Memorandum

To: NTNL Congregations

From: Craig Ongley, NTNL General Counsel

Subject: Exempt and Non-Exempt Employees under the Fair Labor Standards Act

Date; November 13, 2016

After more than two years of deliberation, on May 18, 2016, the United States Department of Labor announced a new standard for determining who qualifies as an exempt employee under the Fair Labor Standards Act (FLSA) and if not exempt whether the employee qualifies for overtime pay should they work more than 40 hours per week.. The new ruling says that if an employee earns less than $47,476 per year ($913 per week), then the employee may be non-exempt unless the employee qualifies for an exception. Unless Congress acts to delay or repeal the change **the law change will take effect December 1, 2016.**

There are a lot of misconceptions concerning the law especially as to the effect of the law on non-profit organizations and more specifically the laws effect on religious organizations and churches. Each congregation needs to look at every individual it has on its payroll and determine whether that employee is exempt from the mandatory overtime provisions or not. Please note that outside contractors such as an outside janitorial service who may come and clean the church each week are contractors and are not employees.

Consequently contractors are not covered by the new law, only employees. Typically if the person receives a W-2 and the church deducts taxes from the person's wages then they are an employee, if they don't and receive a 1099 then they are likely to be considered contractors and not employees.

If you determine that the person is an employee and not a contractor then the next question is whether they earn a gross salary of $47,476 or more per year. If they do then they are exempt under the FLSA provisions and no overtime need be paid. If on the other hand they do not then further analysis is necessary. Please note that there are two primary tests as to whether the FSLA applies to your organization; the enterprise test and the individual test.

**PLEASE SEE THE ATTACHED DECISION TREE FLOW CHART TO BEGIN YOUR ANALYSIS. THE BALANCE OF THIS MEMORANDUM IS INTENDED TO ASSIST WITH YOUR ANALYSIS OF YOUR EMPLOYEES AND YOUR UNDERSTANDING OF THE FLOW CHART.**

There are several exceptions described in the flow chart that are worthy of special attention. First is the interstate commerce exception; second is the "ministerial" or religious exception; third are the managerial/administrative exceptions; and the fourth is the teacher exception.

The interstate exception is whether the employee regularly engages in interstate commerce as part of their job duties. For example does the person talk on the phone to out of state persons or businesses or do they order goods from out of state vendors as part of their job duties. If they do then you need to continue your analysis to the next level. If the employee does not engage in interstate commerce as part of their duties they are not covered under the FSLA and no overtime need be paid.

The second exception is the "ministerial" or religious exception. Obviously any ordained member of the clergy who is employed by the church would qualify for this exception and would not qualify for overtime pay. However what about non-ordained employees such as youth directors, choir or music personnel and administrative help such as secretarial or administrative assistants?

The analysis of any such employees centers on the question as to whether the employee’s duties include worship leadership or conveying the church’s message. Typically the music/choir director and youth director or minister would qualify for the exception and the courts have been fairly consistent in this analysis that these types of employees are not eligible for overtime pay.

If the church has an organist or piano accompanist then this exception is likely not to apply and these employees could be eligible for overtime pay. Secretaries and administrative assistants would probably not qualify for this exception either but may qualify under the third exception.

The third exception is for employees who come under any of the following exceptions:

**Executive**

•Primary duty is management of organization

•Must manage the work of two or more employees

•Authority to hire and fire, or makes hiring and firing recommendations that are given serious consideration

**Administrative**

•Primary duty – office or non-manual work directly related to management of employer

•Must exercise discretion and independent judgment with respect to matters of significance

•Specific examples: human resources managers (make or interpret policy), employees with authority to bind the organization

**Professiona**l

•Performance of work requires advanced knowledge in a field of science or learning acquired by a prolonged course of specialized instruction; or

•Job requires invention, originality, or talent in recognized field of artistic endeavor

•Examples: registered nurse, engineer, accountant (not clerks or bookkeepers)

The fourth exception is the teacher exemption. Many of our congregations run a pre-school or kids day out type program. If the teacher is a bona fide teacher or teaches religious subjects and uses religious materials as part of their employment to teach the children then they would likely meet either the teacher exception or the ministerial exception described above.

**Important Notice: This memorandum is for limited, simplified informational and educational purposes only and does not constitute legal or professional advice. Further, this memorandum does not consider all aspects of federal overtime pay rules and does not address state overtime pay rules, which may be more restrictive or otherwise different from the federal rules. This chart is not a substitute for professional advice from qualified legal counsel.**