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UUA Office of Church Staff Finances

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www.uua.org/careers/compensation/finances



Questions and Answers: Fair Labor Standards Act Webinar October 2016

Introductory Note: In response to the December 1, 2016 change to the federal Fair Labor Standards Act (FLSA), the UUA Office of Church Staff Finances conducted four webinars during October to assist congregational leaders and staff better understand this change and how it might affect congregational staffing and finances. Religious institutions are not exempt from the provisions of the FLSA. Presenters were Jan Gartner, UUA Compensation and Staffing Practices Manager, and the Reverend Richard Nugent, Director, UUA Church Staff Finances. Individuals can listen to a recording of the last webinar, and review the slides presented, at www.uua.org/careers/compensation/finances. This document provides answers to the questions most frequently asked during our webinars. On our website, a wealth of other documents (including an FAQ and Compliance Guide) are available to assist congregational leaders to understand and comply with this change in federal law. Because staffing practices vary greatly from congregational to congregation, the OCSF is not in a position to offer definitive answers to individual situations. We urge congregational leaders to consult with legal counsel if an employee's status is unclear.

IMPORTANT NOTE ABOUT STATE LAW

Many states have wage and overtime laws that differ from the federal FLSA. The answers below **do not reflect state laws** that may be more stringent. Our [Compliance Guide](#) includes a link to a Department of Labor page which then links to the various state labor law pages.

1.0 EXEMPT VS. NONEXEMPT AND SALARIED VS. HOURLY

1.1 If an employee is exempt, does that mean they are not covered by the Fair Labor Standards Act?

The FLSA establishes standards for minimum wage, overtime, recordkeeping, and youth employment. Even if the employee is exempt from minimum wage and/or overtime pay, the youth employment and recordkeeping standards still apply. Recordkeeping requirements are simpler for exempt staff than for nonexempt, but there are still requirements.

1.2 Is the salary required for exempt status pro-rated for someone who works part-time? What about someone who works only part of the year?

The required salary is \$913/week, regardless of hours or number of weeks. For instance, an employee who earns \$1,000 per week meets the salary level test, regardless of how many hours per week they work. Someone who earns \$800 per week does NOT meet the salary level test, regardless of how many hours per week they work.

If you have a part-year employee who earns \$1,000 per week during the part of the year that they work, they meet the salary level test.

Remember that in order to qualify for any of the white-collar exemptions, the staff member needs to be paid on a salary basis, must earn a salary of at least \$913/week, **AND** must meet the job duties test for one of the exemptions – executive, administrative, or professional.

1.3 If a congregation cannot meet the minimum salary requirement (\$913/week), then they must reclassify the employee as nonexempt, correct?

Yes, unless the person can be defined under the ministerial exception.

Assuming they don't fall under the ministerial exception, if this is an employee who:

- tends to put in extra hours, especially overtime hours, and
- their salary comes reasonably close to the salary requirement already, and
- they meet the duties test for one of the exemptions, then...

We suggest running the numbers to see if it makes sense to bump up their salary and have them continue to be exempt rather than paying extra hours and overtime hours over the course of the year. Check our [Compliance Guide](#) for other options and adjustments.

1.4 If any employee is paid more than \$47,476 per year but only works half-time, do they meet the salary level test?

If you are saying that they are earning a paycheck of at least \$913 per week, based on their 20-hour schedule, then they meet the FLSA salary level test. (For someone in a 20-hour position to earn \$913/week, this would be a rate equivalent to a 40-hour employee earning \$94,952/year.)

If you are saying that they would be paid more than \$47,476 if they worked full-time, but they only work half-time and thus only earn half as much then, no, they do not meet the test.

1.5 What if a staff member is paid a salary but not at the salary level needed to be exempt?

If they have essential religious duties and you decide they are exempt under the ministerial exception, then their salary level doesn't matter and you can continue to pay them on a salary basis. Otherwise you need to make them nonexempt. Use their salary and their nominal hours to figure out their hourly rate and pay them for hours worked.

1.6 If an employee is designated 20-hour exempt, can you really say that they are expected to work 20 hours per week? I mean, if "exempt" means you work until the job is done, then how can you put a number of hours on it?

Every job should have a nominal number of hours associated with it – even if you know it will vary. Part of describing the job is defining the amount of time it is intended to take.

If an exempt employee is routinely working beyond their nominal hours, then that is a matter for a supervisory conversation.

At typical salary rates for congregational employees, we expect that very few, if any, 20-hour employees would be paid at the weekly salary level needed for a white-collar exemption. However, if they meet the criteria for the ministerial exception, the salary doesn't matter.

1.7 If our administrator works 40 hours per week and makes less than \$913/week, they are nonexempt and should complete a time sheet. And if they go over 40 hours in a week, they must get overtime (OT), right?

Yes – and remember that some states have more stringent overtime rules. In California, for instance, the overtime rate (time and a half) is paid for more than 8 hours worked in a day.

1.8 Why does it seem that congregations want their employees to be salaried rather than hourly?

An advantage of exempt status (for both employee and employer) is that the recordkeeping is simpler. Daily/weekly hours need not be tracked. Exempt employees receive a fixed paycheck, even when their hours vary, which is much simpler to administer and preferable to most employees.

As we note in the webinar, salaried employees can technically be nonexempt, but that becomes administratively complicated unless their hours are **always** the same. We strongly recommend that nonexempt staff be paid on an hourly basis. (Exempt staff are paid on a salaried basis, by definition.)

1.9 Why would you ever have salaried nonexempt staff if you still need to track their hours and pay for extra hours?

In the end, “salaried” isn't a real option for nonexempt employees. If you want to say that you pay someone \$500 per week for their 25-hour job, that's fine. But if they are nonexempt and they put in more than 25 hours, you need to pay for the additional hours at their hourly rate of pay – in this case \$20/hour, and \$30/hour if they go over 40 hours.

Similarly, we know that congregations sometimes think of a staff member's salary by the month – e.g., \$3,000 per month. Since months don't all have the exact same number of work days, payroll becomes complicated since nonexempt employees must be paid for the hours worked, even with absolutely regular hours. Assuming this is a 12-month, 40-hour employee, take their total annual salary and divide by 2080 (which is 52 X 40) to get their hourly rate (\$17.31 in this case).

1.10 Can we pay hourly employees monthly?

How often employees must be paid varies by state. The U.S. Department of Labor Wage and Hour Division offers [this chart](#). (Note the long list of footnotes!)

1.11 What if a staff member is currently salaried exempt, and will become hourly nonexempt, and payroll is done monthly. Does the payroll need to shift to be tied to weekly or every other week payroll versus monthly?

In some states, hourly employees must be paid more often than monthly. Assuming your state allows monthly pay, you could still do it that way as long as you are paying them for hours worked during the pay period. This seems like a headache to us and this article, [Are You Paying Your Employees Correctly?](#), agrees.

1.12 Can employee hours be spread out over the workweek, and is there a max number of hours in a day? Ex: you have a 20-hour week, can you work one 12-hour day and one 8-hour day?

The federal FLSA has no specifics about maximum hours in a day. You need to document the hours worked each day (for nonexempt staff), but the only thing that matters, for pay purposes, is the total number of hours put in over the workweek.

Again, pay attention to state law. California, just as an example, requires overtime to be paid for more than 8 hours worked in a day (subject to some exceptions).

1.13 Our Office Administrator works 20 hours per week. Does s/he qualify for overtime if working on Saturday?

Some states may have rules about overtime on weekends or if working more than 5 days in a workweek. Based on just the FLSA, however, there's no need for overtime (time and a half) in this situation. Assuming they are nonexempt, of course they need to be paid straight time for the hours.

1.14 Should the employment agreement specify why they are considered exempt and which exemption?

On the job description, if the FLSA status is exempt, it is an excellent idea to specify which exemption applies. That way, if the salary level test changes (or the employee's salary or responsibilities change), you'll know whether it matters. Making it clear on the employment agreement is a good idea, as well.

1.15 We have a part-timer who qualifies under the Professional Exemption. Are they best paid on an hourly basis, rather than salaried? What about the ministerial exception?

To qualify for any of the white-collar exemptions (Executive, Administrative, or Professional), an employee must be paid on a salaried basis. (And remember, regardless of hours, they must be paid at least \$913/week to qualify for the professional exemption.)

The ministerial exception is separate from the Fair Labor Standards Act. While it seems theoretically possible to us that someone could qualify for the ministerial exception and still get paid hourly, it feels confusing and doesn't appear to offer any advantages to the employer or the employee. If you want to pay them hourly, it is better to consider them nonexempt.

1.16 Can you clarify if you are looking at gross or net salary for the salary test?

Gross salary.

2.0 VARIABLE SCHEDULES AND “COMP TIME”

- Refer to [this article](#) for a good Q&A on comp time.
- State wage and overtime law may also come into play.

2.1 Our nonexempt 25-hour employee would prefer time off for extra hours rather than getting paid. Are you saying that’s not possible?

“Comp time,” short for compensatory time, refers to the practice of offering extra time off instead of paying for extra hours in a given workweek. In a nutshell, this is illegal for nonexempt employees, who must be paid for hours worked each week (at 1.5 times their regular hourly rate after 40 hours). What you can do is flex someone’s hours within the workweek. It is fine for them to put in extra hours one day and take hours off another day within the workweek.

2.2 One of our employees typically works 24 hours/week but sometimes works up to 10 hours more. Can they take off the hours the following week as “comp time,” since they haven’t exceeded 40 hours in a week?

If they are nonexempt, they must be paid for their hours worked each week. (And “comp time” technically means offering time off in place of overtime pay, which is illegal.) If it happens that these two weeks fall within the same period, the paycheck will even out since the employee was paid more than “average” one week, and less than “average” the following week.

2.3 What about part-time folks who are expected to work, for example, 20 hours each week? If someone works 25 one week, can we have them work 15 next week?

If they are exempt (say, by way of the ministerial exception, since their salary is unlikely to meet salary level test for white-collar exemption), that’s just fine. If they are nonexempt, that’s still fine but you must pay them for their hours worked each week. If it so happens that these two weeks are in the same pay period, then their paycheck will be the same as if they had worked their regular schedule.

2.4 Is the “no comp time for hourly workers” rule new?

The only thing changing at this time is the salary level required for (white-collar) exempt status. Because of the salary level change, and because of a dramatic increase in wage and hour claims in recent years, this is an important time for congregational leaders to educate themselves on the FLSA and to make any needed adjustments for compliance.

2.5 Why can’t salaried nonexempt employees earn comp time?

Put simply, nonexempt staff must be paid for the hours they work in each workweek. If those hours come out to more than 40, then they must be paid 1.5 times their regular hourly rate for the hours over 40. So even if you think of them as salaried for their regular work schedule, you need to know their hourly rate.

It is legal for someone to flex their hours within a workweek. It is also fine for a nonexempt employee to have varied hours from one workweek to another – but they still need to be paid for the number of hours worked each week. Paying comp time rather than overtime is illegal.

2.6 Our staff put in extra hours in December because of additional services and activities around the holidays. We don't pay them extra, but then they get the week between Christmas and New Year's Day off with pay to compensate. Is that okay?

It's fine for your exempt staff. For nonexempt staff, you do need to pay them for their hours worked each week. If you want to pay everyone for the week between Christmas and New Year's without counting it against their vacation time, you can certainly do that. However, you still need to pay them for hours worked earlier in the month, and at the overtime rate (time and a half) for hours over 40 in any week.

3.0 THE MINISTERIAL EXCEPTION

3.1 Can you say more about what would determine whether a religious educator and/or musician falls under the ministerial exception?

It's important to emphasize that the "ministerial exception" is not statutorily defined in the Fair Labor Standards Act, but rather has been defined by a series of federal court decisions. As such, we can't provide definitive answers to whether a specific position meets the ministerial exception criteria. In the coming years, additional litigation will provide more guidance. In the meantime, we suggest thinking about:

- Are terms like "ministry" and "spiritual formation" used in an employee's job description?
- Does the job title, responsibilities, and/or qualifications point to the need to understand and share Unitarian Universalism? Are they expressing our faith through their role?
- Are they teaching Unitarian Universalism and/or training those who directly teach? Choosing or creating religious education curriculum?
- Do they plan/lead religious elements of worship?

3.2 Can you clarify whether a music director might meet the ministerial exception or the professional exemption?

A music director with an advanced degree in music appears to qualify for the "creative professional" exemption, but it would only apply if s/he is paid a salary of at least \$913/week.

If the music director doesn't meet the salary level test, you might consider whether they meet the standard for the ministerial exception – i.e., do they have essential religious duties?

If you believe that your music director could qualify as exempt under either the ministerial exception or the professional exemption, we recommend choosing the professional exemption, as the white-collar exemptions offer more legal clarity.

3.3 What about a Director of Music who oversees worship three or four times a year? Would s/he fall under the ministerial exception?

See the previous question. We suggest checking with legal counsel. If the musician is integrally involved in worship planning on a regular basis, that would seem to better fit the "essential religious duties" requirement than occasionally overseeing worship.

3.4 What about a very part-time religious educator? Our RE Director works 20 hours per month – never more than 10 in a week. That person couldn't be exempt, could they?

They obviously won't pass the salary test for a white-collar exemption but, depending on their responsibilities, it is possible that they could fall under the ministerial exception. There is no minimum salary for that. Do you feel that you can make a case for them having essential religious duties? Does their job require them to understand and teach Unitarian Universalism?

3.5 Is our Membership Coordinator exempt under the ministerial exception?

This is more difficult to assess especially with the title being "Coordinator." It depends on the nature of their work. If their job description, qualifications, and actual responsibilities clearly show that their job is religious in nature – that they are expected to understand our faith and share it with others, that feels like it meets the "essential religious duties" requirement. Also, how much time do we actually spend on "essential religious duties" vs. other administrative tasks? We encourage congregations to ask for a legal opinion for any case that is not clear-cut.

3.6 So someone with the Ministerial Exception does not need to be paid \$913/week under the new regulations?

That's right – and it's not new. Since the ministerial exception is not actually part of the FLSA, the salary level test doesn't apply.

4.0 COUNTING AND DOCUMENTING HOURS

4.1 Is there a required or suggested format for timesheets? Does the supervisor submit the hours or the employee? We have an employee who works some hours at the church and some at home – do they have to be tracked separately?

You can find many templates online. What is required for nonexempt employees is the total hours worked each day and week. Some staff may find it helpful to track their time by category or activity or in some other way, but no such breakdown is required for FLSA compliance.

We suggest a system where both the supervisor and the employee sign off on the timesheet, simply to confirm that both are in agreement.

4.2 Should we have a policy to say that supervisory approval is needed for putting in extra hours? What if the staff member puts in the extra time without getting the okay first?

Such a policy is a great idea for nonexempt staff. It helps you budget and ensures that staff will be properly paid for their extra time. If nonexempt staff are working more hours than expected or budgeted, their supervisor needs to know.

If someone does put in extra hours without checking first, you do still need to pay them. This becomes a supervisory issue. (Depending on the circumstances, it could be cause for disciplinary action.)

For exempt staff, daily and weekly reporting of hours is not required and extra time is not paid. However, we encourage supervisors to be generally aware of how much time their exempt staff are putting in on the job, as a matter of good management practice and so that offset time and other policies can be implemented fairly.

4.3 If an employee gets an hour lunch everyday, is this hour deducted from the total hours of work if the hour is paid?

There are actually no federal laws requiring rest or meal breaks, but many states do have laws.

Short breaks (5 to 20 minutes) are generally paid time, but meals (30 minutes or more) are not. Remember that if you require any availability of the employee during their lunch break, then it must be paid. (For instance, if they need to be at their desk so they can answer the door or phone, they are on paid time.)

Assuming that the staff member is completely relieved of their responsibilities during their meal time, it does not count as work time and would not customarily be paid time.

Here's a [good article on rest/meal breaks](#).

4.4 What if a holiday falls on a regular day off? Can the holiday be taken another day and within what timeframe?

[Here's an article on holiday pay](#) that answers this and similar questions.

Employers have a lot of leeway in setting holiday pay policy. If you have a policy of paying for holidays and/or offering an alternate day off, you can see why it's important to have a nominal or "default" schedule for each employee.

4.5 We have a nonexempt part-time youth coordinator who feels that he can't bring his family to a young family spaghetti night when his time for coordinating the youth program is up because he might have to answer questions regarding his youth program. Can you speak to that?

One piece of this question has to do with helping uphold good boundaries for an employee who is also a member. How can you be supportive of this staff member as he explains to congregants (politely) that he is off the clock?

As far as paid time goes, if he intends to be at an event with his "member hat" on but gets dragged into work conversations or responsibilities, he does need to be paid for that time. If it is just too hard for a staff member to show up at an event without getting pulled into work-related matters (Jan says, "I've been there!"), it might make more sense to decide up front that attending such events will count as part of his work hours. That would be a supervisory conversation.

When you are both a member and an employee of a congregation, there are pros and cons to showing up for things in one role versus the other. It's important to be clear, both from a professional boundaries standpoint and, for nonexempt staff, from a timekeeping standpoint, about whether you are attending an event in your role as staff.

4.6 Our RE Coordinator volunteered to do PR (send worship service info to the local newspaper). Can she do this?

You want to avoid anything that could be construed as off-the-clock volunteering by nonexempt staff. So either you can make it part of her job and have her do it on paid time, or you can take great care to make sure it is truly done as a volunteer in a manner that could in no way be conflated with her work responsibilities and hours.

4.7 We have a 1/3-time musician who works more in the church year and less in the summer but wants to be paid evenly across the year. Legal?

If you determine that s/he falls under the ministerial exception, that sounds fine because they would be considered exempt. If they are nonexempt, though, they need to be paid for hours worked each week.

4.8 We have a part-time staff member who works irregular hours but really needs to get a regular paycheck, so we've been paying her/him based on an understood average. But it seems that they don't fall under any of the exemptions. Is there a way to make this work?

It sounds like you'll need to reach a new understanding with this employee and pay them hourly based on the hours they put in each week. Is it possible for them to spread their work out more evenly? If you have a vacation or PTO (paid time off) policy, they may be able to fill in light weeks with accumulated vacation hours.

4.9 We have a part-time office admin who is also our rental manager. She is paid hourly for office work and commission for rentals. Is this okay?

Probably. There are numerous ways of paying people besides hourly and salary, including commissions and piece-work (e.g., \$1 per widget). Minimum wage and overtime provisions work differently in each situation. Based on this employee's overall time and earnings, if there is any risk of them either not making minimum wage or putting in more than 40 hours in a week, we suggest seeking professional legal or HR counsel to make sure you are in compliance.

4.10 For recordkeeping purposes, is it OK to have an online form for employees to submit with an electronic signature or do we need a form with an actual signature to keep on file?

For submitting hours, an online form is just fine. We think it's a good idea to come up with a system where the employee and their supervisor both confirm their agreement with the hours submitted.

4.11 How does this all work if we have staff who work in units rather than hours?

A unit is a morning, afternoon, or evening of work. One unit might be 1.5 hours – e.g., a short evening meeting, while another unit might be 4 or 5 hours – a solid afternoon of work.) 12 units/week is considered full-time. In terms of legal compliance for nonexempt employees, you need to count and pay for hours worked, so the units system would quickly break down.

We aren't fans of units but we hear that some professional staff use and like them. (Presumably these are exempt staff, which means they are not legally required to document their daily and weekly hours.)

4.12 What about nonexempt employees who go to General Assembly (or a similar multi-day activity)? Does that count as work?

The Fair Labor Standards Act says that any kind of conference or continuing education counts as work unless all four of these conditions are met:

- Attendance falls outside of regular working hours.
- Attendance is voluntary.
- The activity is not directly related to the employee's job.
- No productive work is performed.

Travel time (but generally not commute to/from airport) and working/instructional time are included in hours worked. Leisure and sleeping time are not.

- If a staff member is *required* to attend General Assembly by their congregation, their travel, working, and instructional time must count as paid hours.
- If the congregation *does not require* the staff member to attend, things are not as clear:
 - The time spent will fall both within and beyond the staff member's regular work hours. (This is one reason that every staff position should have nominal hours – to make clear what falls within their regular schedule.)
 - It may feel hard to determine what is “directly job-related.” Legally, [Training directly related to employee's job](#) means that it is “designed to make the employee handle their job more effectively.”
 - The staff member may or may not be “performing productive work” for the congregation while at GA.

The supervisor and staff member should come to a mutual understanding about compensable hours, based on all of the factors. Congregations might consider providing up to 5 additional days of paid leave to professional staff which can be used to attend denominational gatherings.

5.0 EMPLOYEE OR INDEPENDENT CONTRACTOR?

5.1 Who might be an independent contractor? We have an accompanist who plays for two services per month. Are they an employee or an independent contractor? What about childcare workers?

The specifics of the situation matter – the nature of the relationship, and the degree of behavioral and financial control. Our [Compensation and Payroll](#) webpage has resources to help you answer this question. (See “Employee or Independent Contractor?” under Topics of Special Interest.)

Most people who work in our congregations should be classified as employees. Here are some situations that might be independent contractors:

- A self-employed individual providing custodial, lawn care, or piano tuning services as part of their business
- A minister who offers supply preaching monthly or less often, with no ongoing responsibilities

- An itinerant musician who supports worship occasionally

Childcare workers and accompanists seem more likely to be employees, even if they help out only monthly, because they would be subject to significant behavioral control (training and instruction) from the employer.

If you contract with someone to keep your books who has their own bookkeeping business, they would probably be an independent contractor. But you might also hire a bookkeeper as an employee. Again, specifics matter.

5.2 We have an issue of paying people a rate per hour but they are not on payroll and do not receive a W-2 or a 1099. Is it unlawful to not have them on the payroll? What if they only work for us monthly?

If they are an employee, they need to get a W2. If they are an independent contractor, they get a Form 1099, assuming they earn more than \$600 in a calendar year. See the “Employee or Independent Contractor?” resources on our [Compensation and Payroll](#) page.

Working for your congregation monthly is right on the edge of what we think would make someone an employee. It depends on the work. See the question above. Also, depending on the nature of the work and the contract, an independent contractor can be paid by the hour, per-event/task, or in some other way.

5.3 What about “contract employees” in terms of the FLSA?

The FLSA wage and overtime provisions only apply to employees, so if you are talking about independent contractors (i.e., not employees), then the FLSA doesn’t apply. If you are talking about people on your payroll, then the FLSA applies.

A “contract” minister or religious educator, for instance, is usually an employee hired for a limited period of time (e.g., one year which may/may not be renewal). These individuals are employees and not independent contractors in most situations.

For More Information:

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While we understand the above information to be correct, the staff of the UUA Office of Church Staff Finances are not legal or tax professionals. We encourage congregations to seek the services of their own legal and tax experts for help with unusual cases and individual circumstances. Local counsel can also explain any state laws that may apply.