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April 4, 2016

Rev. Dr. Trace Haythorn
Association for Clinical Pastoral Education, Inc.
One West Court Square, Suite 325
Decatur, GA 30030

Re: Association for Clinical Pastoral Education, Inc.
Chaplain Residency Exemption from Overtime

Dear Dr. Haythorn:

You have asked that we review the application of the Fair Labor Standards Act (FLSA) to your chaplain residency program in which participants serve in hospital or hospice settings.

Facts

Most of your participants have an equivalent of a Master of Divinity degree and are pursuing board certification as chaplains. Your participants pay tuition to ACPE. Your program includes didactic classroom training as well as experiential residency service. The participants in the residency programs are assigned to the hospitals and hospice organizations to serve as chaplains. The hospitals and hospices consider these participants as their employees and pay the participants a salary ranging from approximately $25,000 to approximately $40,000.

As part of the residency program, your participants provide chaplain services which include pastoral counseling to patients, family members and employee. Those services include on-call shifts requiring overnight stays. With the inclusion of the overnight hours, your participants, at times, may spend more than 40 hours per week at the hospital or hospice.

Questions and Brief Answers

1. Are the participants in your program subject to the overtime provisions of the Fair Labor Standards Act?

The short answer is that many of your participants will not be subject to the FLSA and its overtime requirements. There may be some, however, will be subject to that Act and may be entitled to overtime.

2. If not exempt from overtime requirements, must sleeping time be considered compensable?

The hospital and the employee may agree that sleeping time is not compensable so long as certain criteria are met.

Analysis

1. Are the participants in your program subject to the overtime provisions of the Fair Labor Standards Act?

Although the FLSA does not specifically enumerate an exception for ministers, federal courts and the U.S. Department of Labor have recognized a ministerial exception under which certain individuals serving in ministerial capacities are not considered employees under the FLSA. This exception arises under the free exercise clause of the First Amendment and the prohibition against judicial interference with a church's ability to manage its internal affairs including the selection and/or attention of its clergy. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-725 (1976). This exception extends to the "determination of a minister's salary, his place of assignment, the duty he is to perform in furtherance of the religious mission of the church." *McClure v. The Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

a. Employees in a Ministerial Position.

At least two of the U.S. Circuit Courts of Appeals have recognized the ministerial exception in the specific context of an FLSA claim. In *Shaliehsabou v. Hebrew Home of Washington*, 363 F.3d 299 (4th Cir. 2004), the Fourth Circuit court[1] specifically found that an employee in a ministerial capacity was excluded from the application of the FLSA. *Id.*, at 307. There, the court found that a kosher supervisor at a Jewish elder care home who was appointed by a board of rabbis to insure compliance with Jewish dietary law served in a ministerial capacity and was not subject to the FLSA. *Id.*, at 311. The court found that, "the ministerial exception applies only to employment relationships between *religious institutions* and their *ministers*." It further held that, "religious institutions can include religiously affiliated schools, hospitals and corporations." *Id.*, at 310.

In *Schleicher v. The Salvation Army*, 518 F.3d 472 (7th Cir. 2008), the Seventh Circuit court[2] affirmed the trial court's decision that two officers in the Salvation Army who were ordained ministers serving in supervisory, ministerial capacities were not subject to the FLSA. In that case, the ministers were not paid wages but received a small stipend of $150 per week as an allowance to cover basic needs.

Other courts which have acknowledged the application of the ministerial exception to FLSA matters include the following: *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.

[1] The Fourth Circuit includes Maryland, North Carolina, South Carolina, Virginia and West Virginia.
[2] The Seventh Circuit includes Illinois, Indiana and Wisconsin.

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).

There is no substantial debate that your participants serving as chaplains are within ambit of the ministerial exception. The Wage and Hour Division of the U.S. Department of Labor has provided the following guidelines: "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).

The courts use a primary duties test to determine whether an individual falls within the ministerial exception. "If the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of religious order, or supervision or participation in religious ritual and worship, he or she should be considered 'clergy.'" *Shaliehsabou,* 363 F.3d at 306. The Eighth Circuit Court of Appeals reviewed the responsibilities of a hospital chaplain and determined that she served in a ministerial capacity. *Scharon v. St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d 360 (8th Cir. 1991).[3] The chaplain who was an ordained Episcopal priest was responsible for providing "a religious ministry of pastoral care, pastoral counseling . . . and liturgical services for persons in the hospital." *Id.*, at 361. Based on those findings of fact, 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.

Participants in your program include ministers ordained by their particular denomination or faith, as well as spiritual leaders providing the identical counseling to patients, family members, and staff members as was approved by the Eighth Circuit in *Scharon.* These participants are employed in ministerial positions.

b. Employers as Religious Institutions.

In Scharon, the Eighth Circuit Court found that, for the purposes of the ministerial exception, the hospital was a religious employer that employed a chaplain in a ministerial capacity. Its board of directors included church representatives. Its governing documents could be amended only with the approval of the local diocese and presbytery. The court recognized that "while St. Luke's provides many secular services (and arguably may be primarily a secular institution), *in its role as Scharon's employer* it is without question a religious organization." *Scharon*, 929 F.2d at 362 (emphasis added). "It cannot seriously be claimed that a church-affiliated hospital providing this sort of ministry to its patients is not an institution 'with substantial religious character.'" Id.

The Fourth Circuit Court concluded that "a religiously affiliated entity is a 'religious institution' for the purposes of the ministerial exception whenever that entity's mission is marked

[3] The Eighth Circuit includes Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota.

by clear or obvious religious characteristics." *Shaliehsabou*, 363 F.3d at 310. The court went on to find the Hebrew home was a religiously affiliated organization in part because its bylaws define it as a religious and charitable nonprofit corporation, and that its mission was to provide to aged members of the Jewish faith in accordance with the precepts of Jewish law. *Id.*

The Equal Employment Opportunity Commission has provided some guidance as to factors to be considered in determining which entities are protected under the ministerial exception as it applies to discrimination claims under Title VII of the Civil Rights Act.[4] These include:

- Whether its articles of incorporation state a religious purpose.
- Whether its day to day operations are religious (e.g., Are the services the entity provides directed toward propagation of the religion?).
- Whether it operates as a not-for-profit organization.
- Whether it is affiliated with or supported by a church or other religious organization.

BNA, E.E.O.C. Compliance Manual 628:0008 (2008). As demonstrated by the Eighth Circuit Court in *Scharon,* the critical analysis may focus on the entity's demonstrated commitment to a religious purpose specifically related to the chaplain's function when the overall operation of the hospital may not have the same religious overtone.

For the church affiliated hospitals, you should be able to assert successfully the ministerial exception and avoid any overtime commitment to your program participants. For hospitals operating on a for-profit basis or for hospitals associated with governmental entities, you will have difficulty asserting the exception. For this second group, you should be able to demonstrate that the participants are professional who are exempt if they are paid a salary that does not fluctuate based on the quality or quantity of work performed in a week. The current minimum salary is $455 per week ($23,660 annually), although that threshold amount is likely to increase to approximately $50,000 annually sometime during 2016. The Department of Labor has not released its final rule indicating the exact amount or the effective date of the change.

2. If not exempt from overtime requirements, must sleeping time be considered compensable?

In situations in which your participants are subject to the overtime provisions of the FLSA, you can arrange the employment relationship so that some sleeping time can be excluded from the compensable time. For this to work, the hospital and your participant will need to agree in writing that uninterrupted sleep time of at least eight hours will not be considered compensable. The Department of Labor's regulations set out the parameters for this practice at 29 C.F.R. § 785.22:

[4] "Although the Title VII ministerial exception is based on constitutional principles and not on "congressional debate" and Labor Department guidelines as is the FLSA exception, we implicitly have held that the ministerial exceptions under the two Acts are coextensive in scope." *Shaliehsabou*, 363 F.3d at 307.

> Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

To ensure that this scenario works, the shift **must** exceed 24 hours. I am available to help you create a format for that, if you would like.

Another mechanism you may want to consider to limit the cost of overtime is a fluctuating workweek compensation plan as recognized by the Department of Labor at 29 C.F.R. § 778.114. Under that plan, the hospital and the chaplain will agree ahead of time that the hospital will pay the same salary each week regardless of the number of hours actually worked, while some weeks may exceed 40 hours and some may not require 40 hours. The actual overtime compensation would be less than it would under a regular compensation plan. Under the regular plan, the regular rate of pay on which overtime is based is a fixed rate determined by dividing the regular compensation by the number of hours expected in a normal week. Overtime is compensated at 1.5 times the regular rate for overtime hours. In the fluctuating work week plan, the regular rate is determined by dividing the regular compensation by the number of hours worked in each particular week. Overtime is then compensated at 0.5 times the regular rate for all overtime hours. This method ensures that the employee benefits from a consistent salary during weeks in which he/she works less than 40 hours, while the employer benefits during weeks in which there is overtime.

Example: Chaplain is paid a weekly salary of $500 and works in four consecutive weeks 35, 40, 45 and 50 hours.

Regular Plan:

Regular Hours	Regular Pay	Overtime Hours	Overtime Pay	Total
35	500.00	0	0	500.00
40	500.00	0	0	500.00
40	500.00	5	93.75	593.75
40	500.00	10	187.50	687.50
				2,281.25

Fluctuating Work Week Plan:

Regular Hours	Regular Pay	Overtime Hours	Overtime Pay	Total
35	500.00	0	0	500.00
40	500.00	0	0	500.00
40	500.00	5	27.77	527.77
45	500.00	10	50.00	550.00
				2,077.77

Please let me know if you need any further information on any aspect of the compensation plan for your chaplains.

Very truly yours,

David S. Yandle

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