

# Payroll Statuses and the Church Musician



BY JEFFREY VERKUILEN

**C**hurch musicians both in full-time and—perhaps especially—part-time employment sometimes need to address matters regarding employee compensation laws—more specifically, the issues surrounding salaried (i.e., exempt) versus hourly (i.e., nonexempt) positions. This article is intended to discuss various considerations of exempt and nonexempt positions, including related compensation issues. Hopefully, this information will be of assistance to our AGO members who need to improve their employment arrangements or to correct the status of their employment as they work with their employers.

## **FLSA versus State Laws**

Labor laws exist at both federal and state levels. The federal employment laws are covered by the Fair Labor Standards Act (FLSA), administered by the federal Office of Financial Management. The office's website for the FLSA, at which much information can be found, is [Ofm.wa.gov/state-human-resources/compensation-job-classes/compensation-administration/fair-labor-standards-act-flsa](https://ofm.wa.gov/state-human-resources/compensation-job-classes/compensation-administration/fair-labor-standards-act-flsa).

Each of the states also has its own labor laws, administered by its own labor department. The federal laws provide the minimum labor requirements, and states may elect to enact laws that are more comprehensive or more stringent than the federal laws.

## **Exempt versus Nonexempt Employees**

Nonexempt employees (sometimes informally termed as “hourly” employees) are entitled under the FLSA to receive pay at time-and-one-half their “regular rate” of pay for each hour they actually work over the applicable FLSA overtime threshold in the applicable FLSA work period, which is normally 40 hours per week for full-time employees. The FLSA requires that most employees must be paid the federal minimum wage (\$7.25 per hour in 2019) for regular time. It also requires a pay

rate of at least one-and-one-half (1.5) times the regular hourly pay for any hours worked over the standard 40 hours.

Certain types of employees, often classified as exempt employees, are not entitled to the overtime pay that is otherwise guaranteed by the Fair Labor Standards Act (FLSA).

### Tests to Determine Whether Employees May Be Exempt

There are three tests that determine whether an employee may be exempt:

- The Salary Level Test
- The Salary Basis Test
- The Duties Test

**Salary Level Test**—For the FLSA (the federal guidelines), full-time employees who are paid less than \$23,660 per year (\$455 per week) are nonexempt (i.e., paid on an hourly basis). The salary level test provides that full-time employees who meet the salary level (i.e., are paid at least \$23,660 per year) *may* be paid on a salary basis and not an hourly basis. In other words, a full-time salary may not be less than \$23,660 per year.

In an example of state labor requirements, the State of California has a salary level test that exceeds the FLSA. California requires exempt positions to be paid at least twice the current minimum wage. The 2019 minimum wage for California employers is \$11 per hour for small employers (those with 25 or fewer employees) and \$12 per hour for large employers (those with more than 25 employees). Thus, the salary level test in California requires a salary for full-time exempt positions of at least \$45,760 per year (2 x \$11 x 2,080 hours) for small employers, and \$49,920 per year (2 x \$12 x 2,080 hours) for large employers.

If an employee is considered exempt, the employer is *not required* to provide overtime pay to the employee. However, the employer *may elect* to pay overtime to exempt employees. For exempt employees, it is at the employer's discretion whether or not to pay for overtime hours worked. Some employers might create an employee benefits package with extra perks in lieu of overtime pay, or provide compensatory time off.

**Salary Basis Test**—Generally, an employee is paid on a salary basis if the employee has a “guaranteed minimum” amount of money that can be counted on being received for any work week in which the employee performs *any* work. (For this purpose, taking vacation provided by the employer is considered performing work.) This amount need not be the entire compensation received.

With some exceptions, the base pay of a salary basis employee may not be reduced based on the quality or quantity of work performed (provided that the employee does some work in the work period). This usually means that the base pay of a salary basis employee may not be reduced if the employee performs less work than normal, if the reason for that is caused by the employer. Further, an employee's base pay may not be reduced for partial-day absences. However, employers may reduce the base pay for exempt employees in full-day increments for disciplinary suspensions, or for personal leave, or for sickness under a bona fide sick-leave plan (as, for example, if the employee has run out of accrued sick leave).

Thus, there can be “permissible” and “impermissible” reductions in salary basis pay. Permissible reductions have no effect on the employee's exempt status. Impermissible reductions may affect the employee's exempt status, in that the general rule is that an employee who is subjected to impermissible reductions in salary is no longer paid on a salary basis, and is therefore nonexempt. However, employers have several avenues by which they can “cure” impermissible reductions in salary basis pay, and as a practical matter these make it unlikely that an otherwise exempt employee would become nonexempt because of salary basis pay problems. The salary basis pay requirement for exempt status does not apply to some jobs (for example, doctors, lawyers, and schoolteachers are exempt even if they are paid hourly).

**Duties Test**—The FLSA recognizes three main categories of exempt workers. It is the tasks performed on the job, not the job title alone, which determine exempt versus nonexempt employment status.

- **Executive**—Executive employees must have a primary duty of managing the company or a department or subdivision of the company; they must customarily and regularly direct the work of at least two employees; and they must have the authority to hire or fire, or their suggestions and recommendations as to the hiring, firing, or changing the status of other employees must be given due consideration.

- **Administrative**—Administrative employees must have a primary duty of performing office or non-manual work directly related to the management or general operations of the employer or the employer's customers, and their primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

- **Professional** (the category most likely concerning church music staff positions)—Professionally

exempt work means work that is predominantly intellectual, requires specialized education, and involves the exercise of discretion and judgment. These workers are known as “learned professionals” and perform work requiring advanced knowledge acquired through a prolonged course of specialized intellectual instruction. This advanced knowledge must be beyond the high school level. Advanced degrees are the most common measure of this, but are not absolutely necessary if an employee has attained a similar level of advanced education through other means (and performs essentially the same kind of work as a similar employee who has a degree). Some employees may also perform “creative professional” job duties that are exempt. This classification applies to jobs such as musicians, composers, actors, writers, cartoonists, and journalists. It is meant to cover employees in these kinds of jobs whose work requires invention, imagination, originality, or talent—employees who contribute a unique interpretation or analysis. There is not necessarily an automatic determination of exempt status for certain job classifications (such as minister of music).

#### **Full-Time versus Part-Time Exempt Employees**

Part-time employees can be exempt employees. For the exempt-status salary level test, full-time exempt employees must be paid more than \$455 per week, per federal FLSA laws. To switch to a part-time position and remain exempt, first, the number of hours of work for the part-time position must be determined. The minimum salary to remain exempt must be proportionate or higher. For example, if a full-time position with a \$1,000-per-week salary is made a half-time position (20 hours per week, or 50% of full time), the salary must be at least \$500 (or 50% of \$1,000) in order to remain exempt. Additionally, if the responsibilities of the position are revised, they must still meet the other tests for determining exempt status—the salary basis test and the duties test.

In order to preserve the employee’s exempt status notwithstanding a part-time schedule, the following requirements must be carefully observed:

- **The Salary Level Test**—The salary must be at a minimum proportionate for the position if the position were full-time and in accordance with minimum salary guidelines for exempt-status positions.
- **The Salary Basis Test**—The employee’s pay cannot vary based on the hours worked in any week. So, for example, if the position is considered half-time (i.e., 20 hours per week) exempt and the employee works 35 hours in a particular week, the employer does not need to pay the employee for the additional hours. Similarly, if the half-time exempt employee works only 10 hours in a particular week, the employer should not reduce the pay for the hours not worked. For the purposes of payroll, the part-time exempt employee should not have a *specifically required* number of hours of work each week.

- **The Duties Test**—The duties of the employee must be classified into one of the three categories—Executive, Administrative, and Professional. The duties must remain essentially the same. For example, the Executive category requirement that the exempt-status employee be the leader of two or more other employees cannot be reduced to being the leader of one employee for a half-time exempt-status employee.

#### **Switching from Full-Time Exempt to Part-Time Exempt Positions**

Employees can switch from full-time exempt to part-time exempt and back, as long as FLSA and state labor laws are followed. To remain exempt, as discussed previously, the duties of the part-time position would need to retain the characteristics of the full-time position, with compensation for the expected time commitment being proportionate or greater to meeting or exceeding the minimum salary requirements if the position were to be on a full-time basis. If the duties are those of exempt-status employees, and other exempt-status requirements are met, the position should be permitted to be exempt. This, however, does not necessarily *require* the position to be exempt.

#### **Keeping Track of Hours**

Employers may track hours for both hourly and exempt employees. This may be done in order to monitor the amount of work provided by the exempt employee, and/or it may be to monitor and capture various components of an employee’s work efforts. It is acceptable that an employer and an exempt employee have an arrangement where work is not required, or perhaps even not permitted, beyond a certain number of hours. Especially in part-time exempt situations, both the employer and the employee have an interest to ensure that the salary received is commensurate with the time expected for the position. A written contract is very helpful to make this arrangement and understanding clear. It is very easy for “job creep” to occur with any exempt position—full-time or part-time—and understandings, procedures, and recourses need to be anticipated and arranged for if the job demands regularly exceed the agreed-upon work scope of the position.

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Hopefully, this article will provide helpful guidance to our AGO members who are in or anticipating work situations that can be enhanced by an improved understanding of employment laws. An understanding of labor laws is important to ensure that both employers and employees understand each other’s rights, and that work places engender pleasant environments of mutual respect, in order to achieve the goals and missions of both employer and employee.

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