BRYAN CAVE

BRYAN CAVE LLP 90 South Cascade Avenue, Suite 1300, Colorado Springs, CO 80903-1679
T: 719 473 3800 F: 719 633 1518 bryancave.com

MEMORANDUM

Date:	September 28, 2016
To:	Trace Haythorn Association for Clinical Pastoral Education, Inc.
From:	Susan D. Campbell, Esq. Bryan Cave LLP
Re:	Approaches for responding to the 2016 FLSA exempt status regulations

This memorandum addresses possible approaches for hospital, nursing home, and other employers who are considering how to respond to the new federal Fair Labor Standards Act (FLSA) exempt status regulations as they may apply to employees in ACPE's chaplain residency program.

This memorandum is not intended to constitute or be relied upon as legal advice, and employers should obtain legal advice from their own legal counsel, adapted to their specific facts and circumstances. Also, this memorandum does not attempt to analyze local and state wage and hour laws, which may have overtime and exempt status requirements that are more burdensome for employers than, or different from, those of the FLSA.

Introduction

On December 1, 2016, the U.S. Department of Labor's new minimum salary for the FLSA white collar exemptions from overtime pay will come into effect, raising the weekly minimum salary from $455/week to $913/week. On an annualized basis, for employees working an entire year, this results in an increase in the minimum salary from approximately $23,660 to approximately $47,476 per year. This change may affect many employers who employ persons pursuing board certification through ACPE's chaplain residency program.

Currently, participants working in ACPE centers such as hospitals and nursing homes are paid, on average, an annual salary in the range of approximately $25,000 to approximately $40,000. Chaplain residents may work in excess of 40 hours per week, the number of hours above which an overtime premium is payable under the FLSA if the chaplain residents are not exempt from overtime pay. As we understand, many employers currently treat chaplain residents as exempt professional employees, paying the chaplain residents on a salary basis at or above $455 per week, in positions that involve performance of duties that meet the duties test for the FLSA professional exemption. Under the FLSA's new minimum salary requirements for exempt professionals, if employers wish to continue treating chaplain residents as exempt employees,

such that no additional pay is due for overtime hours worked, they will need to increase their weekly salary to equal or exceed $913 per week from December 1, 2016 going forward.

What follows are several possible approaches that employers may wish to consider as they decide how to respond to the new requirements. As a reminder, employers should discuss with their attorneys how the new regulations, and these possible approaches, may apply to their circumstances.

Methods of Addressing These Changes in the FLSA Regulations

a. Increase Salary to Retain Exempt Status

Many employers who currently employ otherwise exempt white collar employees in positions below the new salary minimum have decided to increase the employees' salaries in order to retain exempt status. Some employers take this approach with positions where the employees regularly work significant overtime hours, the current salary is relatively close to the new minimum salary, and/or the employers value being able to count on a fixed salary regardless of hours worked, for budgetary reasons.

Some employers have justified the increase in pay and reduced the budgetary impact of this increase by adding responsibilities to the employees' position description, or by combining positions when possible.

b. Change to Non-exempt Status

Another approach involves changing the employee's status to non-exempt for wage and hour purposes, and calculating an hourly wage rate based upon a projected number of worked hours that keeps the employee's total weekly pay at roughly the same level. Maintaining pay at the same level throughout the year may also involve developing a fixed schedule or a limit on hours worked each week. For example, an employee may be assigned to work no more than 38 hours per week. This might involve three work days, of 10, 12 and 16 hours in length. In some weeks it might be necessary to modify the employee's work schedule, but again with the employee assigned to work no more than 38 hours in the week. If the employee never works above this maximum, no overtime is due under the FLSA (the FLSA's general rule is that an overtime premium is payable when the employee works over 40 hours in a work week, and the FLSA has no generally applied daily overtime threshold).

Another approach involves providing employees who are called to work unexpected long hours in a work day with time off within the same work week, to avoid incurring overtime hours of more than 40 in the work week. This approach works best if the employee is typically assigned work days that are potentially long days (with on-call obligations) early in the work week.

Note: Some states have a daily overtime requirement that applies even if the employee never works in excess of 40 hours per week. For example, in covered industries,

Colorado has a daily overtime requirement that provides that employees who work more than 12 hours in a workday, or 12 consecutive hours including hours occurring in 2 workdays (except duty-free meal periods), must be paid an overtime premium of one and a half times the regular hourly rate for each hour worked over 12, regardless of whether the employee exceeds 40 hours in the work week. *See* Colorado Minimum Wage Order Number 32 (2016), 7 C.C.R. 1103-1.

c. Fluctuating Work Week

The FLSA regulations allow a system for minimizing the cost of overtime for non-exempt employees in certain circumstances. Under this system, the employer and employee must agree in advance that the employer will pay the same amount of base salary each week regardless of hours worked. If the employee works 20 hours one week, he will be paid the same base salary as when he works 40 or 50 hours in following weeks. The base salary covers the straight time pay for all hours worked. If the employee works over 40 hours in a work week, the employer pays an additional overtime premium equal to .50 the regular hourly rate for all hours worked over 40 in the week. In the fluctuating work week method, the regular rate is determined by dividing the regular compensation (typically the base salary) by the number of hours worked in the work week. As will be appreciated, the more hours worked, the smaller the regular rate. The fluctuating work week method can only be used if the base salary will equal or exceed minimum wage for all hours worked. Employers and their attorneys should be aware that there is some question about whether the fluctuating work week method can be applied to employees whose weekly hours rarely fluctuate. Many commentators believe that it can, although there is some question about the U.S. Department of Labor's position on this point. Employers should be aware, also, that some states may restrict or prohibit the use of a fluctuating work week approach. Employers should consult with their legal counsel about whether this method can be used in their state and locality, given the needs and circumstances of the employee's position. The Department of Labor regulation describing this method can be found at 29 C.F.R. 778.114.

d. The Eight and Eighty (8/80) Method

Hospitals and residential care establishments, such as nursing facilities, skilled nursing facilities, residential care facilities, and intermediate care facilities for people with disabilities, are allowed under the FLSA regulations to use a method that employs a fixed fourteen calendar day work period for calculating overtime instead of a 7-day work week. Under this method, employees are paid overtime when they exceed 8 hours in any work day and 80 hours in the fourteen day period, whichever amount of overtime is greatest. The employer and the affected employees must have an agreement or understanding concerning this method in advance. Overtime compensation due for days in which the employee works more than 8 hours can be credited towards any overtime compensation for hours worked in excess of 80 in the two-week period. For example, if the employee works 7 days at 8 hours per day in the first week, and then 3 days at 6 hours per day in the second week, no overtime premium would be payable under the 8/80 method, although 16 hours of overtime would be payable for the first week under the usual

method of calculating the overtime premium (for hours worked over 40 in a 7-day work week). See 29 C.F.R. 778.601 and Fact Sheet #54: The Health Care Industry and Calculating Overtime Pay for descriptions of this method. Employers wishing to use this method should consider also whether it is allowed under applicable state and local wage and hour laws.

e. Annual Salary Earned in a Shorter Period

In this method, often used by educational institutions, the exempt employee works fewer than 12 months of a year, and her weekly salary in those months meets the minimum for exempt employees, which will be $913 per month, after December 1, 2016. Because the employee does not work all months of the year, her annual salary may be less than the approximately $47,000 which would be earned by the employee if she worked continuously through the year. This method might be helpful for positions in which the employee only works 9 or 10 months of the year, is paid at the rate of $913 per week or more while working, and the employer meets its budget constraints because the employee has significant time during the year when he or she is not working. See Department of Labor Field Operations Handbook Section 22g10, which discusses this method. The Field Operations Handbook indicates that the employee's salary can be pro-rated or paid in installments over the entire year, even though the weekly salary amounts would be less than the minimum salary threshold of $913 per week.

f. Ministerial Exemption for Religious Organizations and Religiously Affiliated Employers

Although the FLSA does not expressly provide a statutory exception for ministers, various federal courts and the U.S. Department of Labor have recognized a ministerial exception, primarily arising from the religion clauses of the First Amendment, under which certain individuals serving in ministerial capacities are not considered employees and subject to the minimum wage and overtime requirements under the FLSA.

The ministerial exception has been applied to bar various types of claims by employees serving in ministerial capacities against their employers, when the employers are religious organizations or affiliated with religious organizations. Several U.S. circuit courts of appeals have recognized that the ministerial exception applies to wage and hour claims under the FLSA and state law. *Shaliehsabou v. Hebrew Home of Washington*, 363 F.3d 299 (4th Cir. 2004); *Schleicher v. The Salvation Army*, 518 F.3d 472 (7th Cir. 2008); *Rosas v. Corp. of the Catholic Archbishop*, 627 F. 3d 1288 (9th Cir. 2010). *See also Dole v. Shenandoah Baptist Church*, 899 F.2d 1388 (4th Cir. 1990); *Patsakis v. Greek Orthodox Arch Diocese of America*, 339 F.Supp.2d 689 (W.D. Pa. 2004); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, 2000 WL 2455253 (E.D. Pa. 2005); *Schukla v. Sharma*, 2009 WL 3151109 (E.D.N.Y. 2009).

The Wage and Hour Division of the U.S. Department of Labor has also recognized a ministerial exception to the FLSA in its guidelines to its field auditors: "Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious

orders who serve pursuant to their religious obligations in schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be 'employees.'" Field Operations Handbook, Wage and Hour Division, U.S. Department of Labor, Section 10b03 (1967).

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. ____, 132 S.Ct. 680 (2012), the U.S. Supreme Court recognized and approved the ministerial exception as barring an Americans with Disabilities Act claim by a former teacher employee of a religious school, deeming the teacher to be a "minister." Although the Supreme Court did not specifically address the application of the ministerial exception to the FLSA or state wage and hour laws, in its description of the ministerial exception, the Court referenced at least one federal case applying the ministerial exception to wage and hour claims, *Schleicher* (above). Notably, the court also referenced a case finding that a hospital chaplain is a minister, *Scharon* (below).

While in *Hosanna-Tabor* the Supreme Court did not provide a precise definition of the term "minister," it referenced several circumstances as indicators that an individual is a minister, including significant training and credentialing as a minister, calling by a religious organization to religious service, the performance of religious or ministry duties or functions involving the religious organization's mission and religious message, and recognition of a special role as minister by the employing religious organization. In *Hosanna-Tabor*, the teacher employee claimed a housing allowance on taxes that was available to employees in the exercise of ministry, and the Court also pointed to this as a factor indicating the employee was a minister.

In a case decided before *Hosanna-Tabor*, but using an analysis consistent with that of *Hosanna-Tabor*, the Eighth Circuit court of appeals reviewed the duties of a hospital chaplain and found that she served as a "minister." *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d 360 (8th Cir. 1991). The chaplain was an ordained Episcopal priest providing "a religious ministry of pastoral care, pastoral counseling . . . and liturgical services for persons in the hospital." *Id.*, at 361. The court found that, "She was not a secular employee who happened to perform some religious duties; she was a spiritual employee who also performed some secular duties. Her position as chaplain is primarily a ministerial position." *Id.*, at 362-63.

Chaplain residents typically have significant seminary and other religious training, and may be ordained or have other religious credentials, and in their work provide pastoral counseling and other religious services to patients, family members, and staff members, similar to that of the priest in the *Scharon case.* While this is a question you will want to review with your own attorneys, the federal cases described above and the Department of Labor's field guidance suggest that there is significant support for the position that the chaplain residents employed by religious organizations and church-affiliated hospitals and other institutions would be seen by the Department and the courts as employed in ministerial positions not subject to the overtime requirements of federal and state law.

Please note that church-affiliated hospitals and nursing facilities and other religious organization employers are most likely able to assert successfully the ministerial exception and avoid application of overtime requirements to chaplain program participants. Hospitals operating on a for-profit basis or owned or associated with governmental entities are not likely to be viewed as eligible for the exception.

Where the chaplain resident's employer is not a religious organization or religiously-affiliated organization, a question has been raised whether changing a chaplain employee's status to non-exempt affects his/her ability to claim the housing allowance for tax purposes. While this memorandum does not constitute legal advice and we recommend employers consult with their own attorneys on this point, it seems unlikely that a change in FLSA exempt status would have an impact on eligibility for the housing allowance under the federal tax code.