



Frequently Asked Questions Regarding FLSA (How to Handle New Overtime Changes)

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15. This is going to cost us money. How can we manage overtime within our budget? Do we REALLY need to do this?

If you have additional questions...

Remember, we are all facing these changes together and have a team ready to help you find the answers. Help is a call away:

1. Contact your site's HR person or your Finance Council. They are there to help.
2. Contact Archdiocese of New Orleans HR team.
3. Contact the Accounting Office of the Archdiocese.
4. Contact the CFO or Financial team of the Archdiocese.
5. Contact General Counsel of the Archdiocese.



1. What’s all this hoopla about and what does it mean to be an Exempt or Non-Exempt employee?

Yikes. In the briefest nutshell, the Fair Labor Standards Act (FLSA) is a federal law which establishes minimum wage and overtime pay. It had has been in effect for many years but significant changes will take effect on January 1, 2020. These changes will affect almost every employer in the United States.

This law requires all employees to be classified as exempt or nonexempt. Job title does not determine whether someone is exempt or non-exempt (with the possible exception of our priests and religious who are discussed in more detail in #10 below).

An exempt employee is exempt from being paid overtime regardless of how many hours they work, whether 40 or more in any week. See Fact Sheet number 17A under the Download section of the Archdiocesan website for further clarification on exemptions. Nonexempt employees are due overtime pay for any time worked over 40 hours in any week. Overtime must be time and a half of regular pay.

It is important for employers to maintain accurate timekeeping records of these nonexempt employees to be certain that they are paid a fair and just salary for their good work. There are several tests to determine which classification (exempt or non-exempt) is correct. Please refer to Fact Sheet #17A, Exempt Versus Non-exempt to assist you in making this determination for your employees.

The Archdiocese has attempted to communicate to all site employers regarding this law and the upcoming changes. You might find it helpful to review the Presentation “Understanding Pay & Overtime” in the HR Downloads pages of the Archdiocesan website.

2. Do both exempt and nonexempt employees need to have the same sort of recordkeeping as far as documenting hours and time worked?

Under the law, no. The law requires employers to keep records for non-exempt employees. ***However***, the Archdiocese ***strongly*** recommends that employers maintain accurate records for ALL lay employees. There are several reasons for this: (1) Treating every employee the same regarding accurate recordkeeping lends itself to better employee morale; (2) If there is ever a complaint leading to an audit, the entity will have the appropriate records on hand detailing the employee’s time and records; (3) In the same way, if an audit finds that an employee was incorrectly classified as exempt, then the entity already has the proper record keeping to pay any overtime that may be due to that misclassification; (4) An employee may make a shift in classification during their employment. In such a case, it would allow for a smooth transition to have the same recordkeeping in place. Every lay employee of the Archdiocese of New Orleans Administrative Offices fills out a timecard, regardless of job title or classification.



Any timekeeping plan is acceptable as long as it is complete and accurate. If you do not have such recordkeeping in place, such as a time clock or any other reliable method, you might want to refer to the Fact Sheet #21 under the “Downloads” section of the Archdiocese for guidance. Since this is not a ‘one size fits all’ item, the method your site uses must work for your site. The Archdiocese uses an online time recordkeeping method that will integrate seamlessly with our payroll provider for ease of use. You may or may not use electronic timekeeping; you may also use paper timesheets.

Also, all records must be maintained by the site for at least 3 years.

3. How do you calculate overtime if an employee is making two different salaries based on two different jobs they perform?

(EX: Jane is a receptionist for St. ABC School (a wonderful Catholic school), working 35 hours a week at \$10/hr. Jane also helps in the after school care program 12 hours a week making \$8/hr.)

In the situation above of an employee who works two different nonexempt jobs at two different rates of pay at the same entity, the FLSA allows two different methods of computing the regular rate for overtime calculation purposes: 1) the weighted average and 2) the regular rate associated with the job that caused the overtime to occur. *The "default method" under the regulations is the weighted average method.* Don't panic but this ‘weighted average’ measurement requires minor mathematical computations. In such instances, the employee’s total earnings (from BOTH jobs) are computed and then divided by the total number of hours worked at both jobs. That figure will then be divided in half and multiplied by the number of overtime hours that needs to be paid. Why divided in half? Remember that, using this method, the straight time has already been paid. Therefore, to pay for time and a half, you only need to compute ‘half-time’ to get the correct ‘time and a half.’ For more information regarding these two methods of computing overtime, as well as a weighted-average calculator and tutorial, please visit this website:

http://www.twc.state.tx.us/news/eft/e/i_employees_two_rates.html

4. How do we handle assistant teachers? They really don’t get the credit they deserve. And does it matter if those assistant teachers also supervise extracurricular activities and clubs and receive a stipend for that work?

You’re right. None of our teachers get the credit they deserve. But for these purposes, you should start by determining whether the assistant teachers (or teaching assistants, teacher’s aides, etc.) are exempt or nonexempt. The DOL defines teachers as:



“Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.” See DOL Fact Sheet # 17D on the Downloads section of the Archdiocesan website.

Does this describe your assistant teacher? If so, they are exempt from overtime and, therefore, are an EXEMPT employee. This determination should be made on a case by case basis. If this is *not* an accurate description of the work your assistant teacher does, then follow the salary level test and the salary basis test to determine if they are due overtime.

Now to address the second part of this question, whether it matters if the assistant teacher spends additional time and receives a stipend for supervising extracurricular activities or clubs. If you have already performed the analysis above and determined that the assistant teacher falls under the teacher exemption, then the time spent and amount of any additional stipend wouldn't matter as that teacher would be exempt from overtime.

If you have performed the analysis above and determined that that assistant teacher, for whatever reason, does not fit the definition of a teacher according to the DOL, then this will be handled differently. That employee will therefore be a non-exempt employee. Any time spent supervising extracurricular activities and clubs must be included as hours worked. Under those circumstances, any hours worked over 40 in any week, whether with the assistant teaching responsibilities or responsibilities with the extracurricular activities/clubs MUST be counted towards total hours worked in the week. For non-exempt employees, once they reach 40 hours in any one week, any work over those 40 hours must be compensated as overtime work and paid time and a half.

5. What about those same wonderful teacher’s assistants (or office assistants) who ALSO work in the After Care program? They work so hard. We need to pay them fairly for that work.

Let’s take each scenario separately.

If a teacher’s assistant works in a separate capacity at your site, such as in the After Care program, the first line of inquiry is to classify each job. Is this teacher assistant classified as exempt under the Teacher exemption as explained in the question #4 above? If so, the hours the assistant teacher works as an assistant teacher will not count towards overtime. In this example, if the assistant teacher works from 7:30 AM to 3:30 PM as an assistant teacher, and



then works from 3:30 PM to 5:30 PM in the aftercare program, the only hours that would count towards overtime would be the 3:30 to 5:30 PM aftercare program hours. Again that is only if the employee falls within the teacher exemption as an assistant teacher. This employee would be EXEMPT as an Assistant Teacher and NON-EXEMPT as an after care worker. Only the hours worked as a non-exempt employee would count towards overtime.

Let's now address the scenario where the assistant teacher does not fall within the teacher exemption under FLSA. In such a case, perhaps it is because the assistant teacher primarily performs clerical or childcare work with younger children and does not primarily 'teach, tutor, instruct or lecture' as required for the teacher exemption. In those cases, if the assistant teacher is not exempt under the teacher exemption, then any and all hours that teacher works counts towards the overall hours worked for the week. This employee would then have two NON-EXEMPT jobs at one entity. Under that scenario, if that teacher works from 7:30 AM to 3:30 PM as an assistant teacher and then from 3:30 PM to 5:30 PM in the aftercare program, all of those hours for the week would be counted towards overtime. In that case, that teacher will have worked at that site either as an assistant teacher or in the aftercare program for 10 hours per day for total of five days which would be 50 hours. That individual would be entitled to time and a half for the 10 hours over the 40 hour workweek. In this scenario, if that assistant teacher is making two different rates of pay, one for being an assistant teacher and a separate rate of pay for working in the aftercare program, the employee's rate of pay for determining overtime would be calculated as in question #3 above.

Finally, let's determine how to handle an office assistant who works during the day in the school office and either in the early morning or in the later afternoon in the aftercare program. Again, for such a person, an analysis would be made as to how that person is classified, whether exempt or nonexempt. Would that employee fall under any exemptions such as the administrative exemption? Note that the administrative exemption has a primary duty of office work but a further requirement is that that employee must "regularly exercise discretion and independent judgment in matters of significance." That is a determination that must be made by each site as to that particular employee. For these purposes, we will determine that the office assistant is non-exempt and, as an aftercare worker, is also non-exempt. Therefore, that employee's total hours in both capacities, BOTH as office assistant and after care worker, would be computed each week to determine if the employee is entitled to overtime pay.

6. We have an employee of School Food and Nutrition who works in our cafeteria at lunchtime and then works our school After Care Program (or somewhere else in the school in another capacity). Is this considered one job for overtime purposes?

School Food and Nutrition is a separate legal employer that has a different legal structure, COO, and pay system from our Catholic schools in the Archdiocese of New Orleans. When the employee works for School Food in the cafeteria at your site, that employee is paid by School Food and Nutrition and supervised by School Food and Nutrition. That employee is a



School Food and Nutrition employee. If that same employee chooses to work a second job with a school or parish in After care or another capacity, *even at the same school site*, that employee is then employed by the parish or school, not School Food and Nutrition. **Each job's hours will be computed separately to determine overtime.** In other words, the employee may choose to work 40 hours at each job and payment of overtime would not be triggered. What that means is, if there were enough hours in the week, that employee could possibly be working 40 hours at each job and would still not be due overtime from either of the employers. Those separate jobs with separate employers would not be combined to determine the 40 hour workweek.

a. An employee of School Food and Nutrition who works in the cafeteria at lunchtime then works for a school or parish on occasion for special events (fairs, galas, etc.). Is this considered one job for overtime purposes?

If a School Food and Nutrition employee who works in the cafeteria at your site also works for your school or parish's special occasions (fairs, festivals, galas, etc.), even in the capacity of a cook or cafeteria workers, they are still employed by two separate legal entities and the hours should NOT be combined to meet that 40 hour threshold. Instead, each job's hours should be computed separately. Our understanding is that the school or parish are both contracting these employees *on their own* for these special event. School Food and Nutrition is not assigning them to work the event. Instead, the school or parish is the employer of the person for the event.

However, if this School Food and Nutrition employee **also** works in your site's aftercare program, and in addition works the special events for the school, then the aftercare hours and the special event hours (both jobs paid by the same school) *should* be combined towards that 40 hour threshold, and the employee *would* be due overtime if they work more than 40 hours in the workweek. The hours worked as a School Food and Nutrition employee, however, should not be added into this total, as it a separate job with a separate employer.

7. How do we handle part time workers?

Whether a worker is full-time or part-time, the standard salary level to qualify for exemption will be \$684 per week. Unless covered by an exemption, employees covered by the FLSA must receive overtime pay for all hours worked over 40 in a workweek at a rate not less than one and one-half times their regular rate of pay. In other words, the Department of Labor does not classify based on part-time or fulltime, but rather on how many hours are worked in a week. Therefore, unless otherwise exempted, part time workers are due overtime pay if they work over 40 hours in any one work week. Remember, each workweek is separate from the next. You cannot move hours around (if someone works 35 in one week and 45 in the next, you cannot move the five hours of overtime to the week under 40 hours). You must pay them their deserved overtime!



8. How do we handle substitute teachers?

If a substitute teacher's primary duty is teaching in an educational establishment, they may qualify for the teacher exemption. Substitute teachers should be evaluated on an individual basis the same as any other teacher. *If their primary duty is teaching and imparting knowledge in an educational establishment*, then they would qualify as exempt under the teacher exemption. Please refer to Fact Sheet 17D and FLSA 2005-39 and FLSA 2008-07 under the Downloads section of the Archdiocesan website. However, if a substitute teacher's primary duty is general clerical or administrative tasks unrelated to teaching, then they may not qualify for the teacher exemption. Use the duties test to make a determination of whether their primary duty is primarily teaching or primarily something else.

9. How do we handle coaches whose jobs are so important to our students?

According to the Department of Labor, a coach *may* be considered a teacher under the professional teacher exemption and may be exempt from receiving overtime. Coaches qualify for the exemption *"if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge."* The DOL has stated that *"those faculty members who... spend a considerable amount of their time in extracurricular activities such as coaching athletic teams... are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student."* Therefore, perform the same 'duties' test of coaches to make the determination of whether their primary duty is teaching as defined above.

However, if the coach's primary duty does not fall within this definition, then that employee would properly be classified as non-exempt and would be due overtime for any hours worked over 40 in a week.

10. How do we treat school counselors? Does it matter if the counselor also teaches life skills or other matters to students on a regular basis to students?

As to the first question of how we treat school counselors for FLSA purposes, it depends on the capacity in which the counselor was hired. If the counselor was hired as a licensed professional counselor, that employee may qualify for the professional exemption. The requirements for a Learned Professional exemption are: (1) primary duty is performing work that requires advanced knowledge in a field of science or learning; (2) Knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction; and (3) must meet salary requirements.

The great majority of our (wonderful) school counselors are NOT hired as licensed professional counselors. Instead, they are hired as "school counselors." They may be licensed professional counselors but that qualification is not required as part of their job and



they are not hired in that capacity. Therefore, unless they would fall within one of the other exemptions, they would probably be non-exempt. If the counselor was hired as an academic counselor, that person may qualify for an education administrator exemption. To qualify for the educational administrator exemption, the primary duty of the employee must be performing administrative functions directly related to academic instruction or training in an educational establishment. The employee must also have a salary of at least the current minimum or not less than the entrance salary for teachers. This exemption does *not* include jobs directly related to instruction.

And now to address the second scenario, when the counselor also teaches life skills, coping skills, or something else to students, the analysis would be whether that counselor is a teacher under the previously detailed definition of teacher. Remember above, the definition of a teacher is whether their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Under the scenario of the school counselor, if that school counselor is employed as a school counselor and not also as a teacher, then it would appear that the fact that they are also imparting knowledge in the classroom is still part of their counselor duties and they should not be classified as a teacher. It is important to remember and to determine in what capacity an employee was hired before making these sorts of classifications and analyses.

11. What about the administrative personnel in our schools, some of whom may teach on an occasional basis in the classroom. How would they be classified?

The question was asked whether administrative personnel who also teach in the classroom would be classified as exempt under the teacher or any other exemption, or nonexempt. Again, you would have to determine under any and all exemptions which might apply for these employees. The Department of Labor's definition of teacher is in number four above. It is important to note how the person was hired. If that person was hired as an administrative person, clerical, or secretarial, and only occasionally goes in the classroom to teach, then it would appear that they are not exempt under the teacher exemption. Remember that the teacher exemption is for teachers whose *primary duty* is teaching, etc., and they must be employed as a teacher. If the administrative personnel are not employed as teachers, it would be doubtful that they would qualify for the teacher exemption.

But you should also consider whether the administrative employee might qualify as exempt under the administrative exemption. The employee would have to meet the following criteria: 1) a primary duty of office work; 2) That work is directly related to the management or general business operations of the employer or the employer's customers; 3) That person regularly exercises discretion and independent judgment *in matters of significance*, AND 4) That employee must be compensated on a salary basis at a rate of not less than \$684 per week. Be careful because the DOL will look strictly at this administrative type exemption.



There is a further exemption for educational administrators. Educational administrators may be exempt if: 1) They have a salary of at least the current minimum, or not less than the entrance salary for teachers; 2) Their primary duty is performing administrative functions directly related to academic instruction or training an educational establishment; 3) This exemption does not include jobs directly related to instruction, and 4) be paid on a salary basis of at least \$684 per week. If these administrative personnel do not fit those exemptions and, as noted above, only teach on an occasional basis in the classroom, they are probably nonexempt employees. See DOL Fact Sheet #17C on the Downloads section of the Archdiocesan website for further information on these exemptions.

12. Let's get back to our wonderful priests and religious who work at our sites. They would qualify as exempt under the Ministerial Exemption. Who else may qualify as exempt under this Religious/Ministerial Exemption?

Although the FLSA does not specifically provide for a ministerial exemption, courts have held that this is a valid exemption. One group of people that clearly falls within this ministerial exception are priests, nuns, ministers, deacons and other members of religious orders who serve pursuant to the religious obligations in schools, hospitals, and other institutions operated by a religious employer. In the leading case on this exemption, EEOC versus Hosanna-Tabor Evangelical Lutheran Church, the US Supreme Court determined that the analysis of whether a ministerial exemption applies should be done on a case-by-case basis. The question to be answered is, is this employee a 'minister' under the legal definition? Some of the factors to be considered are:

- 1) How is the person employed, in what capacity?
- 2) What is that employee's job description—what exactly does it include?
- 3) Does the employee perform important religious functions in the capacity employed?

Again, the Supreme Court was clear that there is no rigid formula for deciding when an employee qualifies as a 'minister' under the legal definition and is therefore exempt under certain federal laws. In order for an employee to fall under the Ministerial Exemption, they (1) must be an employee of a religious institution, (2) chosen largely based on religious criteria, AND (3) primarily have religious duties and responsibilities. *Since that ruling, the courts have determined that the following employees have fit that legal description as a minister: seminarians, church music and choir directors, a Catholic diocese director of religious formation, and a religious hospital's Chaplain.* This ministerial exception may well be applied to your director of religious education and/or your youth director (or others) but you need to determine if that person's responsibilities include important religious functions. This is a *good opportunity to revise job descriptions.* In clarifying the job description, define the important religious functions including such words as 'minister', 'ministry', 'spiritual formation', 'spreading the faith', 'evangelism', or similar words if those are the true requirements of a particular person's job. That kind of job description will help support your determination that a particular employee is entitled to the ministerial exemption. It would



be prudent to interpret this exemption narrowly and not try to fit every employee into a ministerial exemption.

13. If the employee works less than 12 months in a year, can you pro-rate their salary to determine the salary level?

The new salary threshold is \$684 per week or \$35,568 per year. During the period that employees work at your site, you will need to guarantee that at least \$684 per week is paid for an exempt employee. Each work week stands on its own for overtime purposes. If an employee is paid over a 12-month period, however, only works for 10 months, the salary threshold would be the weekly pay during that 12-month pay period. Many of our teachers work for 10 months and are paid for the entire 12 months. Teachers, however, would already be exempt under the teacher exemption and, therefore, the question of salary level does not need to be addressed.

If an employee works less than 12 months in a year, to be considered for an exemption, the salary must still meet the weekly minimum of \$684 during the period actually worked. For example, if the employee works for 10 months in a year but is paid over 12 months, the salary paid for each week must be at least \$684 per week over the 10 months actually worked in order to be considered for the exemption. The employer cannot 'pro-rate' that salary to 12 months to determine salary level.

14. Our parishes and schools could not function without our great volunteers. How do we handle volunteers? What about when a volunteer is also an employee on site?

Under the FLSA, individuals who provide services without any expectation of compensation are considered volunteers. The Department of Labor considers several factors to determine whether an individual is an employee or a volunteer. Some questions to ask to determine whether an individual is truly a volunteer:

- i. Is the entity that will receive the service from the volunteer a nonprofit organization?
- ii. Is the activity less than a full-time occupation?
- iii. Are the party's services offered freely and without pressure or coercion?
- iv. Are the services of the kind typically associated with volunteer work?
- v. Has a regular employee been displaced to accommodate the volunteer?
- vi. Does the volunteer receive or expect to receive any benefit from the entity to which it is providing the volunteer service?

It is likely that the individual would be termed a volunteer if the first four questions are answered 'yes' and the final two questions are answered 'no.'

Be particularly mindful if a current employee is requesting to volunteer at the same site at which they work. The Department of Labor is very clear that *an employee should*



not volunteer in the same capacity or having the same responsibilities as their normal job. This is very important. For example, an administrative assistant at your site should not volunteer to perform the same duties that she performs as an administrative assistant. Her volunteer activities should include different responsibilities from her job. The same applies to a maintenance worker, or any other employee at your job site. The volunteer activities should be different than the job duties. If the volunteer activities are the same as the job duties, the activity will be considered 'work' and not a volunteer activity. As a result, the time will count toward the 40 hours of the workweek, and they must be paid overtime for any time over 40 hours.

We strongly suggest that all volunteers sign a volunteer form, such as the one posted on the Downloads section of the Archdiocese website under "Volunteer Forms." This is especially important for those employees who also wish to volunteer in their parish or school. Keep these signed forms on file in case of any audit for at least 3 years.

15. This is going to cost us money. How can we manage overtime within our budget? Do we REALLY need to do this?

You may be right—this may cost you some additional money. And, yes, you REALLY need to do this to comply with the law. But also, and just or more importantly, keep in mind that it is the right thing to do. Period. Our hard-working employees should be fairly compensated for their time worked. We are the face of the Church even in the business dealings of our entities and employees.

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked. Please refer to Fact Sheet # 23, Overtime Pay Requirements under the HR Downloads page of the Archdiocese website. In other words, overtime worked must be fairly paid. COMP Time is ONLY ALLOWED in GOVERNMENT/PUBLIC SECTOR JOBS. For our entities, when non-exempt staff works more than 40 hours in any seven-day work week, they must be paid the overtime premium due them.

However, there are other considerations that employers may use to minimize overtime. This may also be an appropriate time to review jobs, job descriptions, and workloads. Can one employee's work be spread to other employees to make a more uniform workload? This may be an appropriate time to implement a Flex time policy where supervisors can FLEX the time of their staff by adjusting work schedules so that overtime is not reached in a given workweek. [See Administrative Staff Handbook for an example of such a policy].



If you have additional questions...

Remember, we are all facing these changes together and have a team ready to help you find the answers. Help is a call away:

1. Contact your site's HR person or your Finance Council. They are there to help.
2. Contact Archdiocese of New Orleans HR team.
3. Contact the Accounting Office of the Archdiocese.
4. Contact the CFO or Financial team of the Archdiocese.
5. Contact General Counsel of the Archdiocese.

