

Developing Employment Hotspots Nonprofits Need to Know

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This workshop is a discussion of key legal developments in the employment arena that, if not addressed, can (and frequently do) put nonprofits in hot water. These developments include (1) how employee classification rules have changed and tools religious employers can use to address the classifications (exempt-non-exempt, independent contractor versus employees, ministerial versus non-ministerial employees) and the consequences for not following them, (2) offer letters and employment contracts for pastors and church/nonprofit employees (3) employee handbook dos and don'ts (4) negligent hiring and supervision in the ministry context and potential child safety concerns.

Introduction: Why nonprofits and the attorneys who represent them should pay attention to hotspots and developments in employment law.

1. Employee Classifications

a. Under the FLSA: Exempt versus non-exempt in light of changing thresholds.

i. The Fair Labor Standards Act requires employers to:

1. Pay certain minimum wages
2. To track hours of hourly employees and pay overtime.

ii. Like many laws, there are exceptions. Specifically, there are many types of employees that are exempt under the FLSA, meaning employers can pay them a salary, and not track hours, pay minimum wage, or pay overtime.

1. There are some big advantages and some administrative efficiencies to be gained for exempt employees.
2. But there are also significant penalties to misclassifying an employee as exempt from the FLSA, when they are not.

iii. Common exemptions and changes to the thresholds:

1. Executive, Administrative, Professional employees. Note that the salary threshold changed July 1, 2024 from \$35,568 to \$43,888.
2. Highly Compensated employees. From \$107,432 to \$132,964.
3. BUT the DOL's rule was vacated in its entirety by *State of Texas v. U.S. Department of Labor*, 2024 U.S. Dist. LEXIS 207864 (E.D. Tex. Nov. 15, 2024).

iv. Executive, Administrative, Professional rule changes

1. Reference the final rule effective July 1, 2024. Set to increase again in 2025.

2. Written Materials:

- a. Final Rule Text.
 - b. DOL Overview of the New Rule: <https://blog.dol.gov/2024/04/23/what-the-new-overtime-rule-means-for-workers>
 - c. Simms Showers article on the new rule:
<https://www.simmsshowerslaw.com/salary-threshold-for-exempt-employees-to-increase/>
 - d. Court decision overruling new DOL Rule: https://www.simmsshowerslaw.com/update-increased_salary-threshold-for-exempt-employees-blocked-by-texas_court/
- v. How to know if someone is exempt – and what has changed.
1. Focus on job descriptions and what do they really do
 2. Salary limits
- vi. Be careful. There are steep penalties for violations of the FLSA.
1. Civil monetary penalties. Adjust each year for inflation. See the Department of Labor's adjustment chart: <https://www.dol.gov/agencies/whd/flsa#cmp>
 2. There can be criminal penalties including fines and penalties for willful violations.
 3. Department of Labor or employee may file suit for damages, which would include back wages, an equal amount in liquidated damages, plus attorney's fees and court costs.
- vii. A bigger exception: Ministerial Exception.
1. A brief overview of the ministerial exception.
<https://www.simmsshowerslaw.com/liability-looms-large-for-religious-organizations-after-supreme-courts-expansive-interpretation-of-sex/>
 2. An in-depth review of the ministerial exception in its context of the Church Autonomy Doctrine. Carl H. Esbeck, An Extended Essay on Church Autonomy, 22 Federalist Soc'y Rev. 244 (2021)
<https://fedsoc.org/commentary/publications/an-extended-essay-on-church-autonomy>.
- viii. Relatedly, note that even though the federal minimum wage under the FLSA has been \$7.25 an hour since 2009, many states, counties, and cities have steadily increased their minimum hourly wage every year, with some reaching or exceeding \$15 an hour. California, Connecticut, Maryland, Massachusetts, New York, New Jersey, Washington State, and Washington, D.C. have increased their minimum wage to at least \$15 an hour as of January 2024. Several other states increased their minimum wage or tied their minimum wage to inflation.

1. See Va. Code § 40.1-28.10. Establishes a \$12 minimum wage to be adjusted by the Consumer Price Index.

b. Independent Contractor changes.

- i. Discuss the different tests and the changes from the last two presidential administration's interpretation of the FLSA and independent contractors.
- ii. Compare to State Law. VA as an example.
- iii. <https://www.wagenmakerlaw.com/blog/employee-vs-independent-contractor>
- iv. <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>

2. Considerations for Offer letters and employment agreements for Pastors and Church employees

a. Employment classification

- i. Reinforce above to ensure that employer correctly identifies classification of employee at point of hiring.

b. Housing Allowance

- i. 26 U.S.C.A. 107, I.R.C. Section 107 "Minister of the Gospel"
- ii. Designated Amount.
- iii. Reasonable Amount.

c. Ministerial Exception

- i. Note that "minister" for purpose of housing allowance under the tax code may be different than a minister for the sake of employment laws.

d. SECA

- i. Ministers are generally exempt from Social Security and Medicare withholdings.
- ii. However, they are required to pay self-employment taxes on their net earnings unless they have requested and are granted an exemption from self-employment taxes.
- iii. IRS Publications 517; Form 4361

e. Christian dispute resolution provisions

- i. Agreements to arbitrate statutory claims are enforceable. - *Gilmer v. Interstate/Johnson Lane Corp.* 500 U.S.20, 26, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).
- ii. An arbitration agreement is enforceable if there is sufficient consideration, and a mutual promise to arbitrate constitutes sufficient consideration. *Johnson v. Circuit City Stores*, 148 F.3d 373, 377-8 (4th Cir. 1998).

f. Intellectual property

- i. Work-For-Hire Doctrine – Copyright Act of 1976.
- ii. Work is made “for hire” if created by an employee “within the scope of his or her employment.” *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737–38, 109 S.Ct. 2166, 2171, 104 L.Ed.2d 811 (1989).
- iii. Exceptions for previously created IP should be identified in the agreement.

g. Common non-compete, solicitation, and confidentiality issues.

- i. What legal considerations apply to use of non-competes or restrictive covenants in offer letters/employment agreements with pastors or church/nonprofit employees?
- ii. People are frequently surprised to learn that the developments in non compete and restrictive covenant law often impact churches as especially larger churches and ministries often have non-compete provisions with their key leaders.
- iii. Various authorities have sought to significantly restrict the use of non competes:
 1. States have passed laws restricting the use of non-competes. For instance, four states ban non-competes and 34 jurisdictions including Virginia (Va. Code § 40.1-28.7:8), DC (§ 32–581.01 et seq) restrict their use.
 2. The Federal Trade Commission issued a Final Rule heavily restricting the use of non-competes for most workers.
 3. The NLRB issued a memo asserting that “the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the [NLRA].
- iv. FTC Final Rule is supposed to be effective September 4, 2024, but that implementation date is likely to be impacted by litigation seeking to enjoin the enforcement of the rule.
 1. The FTC Final Rule, if allowed to go into effect would:
 - a. prohibit employers from entering new non-compete agreements with most workers (both employees and independent contractors)
 - b. apply to members of LLC’s as well as employees and independent contractors
 - c. require employers to provide written notice to employees indicating that all existing non-compete agreements are unenforceable unless an exemption applies, consistent with FTC mandated wording.
 2. Consider litigation updates
 - a. Ryan LLC v. Federal Trade Commission (injunction granted as to Plaintiff, but no nationwide injunctive relief yet, pending future developments in other cases).

3. For information on the FTC Final rule see:
 - a. The Final Rule cited above
 - b. The Simms Showers article on the FTC Final Rule.
- v. Discussion of NLRB authority or jurisdiction over churches and ministries to restrict non-competes or non-solicitation agreements.
 1. NLRB has made pronouncements in other situations covering labor relations in interstate commerce. But they typically have not wielded a heavy hand against churches.
 2. Impact on auxiliaries compared to churches themselves. We've saved an NLRB article under Newsletters for 2024.

3. Handbook Dos and Don'ts

- a. Written Material
<https://www.simmsshowerslaw.com/employment-handbooks-dos-donts/>
- b. Do: Cover Key Areas
 - i. Hiring and termination
 - ii. Operational procedures and policies
 1. Prohibiting workplace harassment. One of the primary defenses an employer has in defending itself from harassment claims is to consistently follow a clear and effective harassment policy. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
 2. Employer property, workplace monitoring and electronic media.
 3. Alternative dispute resolution of claims.
- c. Don't: Copy and Paste from online templates or AI without making sure the document meshes with your specific structure, religious beliefs, practices, state law, and the like.
- d. Do: Have signed acknowledgement of receipt by the employee. May be the most important page of the handbook.
- e. Don't: Waive or complicate employment at-will protections or create ambiguity about whether your handbook is a contract over which employees may sue you.

f. Don't: Break the law.

i. Many churches and ministries encourage their employees (including in their handbook) not to share financial information (including their own salary). Consider whether your state has recently passed a pay transparency law.

1. Many have including:

- a. Colorado
- b. Rhode Island
- c. New York State
- d. Hawaii
- e. Illinois
- f. Minnesota
- g. Virginia

2. The laws differ in what they require.

a. VA law penalizes employers who forbid employees from sharing pay or compensation information or who take action against employees who share or inquire about wages or other compensation. Va Code § 40.1-28.7:9

3. Others may mandate reporting salary. California requires annual reports with pay categorized by protected characteristics.

ii. Some states have laws that require you to include certain provisions in your handbook if you have a handbook.

4. Negligent Hiring, Retention, and Supervision

a. Scenario: A church volunteer or employee does the unthinkable. A blatant violation of the law and your ministries moral standards. The question is will the individual bear the responsibility for this action or will the church?

b. Introductory principles:

i. Traditionally: Persons are not responsible for the negligent, let alone criminal, actions of others.

1. "As a general rule, there is no duty to warn or protect against acts of criminal assault by third parties. This is so because under 'ordinary circumstances, acts of assaultive criminal behavior by third persons cannot reasonably be foreseen.'" *Terry v. Irish Fleet, Inc.*, 296 Va. 129, 135 (2018)

ii. *Respondeat superior*. Employers are responsible for the actions of their employees acting in the scope of their employment.

iii. That would appear to give ministries a pass, since criminal actions are not going to be in the scope of the ministry's employment. Or so one would think.

- c. Real life example: *A.H. v. A Church of God in Christ, Inc.* in the Virginia Supreme Court (2019). Court allowed case to proceed against the church and national denomination in a direct negligence action due to the criminal acts of a sexual abuser (deacon and youth leader) because the church had a “special relationship” to protect the children receiving ministry from the church. Even though the negligent supervision, retention, and hiring claims were struck.
- d. Expanding liability even if the employee acts *outside the scope of their employment*, but it was negligent for the Employer to hire or retain them to begin with or if they negligently supervised.
 - i. 34+ states recognize liability not only for an organization’s negligent selection of their employees, but their independent contractors as well. *See Alonzo v. Menholt*, 9 N.W.3d 148, 157 (Minn. 2024)
- e. Not all states recognize all of these causes of action.
 - i. Virginia does not recognize negligent supervision or training as a cause of action. *MCI Commc'ns Servs., Inc. v. MasTec N. Am., Inc.*, No. 3:17-CV 00009, 2017 WL 2274492, at *3 (W.D. Va. May 24, 2017).
 - ii. West Virginia just announced that it does recognize negligent supervision even though it is a “narrow and highly fact-dependent” theory. *Camden Clark Memorial Hospital, Inc. v. Marietta Area Healthcare, Inc.* (No. 23- 569, 11 June 2025).
- f. Discussion of the elements of these causes of action.
- g. What steps might an organization take to reduce the possibility of negligent hiring, retention, or supervision?
 - i. Screening (e.g. child care workers) *See* Evangelical Council for Abuse Prevention (ECAP) best practice standards and assess what the duty of care is. <https://ecap.net/standards/>
 - ii. Training.
 - iii. Child Protection Policy and supervision – two adult rule or rover.

5. What else should you be aware of as an employer?

- a. Bans on "Captive Audience Meetings."
- b. Data Privacy Laws.
- c. Child Labor Laws.
- d. Artificial Intelligence.

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