

Key Employment Law Developments Nonprofits Need to Know

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Description: This workshop is a discussion of key legal developments in the employment arena that, if not addressed, can (and frequently do) put nonprofits in hot waters. Including: (1) changes to rules regarding classifications (exempt-non-exempt, independent contractor versus employees) and the consequences for not following them, (2) developments regarding non-compete agreements and the ways nonprofits may be impacted (3) pay practices and minimum wages and (4) state laws that impact religious practice.

Introduction: Why nonprofits and the attorneys who represent them should pay attention to developments in employment law.

1. Employee Classifications Under the FLSA: Exempt versus non-exempt in light of changing thresholds.

- a. The Fair Labor Standards Act requires employers to:
 - i. Pay certain minimum wages
 - ii. To track hours of hourly employees and pay overtime.
- b. Like many laws, there are exceptions. Specifically, there are many types of employees that are exempt under the FLSA, meaning employers can pay them a salary, and not track hours, pay minimum wage, or pay overtime.
 - i. There are some big advantages and some administrative efficiencies to be gained for exempt employees.
 - ii. But there are also significant penalties to misclassifying an employee as exempt from the FLSA, when they are not.
- c. Common exemptions and changes to the thresholds:
 - i. Executive, Administrative, Professional employees. Note that the salary threshold changed July 1, 2024 from \$35,568 to \$43,888.
 - ii. Highly Compensated employees. From \$107,432 to \$132,964.
- d. Executive, Administrative, Professional rule changes
 - i. Reference the final rule effective July 1, 2024. Set to increase again in 2025.
 - ii. Written Materials:
 1. Final Rule Text.
 2. DOL Overview of the New Rule
<https://blog.dol.gov/2024/04/23/what-the-new-overtime-rule-means-for-workers>
 3. Simms Showers article on the new rule.
<https://www.simsshowerslaw.com/salary-threshold-for-exempt-employees-to-increase/>
- e. How to know if someone is exempt – and what has changed.

- i. Focus on job descriptions and what do they really do
 - ii. Salary limits
- f. Be careful. There are steep penalties for violations of the FLSA.
 - i. Civil monetary penalties. Adjust each year for inflation. See the Department of Labor’s adjustment chart.
<https://www.dol.gov/agencies/whd/flsa#cmp>
 - ii. There can be criminal penalties including fines and penalties for willful violations.
 - iii. Department of Labor or employee may file suit for damages, which would include back wages, an equal amount in liquidated damages, plus attorney’s fees and court costs.
- g. A bigger exception: Ministerial Exception.
 - i. A brief overview of the ministerial exception.
<https://www.simmshowerslaw.com/liability-looms-large-for-religious-organizations-after-supreme-courts-expansive-interpretation-of-sex/>
 - ii. An in-depth review of the ministerial exception in its context of the Church Autonomy Doctrine. Carl H. Esbeck, An Extended Essay on Church Autonomy, 22 Federalist Soc’y Rev. 244 (2021)
<https://fedsoc.org/commentary/publications/an-extended-essay-on-church-autonomy>.
- h. Relatedly, note that even though the federal minimum wage under the FLSA has been \$7.25 an hour since 2009, many states, counties, and cities have steadily increased their minimum hourly wage every year, with some reaching or exceeding \$15 an hour. California, Connecticut, Maryland, Massachusetts, New York, New Jersey, Washington State, and Washington, D.C. have increased their minimum wage to at least \$15 an hour as of January 2024. Several other states increased their minimum wage or tied their minimum wage to inflation.
 - i. See Va. Code § 40.1-28.10. Establishes a \$12 minimum wage to be adjusted by the Consumer Price Index.

2. Independent Contractor changes.

- a. Discuss the different tests and the changes from the last two presidential administration’s interpretation of the FLSA and independent contractors.
- b. Compare to State Law. VA as an example.
- c. <https://www.wagenmakerlaw.com/blog/employee-vs-independent-contractor>
- d. <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>

3. Non-Competes and Restrictive Covenant Laws (Will Thetford)

- a. People are frequently surprised to learn that the developments in non-compete and restrictive covenant law often impact churches as especially larger churches and ministries often have non-compete provisions with their key leaders.
- b. Various authorities have sought to significantly restrict the use of non-competes:

- i. States have passed laws restricting the use of non-competes. For instance, four states ban non-competes and 34 jurisdictions including Virginia (Va. Code § 40.1-28.7:8), DC (§ 32-581.01 et seq) restrict their use.
 - ii. The Federal Trade Commission issued a [Final Rule](#) heavily restricting the use of non-competes for most workers.
 - iii. The NLRB issued a memo asserting that “the proffer, maintenance, and enforcement of such agreements violate Section 8(a)(1) of the [NLRA].
- c. FTC Final Rule is supposed to be effective September 4, 2024, but that implementation date is likely to be impacted by litigation seeking to enjoin the enforcement of the rule.
 - i. The FTC Final Rule, if allowed to go into effect would:
 - 1. prohibit employers from entering new non-compete agreements with most workers (both employees and independent contractors)
 - 2. apply to members of LLC’s as well as employees and independent contractors
 - 3. require employers to provide written notice to employees indicating that all existing non-compete agreements are unenforceable unless an exemption applies, consistent with FTC mandated wording.
 - ii. Consider litigation updates
 - 1. Ryan LLC v. Federal Trade Commission (injunction granted as to Plaintiff, but no nationwide injunctive relief yet, pending future developments in other cases).
 - iii. For information on the FTC Final rule see:
 - 1. The Final Rule cited above
 - 2. The Simms Showers [article](#) on the FTC Final Rule.
- d. Discussion of NLRB authority or jurisdiction over churches and ministries to restrict non-competes or non-solicitation agreements.
 - i. NLRB has made pronouncements in other situations covering labor relations in interstate commerce. But they typically have not wielded a heavy hand against churches.
 - ii. Impact on auxiliaries compared to churches themselves. We’ve saved an NLRB article under Newsletters for 2024.

4. Pay Transparency.

- a. Consider whether your state has recently passed a pay transparency law.
- b. Many have including:
 - i. Colorado
 - ii. Rhode Island
 - iii. New York State

- iv. Hawaii
 - v. Illinois
 - vi. Minnesota
 - vii. Virginia
- c. The laws differ in what they require.
- i. VA law penalizes employers who forbid employees from sharing pay or compensation information or who take action against employees who share or inquire about wages or other compensation. [Va Code § 40.1-28.7:9](#)
 - ii. Others may mandate reporting salary. California requires annual reports with pay categorized by protected characteristics.

5. Laws Impacting Religious Practice.

a. “Virginia Values Act” VVA – continued developments

i. Basics of the Law:

1. The law dramatically expanded employment discrimination law in Virginia and added sexual orientation and gender identity.
2. The law seemed intended, and could be interpreted, to prevent religious employers from hiring consistent with their beliefs.
3. See [New Sexual Orientation and Gender Identity Law in Virginia: Ramifications for Religious Employers and Others](#)

ii. Litigation and Settlement: *Calvary Road Baptist Church v. Miyares*

1. Early decisions by the court focused on whether the ministries had standing to file a pre-enforcement challenge or whether they must wait until they were threatened with fines and prosecution.
2. Ultimately after the Virginia Supreme Court’s ruling in [Vlaming v. West Point School Board](#) the Commonwealth agreed that the law could not be enforced “with regard to the Plaintiff’s provision of their services, use of their facilities, and publication of their beliefs in a manner consistent with their religious convictions about marriage, sexuality, and gender. . . .”
3. Accordingly, the Plaintiff ministries would be free to employ individuals who “profess and live according to the religious beliefs” held by the ministries and not be required to employ individuals who do not profess and live according to religious beliefs held by Plaintiffs.
4. Plaintiffs would also not be required to pay for or facilitate gender dysphoria treatment that violates their religious teachings.
5. These recognitions are important developments in protecting other ministries as well.

b. Bans on "Captive Audience Meetings."

- i. NLRB approved such meetings until 2022. Several states addressing them
- ii. Minnesota law purports to prohibit all captive audience meetings. This is usually to address collective bargaining/labor-relations issues, but the law broadly prohibits employers from requiring employees to listen or receive communications regarding employer positions regarding "religious" or political matters" with no religious exemption.
- iii. How does this apply to religious organizations that need their employees to communicate the organization's religious views to effectuate its mission?
- iv. See MN, CN, ME, WA, OR.
- v. There have also been challenges to such laws. *See, e.g., Minnesota Chapter of Associated Builders and Contractors Inc. v. Ellison* (filed 2024). Complaint attached [here](#).

6. What else should you be aware of as an employer?

- a. Data Privacy Laws.**
- b. Hairstyle Equity.**
- c. Mandatory E-Verify Use.**
- d. Child Labor Laws.**
- e. Artificial Intelligence.**
- f. Paid Sick Leave Laws.**

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