



FLSA2021-2

January 8, 2021

Dear **Name\***:

This letter responds to your request for an opinion on whether the ministerial exception allows a private religious daycare and preschool to pay its teachers on a salary basis that would not otherwise conform with the wage-and-hour requirements of the Fair Labor Standards Act (FLSA). We conclude that the exception would allow the school to do so if the teachers qualify as ministers.

## BACKGROUND

You write on behalf of a not-for-profit daycare and preschool (collectively, “the school”). The school is affiliated with and under the direct control of a church. All of the school’s teachers furnish some religious teaching to the students. The school believes that the teachers qualify as ministers for purposes of the ministerial exception, and you note that you are not asking us to determine whether the employees are, in fact, ministers for purposes of the exception. Instead, you ask whether, assuming that the teachers qualify as ministers, the teachers are exempt from the FLSA’s wage-and-hour requirements under the ministerial exception and whether the school can pay them as salaried exempt employees or on any other basis it chooses.

## GENERAL LEGAL PRINCIPLES

The FLSA generally requires that covered employers pay to their covered employees at least the Federal minimum wage for each hour worked and one-and-a-half times their regular rate of pay for every hour they work in excess of forty hours per workweek.<sup>1</sup> We assume for purposes of this letter that the church and school are covered employers;<sup>2</sup> that, potential application of the ministerial exception aside, the teachers are covered employees; and that the school does not furnish programs of the sort that would qualify the teachers for the teaching professional exemption.<sup>3</sup>

The First Amendment’s Free Exercise and Establishment Clauses protect a religious institution’s “autonomy with respect to internal management decisions that are essential to [its] central mission.”<sup>4</sup> Among these matters is the selection of whom to employ in certain key roles.<sup>5</sup> Because the exception was first recognized in cases dealing with church ministers, it became

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<sup>1</sup> 29 U.S.C. §§ 206–207.

<sup>2</sup> *Cf.* 29 C.F.R. § 779.214 (noting that religious and educational institutions are covered employers when they engage in “ordinary commercial activities”).

<sup>3</sup> *Cf.* 29 C.F.R. § 541.204(b) (stating that, in some states, educational establishments eligible for the teaching professional exemption include nursery school programs).

<sup>4</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020); *see* U.S. CONST. amend. I, cls. 1-2.

<sup>5</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

known as the ministerial exception, though an employee does not have to be ordained or have a particular job title to qualify.<sup>6</sup> There is no rigid formula for determining who qualifies for the exception.<sup>7</sup> Instead, an employee qualifies based on her role in conveying the organization’s message and carrying out its mission. The relevant factors are those that shed light on that question, which will vary from situation to situation.<sup>8</sup> As the Supreme Court has explained, “What matters, at bottom, is what an employee does.”<sup>9</sup>

Teachers at religious schools can be ministers under this test. “The religious education and formation of students is the very reason for the existence of most private religious schools, and therefore the selection and supervision of the teachers upon whom the schools rely to do this work lie at the core of their mission.”<sup>10</sup> And ministers are exempt from the FLSA’s wage-and-hour requirements.<sup>11</sup>

## OPINION

Based on the facts you have provided, and on your requested assumption that the teachers qualify for the ministerial exception, we conclude that the school may pay them on a salary basis that would not otherwise comport with the FLSA. We additionally note the contours of the ministerial exception to assist the school in reaching the correct conclusion regarding the teachers’ status.

### **A. The school is a religious institution, so its ministers are exempt from the FLSA’s wage-and-hour requirements.**

Given your representation that the school is affiliated with and under the direct control of a church, we have little trouble concluding that it is a religious organization whose employees may qualify for the ministerial exception. Assuming the teachers here are such ministers, as you have asked us to do, the school may therefore compensate them on a salary basis that would not otherwise comport with the FLSA’s wage-and-hour requirements since, as explained above, ministers are exempt from those requirements.

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<sup>6</sup> *Id.* at 2061–63.

<sup>7</sup> *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012).

<sup>8</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2063.

<sup>9</sup> *Id.* at 2064.

<sup>10</sup> *Id.* at 2055.

<sup>11</sup> See *Schleicher v. Salvation Army*, 518 F.3d 472 (7th Cir. 2008); *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299 (4th Cir. 2004); WHD Opinion Letter FLSA2018-29 (Dec. 21, 2018); see also *McClure v. Salvation Army*, 460 F.2d 553, 559 (“matter[s] of church administration and government” include “the determination of a minister’s salary”); cf. *Alcazar v. Corp. of the Catholic Archbishop of Seattle*, 627 F.3d 1288 (9th Cir. 2010) (en banc) (applying ministerial exception to state minimum wage law claim). The FLSA does apply to a religious organization’s non-ministerial employees, see *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290 (1985), including non-ministerial teachers, see *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398–1401 (4th Cir. 1990); *DeArment v. Harvey*, 932 F.2d 721, 722 (8th Cir. 1991) (adopting *Dole*). *Dole* may have come out differently today, given *Our Lady of Guadalupe*’s robust application of the ministerial exception to teachers in religious schools, see 140 S. Ct. at 2073 (Sotomayor, J., dissenting) (citing *Dole*), and its reliance on the outdated principle that FLSA exemptions are to be narrowly construed, *Dole*, 899 F.2d at 1397; see *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018).

**B. Employees of religious schools can qualify for the ministerial exception to the FLSA’s wage-and-hour requirements, depending on their duties.**

Putting aside the assumption, we additionally note the contours of the ministerial exception to assist the school in reaching the correct conclusion regarding the teachers’ status. As the Supreme Court observed earlier this year, “educating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school[.]”<sup>12</sup> Religious education is central to many faiths; the church here is only one of countless groups of believers that has determined that teachers, even those whose students are of a very young age, are part of their ministry. While you stated in your request that you are not asking us to determine whether the employees qualify as ministers for purposes of the ministerial exception, we note that while the employer’s “explanation of the role of such employees in the life of the religion in question is important,” it does not control whether the ministerial exception applies.<sup>13</sup>

Whether the employees here actually qualify as ministers depends on their duties as employees, not upon the employer’s designation.<sup>14</sup> There is no checklist one can use to determine whether the ministerial exception applies. Instead, a “variety of factors may be important” based on their “relationship to [an employee’s] ‘role in conveying the Church’s message and carrying out its mission.’”<sup>15</sup> The question must be answered on a case-by-case basis and requires considering “all relevant circumstances” surrounding each employee “to determine whether each particular position implicate[s] the fundamental purpose of the exception.”<sup>16</sup> Ultimately, ministerial status depends on the employee’s role in carrying out the employer’s mission and conveying the employer’s message.<sup>17</sup>

We hope that this additional discussion helps the school determine whether its employees qualify for the ministerial exception.

**CONCLUSION**

For these reasons, we conclude that the employees, if they qualify for the ministerial exception, may be paid on a salary basis that would not otherwise comport with the FLSA.

This opinion is based exclusively on the facts you have presented and on your representation that you do not seek this opinion for a party that WHD is currently investigating or for use in litigation that began before your request. This letter is an official interpretation by the Administrator of WHD for purposes of the Portal-to-Portal Act and may be relied upon in accordance with section 10 of that Act, notwithstanding that after any such act or omission in the

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<sup>12</sup> *Our Lady of Guadalupe*, 140 S. Ct. at 2064.

<sup>13</sup> *Id.* at 2066.

<sup>14</sup> *Id.* at 2064.

<sup>15</sup> *Id.* at 2063 (quoting *Hosanna-Tabor*, 565 U.S. at 192).

<sup>16</sup> *Id.* at 2067.

<sup>17</sup> *Id.* at 2063–64.

course of such reliance, the interpretation is “modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.”<sup>18</sup>

We trust that this letter responds to your inquiry.

Sincerely,

A handwritten signature in cursive script that reads "Cheryl M. Stanton". The signature is written in black ink and is positioned above the printed name and title.

Cheryl M. Stanton  
Administrator

**\*Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b).**

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<sup>18</sup> 29 U.S.C. § 259.