Employment Law: New Developments, New Considerations, More Unanswered Questions

BY JEFFREY J. VERKUILEN

The November 2019 issue of THE AMERICAN ORGANIST included an article I wrote, "Payroll Statuses and the Church Musician." In late 2019, the Department of Labor, in accordance with the Fair Labor Standards Act (FLSA), issued updated directives regarding pay practices. After my article was published, a number of AGO members contacted me with various comments and questions and shared some of their experiences. These employment issues are the reason for this present article, which provides an update to the Department of Labor guidelines, shares how members might approach and respond to these matters, and includes some of my personal observations and suggestions. Unfortunately, labor laws, especially as they pertain to part-time church musicians, have become less clear, resulting in quite a bit of concern and confusion.

Revised Overtime Guidelines

In late 2019, the Wage and Hour Division of the Department of Labor issued a ruling, "Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees." (The 245-page document is found at bit.ly/FSLA-overtime.)

One of the most significant labor law changes was to the Salary Level Test, one of the three tests (along with the Salary Basis Test and the Duties Test) used to determine eligibility for exempt classification (i.e., not eligible for overtime pay):

- Prior to 2020: An employee who made less than $455 per week ($23,660 per year) was entitled to overtime pay.
- Beginning in 2020: An employee who makes less than $913 per week ($47,476 per year) is entitled to overtime pay.

States are still able to enact labor laws that are more rigorous than the federal guidelines, in this case with a lower wage level to be entitled to overtime pay.

Throughout this large document, part-time work matters are addressed only twice—and only in footnotes. The Department of Labor, at least at this time, does not intend to get involved in the thick of rewriting and interpreting the exempt

labor laws for the countless variety of part-time employment situations. Consequently, the Department of Labor document states that prorating the salary level to the hours of work for part-time employees is not valid, though this practice has been widespread. The Department of Labor, however, does assert that "an employer may pay a nonexempt employee a salary to work part time without violating the FLSA, so long as the salary equals at least the minimum wage when divided by the actual number of hours (40 or fewer) the employee worked" (footnote 72, p. 38).

Implications and Interpretations

The application of the Salary Level Test is the same for both full-time and part-time employees—there is no prorating the salary levels for part-time employees. Thus, for *both* full-time and part-time employees, only those who make $47,476 per year or more may be considered exempt (i.e., not required to be paid overtime), though an employer could optionally provide overtime pay. All other employees—those who make $47,476 per year or less—are entitled by law to overtime pay. Any full- or part-time employee can be paid on a salaried basis, provided that the salary divided by the number of hours worked is at the hourly minimum wage or greater (e.g., $7.25 per hour, or whatever greater rate may apply to the locality of the employment).

With the implementation of these new guidelines, part-time employees, whether paid by the hour or by salary, are due pay for hours worked beyond their regular hours. Overtime rates (e.g., time and a half) apply only for those hours in excess of normal full-time employment hours (i.e., hours beyond 40 per week). Therefore, if a part-time employee who normally works 15 hours per week instead works 20 hours in a given week, that employee is due an extra payment of 5 hours at the normal rate of pay. If the same 15-hour-per-week employee works an extra 30 hours in a given week, the employee is due an extra 25 hours at the normal rate of pay (to reach 40 hours), and 5 hours of overtime pay at, presumably, 1.5 times the normal hourly rate.

An issue arises, then, of tracking hours. In many professions for part-time (and full-time) employees, tracking and reporting time is the norm—not only is pay based on the hours of work, but also billing to customers and clients may be tied to the time-reporting system, and studies of efficiency can be gained by time-reporting information. But in the artistic professions, such as organists and choir directors employed by religious institutions, time reporting can be very difficult. How does one report time for such matters as studying and practicing music? Does payment to a musician on an hourly basis impede creativity? How is working from an off-site location addressed (e.g., practicing music at home)? Further, does payment on an hourly basis change the relationship of the musician to other comparable staff members who are paid on a salaried basis?

It is possible for a musician employee who is working out of the office and at home practicing and planning music to remotely log on and off of a time-reporting system when performing agreed-upon work, which for this purpose includes rehearsal time. Most anyone would find this burdensome at best, subject to abuse (from the view of the employer), and distrustful (from the view of the employee). When a musician is away from the church or the office and practicing music, who is to say that the musician, while logged onto a time clock, is actually practicing? (Employees who work at home on a computer can be monitored by the consistency or quantity of keystrokes in a given time period, providing assurance to the employer that the employee is actually at the computer.) I am aware of at least one diocese that is now requiring musicians to do all compensable work on the church premises—no compensable work from home is permitted.

Observations and Suggestions

There are no clear resolutions to these matters, and the Department of Labor is apparently not intending to address them for part-time musicians any time soon.

There are some musicians whose employers compensate them differently depending on the work that they are doing. For example, a musician employee may spend time writing correspondence, preparing information for bulletins, and attending staff meetings. That work is compensated at a given rate. The same musician employee also spends time playing services, for which another rate of pay applies, and that rate includes an assumption of including a given amount of planning and rehearsal time for that service. While on the surface this might seem to be a reasonable approach to the issue, problems can easily arise. Does pay adjust for certain seasons—Christmas, Holy Week—when additional work efforts are required? If a part-time employee whose compensation is based on multiple rates of pay works in excess of 40 hours in a given

week, which hourly rate is used to calculate the overtime? Challenges to this type of pay structure can make this system fail, and it would likely not hold up well in employment law.

Perhaps a viable solution for now, until further guidance is provided on the matter, is for religious institutions to require written terms of employment for their musician employees that clearly define the work expectations. (The AGO has for a long time advocated for the use of such written agreements for employment of musicians in houses of worship. These recent matters concerning employment law seem to make this recommendation more urgent and more prudent.) Further, that definition of work expectations should include the number of services at which to provide music and the anticipated amount of preparation and rehearsal time associated with those services. Added to this would be other job duties, such as meetings and correspondence. Compensation is probably easiest in this case when the musician is on a salaried basis. There may be a need to incorporate extra compensation into the contract for certain seasons requiring extra time (such as Christmas and Holy Week). There could also be the possibility of consideration of accrued compensable time off in lieu of extra pay within the work period. (Overtime compensation needs to be paid in the period in which it is incurred and earned.)

For musicians who only play or conduct choirs at services (i.e., those musicians who do not have administrative responsibilities), a determined rate per service that considers rehearsal and preparation time could be considered. Such a musician may be an employee or an independent contractor, depending on the circumstances of the position; a stipend for services could draw the work closer to a contractual relationship rather than an employment relationship.

Along this line of thought, perhaps we will see a greater number of contractual (nonemployment) work situations for church musicians. This would require some changes in the working relationship between the musician and the church. Generally, if the business (or church) has less control over how the worker is to do the work, if the worker is engaged in determining the compensation, and if the work is for a specific time period, the work is likely to be considered a contractual relationship, and the worker an independent contractor, not an employee. On the other hand, if a business (or church) has more control over how the work is done, if they determine the compensation level, and if the relationship is long-term or indefinite, the worker is more likely to be considered an employee. Combinations of these situations can make this determination difficult (and can be subject to challenges by the IRS). The correct determination is important, as it involves how social security and Medicare are funded for the work performed, whether by a shared arrangement between employee and employer as FICA taxes or entirely by an independent contractor by payment of self-employment taxes. (For a short discussion on the various considerations to classify a worker as employee vs. independent contractor, refer to this IRS website: bit.ly/employee-vs-contractor.)

Final Thoughts

The Department of Labor has left unresolved a significant gap in the guidance and interpretation of labor law as it pertains not only to part-time musicians but also to others employed in the creative arts. This article may do more to raise questions with readers than provide answers. Some type of reliable, useful, and reasonable system for reporting time, with consideration for remote work for preparation, practice, and planning time, is perhaps the direction in which these matters may be taking us. Because there does not seem to be an intention by the government to resolve these issues in the foreseeable future, we can expect interpretations of the laws at congregational, diocesan, and denominational levels that are in disagreement with one another. It will be very helpful for both church musicians and congregational leadership to understand the implications of the law so that it is not misinterpreted and abused. Ultimately, we need to be sure church musicians are fairly and reasonably compensated; this will help foster an agreeable environment in religious institutions, better permitting the members of their congregations to benefit and grow from the work efforts of their musicians.

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