, they do not hold Foursquare ministerial credentials and, therefore, may not be referred to publicly as a minister or a pastor. For example, a non-credentialed employee who oversees children’s ministry should not be given the title “Children’s Pastor” but instead should have a title along the lines of “Director of Children’s Ministry” or something similar.
7. Could these individuals who are not credentialed by The Foursquare Church but are considered exempt under the ministerial exception qualify for a housing allowance? No. The ministerial housing allowance is governed by the Internal Revenue Service (IRS). The IRS states that only ordained, commissioned, or licensed ministers of the gospel are eligible for a housing allowance.

# **Schools and the FLSA**

1. Are church-operated schools and daycares exempt from FLSA? No, schools and daycares are not exempt from the FLSA and must adhere to the FLSA minimum wage and overtime rules.
2. Are there any exemptions that might pertain to employees of a church-operated school or daycare? Yes, schools and daycares operated by churches are religious organizations. Therefore, some of the employees of those entities may be exempt under the ministerial exception. In order for employees to be exempt under the ministerial exception, they must **regularly** perform **essential religious duties**. Personnel documentation, as outlined in the ministerial exception section, must substantiate that employees perform those duties. Additionally, while many school or daycare employees will not qualify for the ministerial exception, the FLSA has other exemptions that might apply to various employees of those entities, e.g., teachers and administrators. These exemptions and their requirements can be found at the U.S. Department of Labor site, specifically Fact Sheet #17C, Fact Sheet #17D, and Fact Sheet #46. Please remember that if the ministerial exception does not apply, employees must be exempt under the FLSA, and they must also be exempt under state law. For example, the FLSA does not have a salary minimum for teachers to be exempt, but California law does. A California teacher may be exempt under the federal FLSA but not exempt under state laws unless the salary test is met. Consult a qualified labor law attorney in your state if you have specific questions.

# **Next Steps: Miscellaneous**

1. If employees qualify under one of the FLSA categories of exemption but are not paid the required salary amount under the FLSA rule, what can I do?

* Examine the duties the employees perform and determine if they regularly perform essential religious functions to qualify as excluded from the FLSA under the ministerial exception. If they regularly perform essential religious functions, update the appropriate documents, such as the job description, employee handbook, and other applicable documents as outlined in the ministerial exception section. Inform the employee to explain that they will be considered exempt under the ministerial exception.
* Consider increasing employees’ weekly salary to meet the salary test so they can continue as exempt employees.
* If a position is not exempt under the ministerial exception and if you do not want to increase the employee’s wages, then the position will now be considered non-exempt, and the employee will be governed by the guidelines for non-exempt employees. This includes being paid at least minimum wage and being paid overtime for overtime hours. This will require keeping track of employee hours, so you should institute a policy that requires approval of overtime hours before they are worked in order to eliminate or significantly reduce overtime hours. Another consideration would be to reduce the number of hours the position works (perhaps to part-time) and use volunteers to fulfill the tasks the employee will no longer have time to perform.

1. If an employee does not want to receive overtime, could that employee volunteer their time after they meet 40 hours in a workweek? No, employees may not volunteer their time for the same type of work they perform as a paid employee.
2. Does the final rule increase the federal minimum wage amount? No, the final rule does not change the federal minimum wage amount.
3. For non-exempt employees, what type of records are we required to maintain? The U.S. Department of Labor Fact Sheet #21 outlines the recordkeeping requirements that must be maintained by an employer.
4. Will the amount for the minimum salary go up again? Yes, the final rule requires automatic salary updates every three years.

If I have more questions, whom should I contact? Please contact your district office for more information, or you may contact an attorney who specializes in labor law in your state.

You may find all the documents referenced here by visiting the U.S. Department of Labor website.