Under Federal law the Fair Labor and Standards Act (FSLA), (29 USC § 201 et seq.) establishes the federal minimum wage and a 40-hour workweek with time-and-a-half pay for overtime work for employees. However, in California, employers are also governed by California Labor Code, which in some areas places a higher standard over FLSA on employers in California. For example, the California minimum wage is higher than the federal minimum wage. Therefore, employers in California must pay the higher minimum wage.

Employee or Independent Contractor?

One of the first tasks that Christian Schools must do when hiring someone is to determine whether the applicant will be an employee or an independent contractor. There are very few, if any, individuals that can truly qualify for independent contractor status while working in a Christian school. Briefly, here’s information on the two categories:

• If you have control over the person’s workday, provide the tools of his or her trade, provide instruction on what is to be done and how it is to be done, and pay the person on a regular schedule, you have an employee, not an independent contractor!

• Independent contractors are not limited by these items. They usually work for more than one entity at a time, can realize a profit or a loss, and have their own staff, office, advertising, and business license.

• Employees fill out W-4 forms for the employer and in January receive W-2 forms.

• Self-employed individuals (independent contractors) fill out W-9 forms and receive 1099 forms in January.

In California, there are several state agencies that have their own tests for determining whether someone is an independent contractor. The Division of Labor Standards Enforcement (DSLE) is one such agency that has its own test. More information can be found at http://www.dir.ca.gov/dlse/faq_independentcontractor.htm.

Exempt and Nonexempt Employees

The next step is to determine whether the person is being hired for an exempt or nonexempt position. Under the FLSA, employees are divided into these two broad categories. Executive, professional, and administrative employees can qualify as exempt employees, which means that they do not need to be paid overtime for working more than 40 hours in a workweek. There are not “on the clock.” Nonexempt employees must be paid for a forty hour workweek and paid time and a half for work done over 40 hours in a week.

Commented [CS1]: Or more than 8 hours in a day.
Caution: The Department of Labor looks at duties, not titles of individuals, when determining whether they are properly classified as exempt from overtime or not.

Again, California Labor Code has the same categories but defines them differently than federal law. Here are the qualifications that must be met to be an exempt employee in the State of California. Under the “duties test,” the employee must be “primarily engaged in” exempt activities. An employee who is “primarily engaged in” exempt duties only if more than 50% of the employee’s work time is devoted to exempt duties.

**Executive category.** To qualify as an "EXECUTIVE" exempt person, means any employee:
1. Whose duties and responsibilities involve the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof; and
2. Who customarily and regularly directs the work of two or more other employees therein; and
3. Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and
4. Who customarily and regularly exercises discretion and independent judgment; and
5. Who is primarily engaged in duties, which meet the test of the exemption.
6. An executive employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c). Currently, this would be $3,467 per month.

For example, an administrator employed for a 52-week academic year, including earned vacation periods, must earn at least a gross annual income of $41,600 or a monthly income of $3467 for the school to classify him or her as an employee exempt from overtime payment. This is based on a minimum wage of $10.00 per hour. Christian School administrators would typically fit here or in the administrative category. This category could possibly apply to division principals.

**Administrative category.** To qualify as an "ADMINISTRATIVE" exempt person, means any employee:
1. Whose duties and responsibilities involve either:
   a. The performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer's customers, or
   b. The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision
thereof, in work directly related to the academic instruction or training carried on therein; and

2. Who customarily and regularly exercised discretion and independent judgment; and

3. Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity, or

4. Who performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge, or

5. Who executes, under only general supervision, special assignments and tasks, and

6. An administrative employee must also earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c). Currently, this would be $3,467 per month.

A key component of the administrative duties test is that the employee must regularly exercise discretion and independent judgment as opposed to just following commands, policies or procedures. This phrase means the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The employee must have the authority or power to make an independent choice, free from immediate direction or supervision and with respect to matters of significance.

Again, the exemption is about duties performed and not just titles. Therefore, in most cases, the administrative assistant in the Christian School would not be exempt. However, there may be cases in a large school, where the administrative assistant could meet this duties test. The administrative exemption in most cases applies to Divisional Principals, Vice Principals, Deans, and Academic Counselors.

**Professional category.** To qualify as an "PROFESSIONAL" exempt person, means any employee:

1. Who is licensed or certified by the State of California and is primarily engaged in the practice of one of the following recognized professions: law, medicine, dentistry, optometry, architecture, engineering, teaching, or accounting, or

2. Who is primarily engaged in an occupation commonly recognized as a learned or artistic profession. "Learned or artistic profession" means an employee who is primarily engaged in the performance of:

   a. Work requiring knowledge of an advance type in a field or science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes, or work
that is an essential part of or necessarily incident to any of the above work; or

b. Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee or work that is an essential part of or necessarily incident to any of the above work; and

c. Whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

3. Who customarily and regularly exercised discretion an independent judgment in the performance of duties set forth above.

4. Who earns a monthly salary equivalent to no less than two times the state minimum wage for full-time employment. Full-time employment means 40 hours per week as defined in Labor Code Section 515(c). Currently, this would be $3,467 per month.

In 2005, ACSI and other organizations worked to pass legislation that would exempt private school teachers. The California Labor Code Section 515.8 specifies that teachers at a private school are exempt if they meet the following conditions:

1. The employee must be employed as a teacher in a private elementary or secondary academic institution in which pupils are enrolled in kindergarten, or any of grades 1 through 12.

2. The employee must be primarily engaged in the duty of imparting knowledge to pupils by teaching, instructing, or lecturing. “Primarily engaged” means that the individual must devote more than 50% of his/her hours of employment to teaching.

3. The employee must customarily and regularly exercise discretion and independent judgment in performing the duties of a teacher.

4. The employee must earn a monthly salary equivalent to no less than two times the state minimum wage for full-time employment.

5. In addition to meeting all of the above requirements, the employee must have attained at least one of the following levels of professional advancement:

   a. A baccalaureate or higher degree from an accredited institution of higher education;
b. Current compliance with the requirements established by the California Commission on Teacher Credentialing for obtaining a preliminary or alternative teaching credential; or

c. Current compliance with the requirements established by the certification authority in a state other than California for issuance of a teaching credential.

In the Code it states that this exemption specifically does not apply to teaching assistants, instructional aides, student teachers, day care providers, vocational instructors, or similar employees.

The double the minimum salary for California private school teachers is a higher standard than federal FLSA that has no minimum salary requirements. The position of ACSI is that Christian Schools must pay teachers double the minimum salary on a monthly basis, currently $3,467 and cannot be prorated for part-time teachers or substitute teachers. If a part-time teacher or substitute is not paid the current $3,467, then those employees must be treated as nonexempt employees and paid an hourly wage.

The Code also specifies that the teacher exemption is for teachers in Kindergarten through 12th grade. Therefore, it is the opinion of ACSI that a preschool teacher must be treated as a nonexempt employee and paid at least the minimum wage and overtime for work over 40 hours.

Paying Teachers 10 months or 12 months. It is typical for Christian Schools to offer administrators and teachers a 10 month contract but pay them over the twelve months. This allows teachers to get paid while not working over the summer. There are a variety of legal opinions from experts in California as to whether this is legal or not. Under Federal law, it is legal to offer teachers deferred compensation. However, ACSI takes a conservative view on this policy. It is the opinion of ACSI that the law clearly focuses on the double the minimum wage being paid monthly. So to then reduce that amount, we drop the wages below the current double the minimum wage each month to cover the 12 months. It is our opinion that a safer alternative is for the school to pay the contract over 10 months but encourage the teachers to save for the summer months. One Christian School went to the local credit union and had them open savings accounts for each teacher. Then the teachers could elect to do a payroll deduction that automatically was deposited into the credit union savings account to give them income over the summer as needed.

How Would the New Federal Law Minimum Wage Affect California Law?
The Department of Labor (DOL) has proposed new regulations to FSLA that would possibly raise the minimum salary of exempt employees from $455 per week to approximately $970 per week. However, under federal law, teachers are automatically exempt with no minimum wage. Under federal law administrators, principals, vice principals, etc. are exempt if they earn at the same amount as a beginning teacher in the school. So under federal law, any exempt employee in the Christian school other
than those in administration, will be required to earn a minimum of $970 per week or $50,440 per year.

So in California, Christian schools administration and teachers will not be impacted by the proposed changes to the federal law. However, those other exempt employees, such as HR Directors, Business Managers, Development Directors, must meet the new proposed minimum wage of $970 per week.

**Basic Overtime Issues Related to Nonexempt Employees**

**Employers must pay for all “required” work.** When an employer places requirements on employees to be somewhere or to do something as part of their employment, all of the time taken to fulfill those requirements or expectations must be tallied to determine their pay and whether any overtime is owed to the employees. For instance, you may consider that a school secretary’s workday is from 8:00 AM to 4:00 PM, but if the secretary must be present for staff devotions at 7:40 AM, the extra 20 minutes must be counted on the time card. Similar illustrations abound, such as nonexempt employees (1) being required to be present during staff meetings at the beginning or end of the school day, (2) being required to help with evening school open houses or student activities and games, or (3) being asked to take minutes at an evening school board meeting.

**Employees must be paid if they work in excess of 8 hours in a day.** Under the California Labor Code, a nonexempt employee that works in excess of 8 hours in any work day must be compensated at the rate of 1.5 times the regular rate of pay.

**Employers must pay overtime whether it is authorized or not.** Although the employee handbook states that overtime will not be compensated if it is not authorized, as a disclaimer for employees to read and hopefully follow, the fact is that employers are legally required to pay overtime when it occurs, whether it is authorized or not!

**Stop employees from working unauthorized overtime.** An administrator who encounters a nonexempt employee at the end of the day who says that he or she has just a few more minutes of work to do to finish a project must stop the employee from working. The school is liable if this work beyond the end of normal work hours creates enough additional time for the employee to qualify for overtime.

Stopping the off-the-clock work may save your school from a major overtime claim for back wages if a disgruntled employee later leaves your school. If a complaint is filed with the labor department, it will usually trigger an audit of your payroll practices for all employees, not just the disgruntled employee’s records. A surprising number of disgruntled former employees succeed in collecting overtime pay and interest going back for months of employment for what everyone thought at the time was “volunteer” work.
Nonexempt workers who repeatedly ignore the “no-overtime” rule by coming to work too soon or staying too late should be subject to write-ups or progressive discipline up to and including dismissal.

**Employees cannot “volunteer” time beyond the normal workday in their normal areas of responsibility.** The “no-volunteering” requirement seems strange unless you understand that this requirement was instituted to protect workers. It keeps an employer from pressuring workers to stay late while off the clock. You may recall that some television programs have exposed employers for such tactics. One program showed how a supermarket chain had butchers clock out but then stay and clean all of the butcher equipment. The employees complied because they didn’t want to lose their jobs. The supermarket chain had to pay back overtime with interest to the butchers and had to pay heavy fines.

*If the volunteer activity falls under the routine duties of the person’s job description, labor departments generally consider it overtime work subject to overtime pay.*

For instance, don’t allow a secretary to “volunteer” to stay late to do secretarial work unless you plan to pay overtime. Most authorities agree that the secretary may occasionally volunteer for some “non-secretarial” responsibility at the school. For instance, if a worker in the after-school daycare program becomes ill unexpectedly near the end of the school day, the secretary can “volunteer” to stay late helping in the after-school program because those duties don’t fall under the secretary’s regular job description.

*In addition to overtime pay, nonexempt staff must be paid at their normal hourly wage rate for the following:*  
- Rest periods of 20 minutes or less  
- Meal periods if staff are not fully relieved of duties  
- Meetings after work hours to discuss daily operations or problems  
- Before-work devotions and any preparation necessary for principal activity  
- Equipment maintenance before or after working hours.  
- Nursing Moms at Work (Under ACA)

California Labor Code requires a 10 minute rest period for every four hours worked and 30 minute meal break after five hours worked. Meal breaks may be waived by the employee if the workday is no more than 6 hours. Allowing the receptionist to eat lunch while still answering the phone would require the school to pay the employee during that time. The employee was not fully relieve of their duties.

*This is not a comprehensive analysis of all the Labor Code that relates to schools. In all cases when dealing with contracts, employment laws, and*
employment policies, the school should seek local legal counsel to review the school's policies and procedures.

Additional information can be found at the following websites:
http://labor.ca.gov/
http://finduslaw.com/california-employment-labor-laws
http://www.cde.ca.gov/sp/ps/rg/psfaq.asp

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