



The Ministerial Exception: How Far Is Too Far?

By Rich Meneghello (Portland)

Two recent court decisions have further defined the contours of the “ministerial exception,” which prohibits courts from addressing employment claims brought against religious organizations when the decisions were based on the organization’s religious principles or practices. *Archdiocese of Washington v. Moersen* demonstrates that this exception has its limits; *Klouda v. Southwestern Baptist Theological Seminary* shows just how far the exception can be applied.

When is a Church Organist not a Church Organist?

William Moersen was a long-time organist for St. Catherine Labouré Parish in Wheaton, Maryland, beginning his role when he was only 11 years old in 1958, playing regularly through 1976, and after a hiatus, resuming as the parish organist in 1991. In 2001, his parish pastor provided him an employment contract, the first written document governing his employment.

Soon after he signed the contract, he raised allegations of potential sexual abuse committed by a choirmaster against him when he was a young boy at the church. Moersen claims that immediately after reporting the harassment, his employment situation began to deteriorate and he began to face unfair criticism. In early 2002, the parish terminated his employment citing an inability to work cooperatively with staff and supervisors. Moersen sued for breach of contract, wrongful discharge, and other related claims.

The Archdiocese defended against this claim using the “ministerial exception” – the doctrine that states that where otherwise illegal discrimination is based on religious belief, religious doctrine, or the internal regulations of a church, the U.S. Constitution exempts religious institutions from certain employment laws. In such cases, restricting a church’s freedom to select its ministerial employees would violate the Free Exercise Clause of the First Amendment by inhibiting a church’s ability to express its beliefs and put them into practice through its employees.

The Archdiocese pointed to the employment contract which described the role of the organist, and noted that his functions included supporting the church’s message, selecting music for services, and assisting in the church services. These functions, the church argued, are certainly related to the overall mission of the parish and thus should not be subject to normal employment laws.

A Maryland state court dismissed the lawsuit, agreeing with the church. On appeal, the Maryland State Supreme Court disagreed.

It reviewed Moersen’s actual day-to-day functions and determined that he was “merely an organ player.” Despite what the contract said, he did not select music for the services or otherwise assist in the services besides providing music. He had no supervisory role in any respect, was not involved in any form of church governance, did not directly teach or spread religious faith, lead choirs, teach hymns, or control any part of church services.

Moreover, he was not required to have any specialized knowledge of Catholic faith, nor required to profess, support or even become a member of the religion. Putting it simply, the court noted that the issue came down to this question: was Moersen more than just an organist, or just an organist? If his primary duty involved spreading the religious faith, the ministerial exception would apply. But if his primary duty was merely playing an organ, he could properly bring a lawsuit. Since the court concluded that he was just an organist, it ruled that he could proceed with his lawsuit.

Although this case was decided in June, 2007, the U.S. Supreme Court recently rejected a chance to hear the case on appeal in February, 2008. By rejecting the application for appeal, the U.S. Supreme Court decided not to enter the fray, and the ruling of the Maryland Supreme Court stands.

No Women Need Apply

At the other end of the spectrum is a case out of Fort Worth Texas, where a federal court rejected a fired employee’s lawsuit under this same exception.

Sheri Klouda was a professor at the Southwestern Baptist Theological Seminary where she taught Hebrew, and had earned her doctorate. She began in 2002 as an assistant professor, but in 2004, was told that she would not be receiving tenure. She continued to teach at the school until January 2006, when seminary

officials told Klouda that she would no longer be able to teach; shortly after, it terminated her employment. Klouda filed a lawsuit alleging breach of contract and gender discrimination against the seminary, claiming she had been promised that she would remain employed if her performance was acceptable.

The seminary admitted that Klouda’s performance was acceptable but ultimately decided to terminate her employment because she is a woman. Officials at the school cited to their denomination’s most recent statement of beliefs published in 2000, which held that both men and women can serve the church but that the office of pastor is limited to men. The faith bases this belief on a Bible quote from the first chapter of Timothy in which the Apostle Paul says, “I permit no woman to teach or have authority over a man.”



A Primer On The “Salary Basis” For Schools

By Tamara Devitt (Irvine)

Anyone who has ever undertaken the task of analyzing the applicability and implications of “white collar” exemptions under the federal Fair Labor Standards Act (FLSA) knows that it usually requires a multi-tiered, multi-page flow chart, not to mention a great deal of patience. But there is some good news for schools: the exemption analysis for teachers is less complicated because there is no requirement to meet the “salary basis” test under the FLSA.

In this article, we’ll look at: 1) the FLSA’s “salary basis” test as applicable to “white collar” exemptions for private employers generally; 2) the implications of the exemption applicable to teachers; and 3) the more common exemption issues likely to arise in private schools. Keep in mind that state laws may have different exemption tests and thus, the analysis may differ significantly.

White-Collar Exemptions and the “Salary Basis” Test

The FLSA provides standards concerning minimum wages, maximum hours, overtime pay, equal pay and recordkeeping. But the law exempts executive, administrative and professional employees (which includes teachers) from its minimum-wage, overtime and timekeeping requirements. One of the requirements for these so-called “white collar” exemptions – there are several others not dealt with here – is that the employee must be paid on a “salary basis” and must receive a salary of at least \$455 per week. If the “salary basis” test is not met, the employee is not exempt.

An employer must do more than satisfy the threshold salary amount to meet the “salary basis” test. Exempt employees must receive a predetermined amount of compensation, which is not subject to reduction because of variations in the quantity or quality of the employee’s work. In other words, with limited exceptions, employees must receive their full salary for every workweek in which they perform any work, regardless of the number of hours or days worked in that workweek.

An employer cannot make deductions for absences caused by the employer (such as when work is not available) or for reasons of work quality. The most common trouble spot is when an employee’s salary is docked because the employee misses a partial day of work. Such docking practices violate the concept that exempt employees are paid for the value of their services and not their time. The salary need not be paid for a workweek in which an employee does not perform *any* work, however.

Some Deductions are Still Permitted

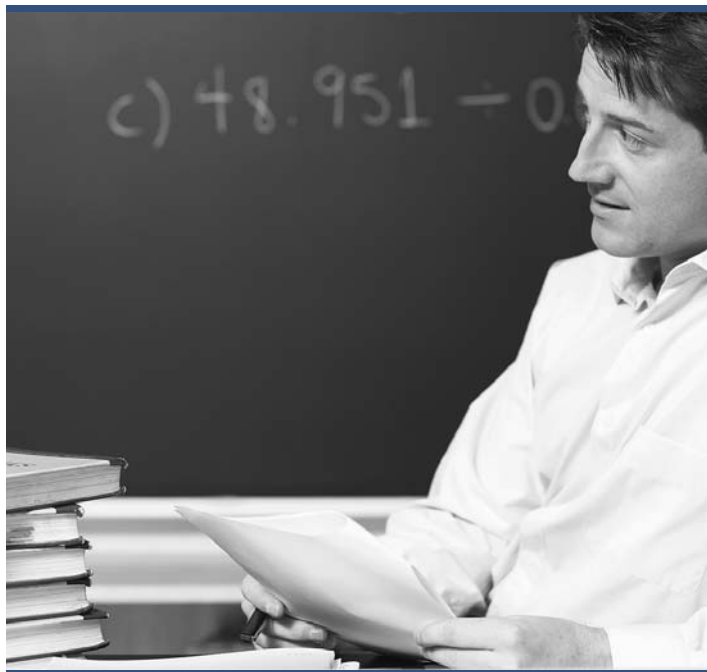
Certain deductions from salaries are permitted without losing the “white collar” exemptions. These include:

1) *Personal absences other than sickness or disability.*

Full-day (but not partial-day) deductions may be made when an employee is absent from work due to personal reasons other than sickness or disability. For example, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for one full-day absence.

2) *Absences due to sickness or disability in accordance with a bona fide plan, policy or practice.*

Full-day deductions from pay may also be made for absences due to sickness or disability (including work-related accidents) if they are made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability.



3) *Offsets against salary amounts received for jury fees, attendance as a witness or military pay.*

While a salary may not be reduced for absences within a workweek caused by jury duty, attendance as a witness or temporary military leave, you may use amounts received by the employee for such services as an offset against the employee’s salary.

4) *Deductions for penalties.*

Such deductions are lawful only if imposed for infractions of safety rules of major significance. This is a vary narrowly construed exception, so you should seek legal counsel before deciding to deduct an employee’s pay in order to ensure the situation falls under this exception.

5) *Disciplinary suspensions.*

Full-day deductions imposed in good faith for violation of workplace conduct rules are lawful. Such suspensions must be imposed under written policies applicable to *all* employees. For example, suspending an exempt employee for three days for violating a generally applicable written policy prohibiting sexual harassment would be lawful, and would not break the salary basis of pay.

6) *Initial and terminal weeks of employment.*

You are not required to pay the full salary in the first and last week of an employee’s employment, but instead may pay a proportionate part of the full salary for time actually worked. This exception does not apply to exempt employees employed occasionally for a few days.

7) *Family Medical Leave Act.*

Employers are not required to pay full salary for weeks in which an exempt employee takes unpaid leave under the FMLA. In other words, the Family Medical Leave Act allows for you to pay a proportional part of an employee’s full salary for time actually worked in the workweek when the employee takes unpaid leave under the FMLA.

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After he was most recently elected, the President of the seminary told seminary officials that only those who are qualified to serve as pastors themselves should be teaching future ministers of the school. Therefore, he reached the conclusion that Klouda should not be teaching theology, but was welcome to teach other classes. Of the seminary's full-time faculty of 116, 10 are women.

In a March 19, 2008 ruling, U.S. District Judge John McBryde dismissed all of the complaints in her lawsuit, ruling that "the courts are prohibited by the First Amendment from involving themselves in ecclesiastical matters, such as disputes concerning theological controversy, church discipline, ecclesiastical government or the conformity of the members of the church to the standard of morals required." Therefore, the lawsuit should be treated the same way the law would treat an employment dispute between a church and a minister – by avoiding involvement.

What Do These Cases Teach Religious Employers?

There are a few valuable lessons to be learned from these and prior cases addressing religion in employment. Most religious institutions are aware that, beginning in 1987, the U.S Supreme Court made clear that religious institutions have the right to hire and employ only individuals of a particular religion for any job connected with the "carrying on . . . of its activities." *Corporation of the Presiding Bishop of the Church of Jesus Christ of LatterDay Saints v. Amos*. This means that from the priest to the janitor, a religious institution can base its hiring and employment decisions on the applicant's religion, with respect to positions in any way connected to the religious institution.

Once an individual is employed, the institution typically makes a whole range of decisions relating to the individual's status or activities. If the institution makes an adverse employment decision about the individual, the decision-making process may be shielded from judicial review under the ministerial exception depending on whether or not the decision at issue is related to the institution's religious standards or practices.

In making such determination, the first thing to remember is that job descriptions alone will not matter, and that a religious employer should be prepared to closely examine the actual job functions for any position that it believes falls under special religious protection. Certain jobs are easy to define and place on the ministerial exception spectrum. For example, one expects a minister or priest to act in accordance with the entity's religious principles and any question regarding interpretation of those religious principles should not be decided by a court.

Other positions may not, at first blush, appear to be as religiously focused, but could be under the law. For example, courts have held that where an employee holds a position of a functional minister and the qualification or behavior of the individual is inconsistent with the institution's religious principles or practices, the determination of whether the religious principle is valid or appropriately applied is not for the courts to decide.

In that regard, a Florida federal court held in *Woodall v. Rockledge Christian Center* that a teaching assistant whose duty was primarily to spread the faith, teach religious principles, tell Bible stories, enforce Biblical disciplinary principles, etc., was a functional minister to the children she supervised even though she had never been to seminary. Consequently, her pregnancy discrimination claim based on the church's decision to terminate her employment for becoming pregnant out of wedlock was not a claim that could be assessed by a court, consistent with the ministerial exception.

On the other hand, as with the organist in the *Moersen* case, if a person who works for a religious institution claims that there has been a breach of contract and an assessment of the issue does not involve an analysis of religious principles, the matter is one that the courts can address and will not be dismissed under the ministerial exception.

The Bottom Line

It is a worthwhile exercise to review an employee's actual day-to-day activities in determining the proper application of the exception. The more involvement that the individual has with spreading religious information, making religious decisions, or ministering to others, the more likely a decision about that aspect of their activities will be found to be inappropriate for a court to assess, regardless of the type of claim it involves (breach of contract, discrimination, defamation, etc.).

Another important lesson to remember is that the ministerial exception, when applied properly, can be a powerful tool. Many school administrators were probably shocked to read this article and learn that, in 2008, it would be perfectly acceptable for an employer to blatantly make an employment decision based on gender and win the lawsuit. While we do not advocate making employment-related decisions based on gender, this decision is important because it demonstrates just how much protection the ministerial exception can offer.

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Impact of Impermissible Deductions and the "Safe Harbor" Rule

What is the impact of an employer making improper deductions from the salaries of exempt employees? It depends. The Labor Department will consider various factors in determining whether or not the employer *intended* to pay employees on a salary basis in order to determine whether the exemption is lost, including: 1) the number of improper deductions; 2) the time period over which such deductions were made; 3) the number and location of the affected employees; 4) the number and location of managers responsible for the deductions; and 5) whether there is a clearly-communicated policy permitting or prohibiting improper deductions.

An actual practice of making improper deductions causes the exemption to be lost during the timeframe in which they were made, not only for the individual affected, but for *all* employees in the same job classification and working for the same managers. But inadvertent (meaning unintentional) or isolated improper deductions will not cause the exemptions to be lost if the employer reimburses the employees affected.

Schools may also salvage the exemptions under FLSA's "safe harbor" provision. To apply the safe harbor, you must: 1) have in place a clearly-communicated policy prohibiting the improper pay deductions; 2) include a complaint mechanism through which employees can bring impermissible deductions to the school's attention; and 3) undertake to investigate such complaints and, when discovered, reimburse the employee and make a good-faith commitment to comply with the salary-basis rules in the future. Although not required, you should have a written policy prohibiting improper pay deductions.

Applying the Professional Exemption to Private School Teachers

Teachers who qualify for the professional exemption under the FLSA are exempt from recordkeeping and overtime requirements. Any employee employed as a teacher in an educational establishment with a primary duty (more than 50% of the time) of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge is exempt.

Examples include regular academic teachers, kindergarten or nursery school teachers, teachers of disabled or gifted children, home economics teachers and vocal or instrumental music instructors. Also included under

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the FLSA exemption for teachers are those faculty members engaged as teachers, but who also spend a considerable amount of time in extracurricular activities such as coaching or acting as advisors in such areas as drama, speech, debate or journalism.

In addition, the FLSA does not provide for a specific degree requirement nor require a teaching certificate in order for the exemption to apply. But this is an area where some states have more restrictive provisions for teachers. For example, California's Division of Labor Standards Enforcement takes the position that under California law,

teachers who do not possess a state credential *are* entitled to overtime compensation.

But schools need not comply with the "salary basis" test in order to satisfy the professional exemption under the FLSA. The regulations specifically provide that the salary requirements do *not* apply to teaching professionals. Thus, schools have more flexibility in the means and manner of paying teachers without losing the exemption for teachers.

For instance, schools need not meet the minimum salary threshold of \$455 per week for teachers, and partial day deductions for absences are permitted, without losing the exemption from the FLSA's overtime and recordkeeping requirements. Of course, schools may have contractual obligations with teachers that require a minimum salary, or provide for some other guarantee that may not allow for such deductions.

Other Potential Wage/Hour Pitfalls

The FLSA's relaxed rules for teachers does not mean schools should be less vigilant about wage hour law. Various wage-hour traps exist for both exempt and non-exempt employees of private schools. A common issue includes the administrative exemption. Depending on the employee's duties and responsibilities, positions such as controller, registrar, publications director, admissions officer, development officer, and technology manager might not be exempt. This is a concern particularly where employees may have many different responsibilities.

Likewise, employees are sometimes misclassified as exempt managers under the executive exemption, which has very specific requirements pertaining to the individual's actual supervision and hiring or firing of employees (or decisions that are given particular weight). Without the proper analysis as to the employee's actual job responsibilities, authority, and ability to exercise discretion and make decisions, classification of such employees as exempt may create serious wage hour problems.

If you're unsure about your employees' classifications, consult with your Fisher & Phillips attorney. We can answer your questions, and help with an onsite audit of your pay practices, too.

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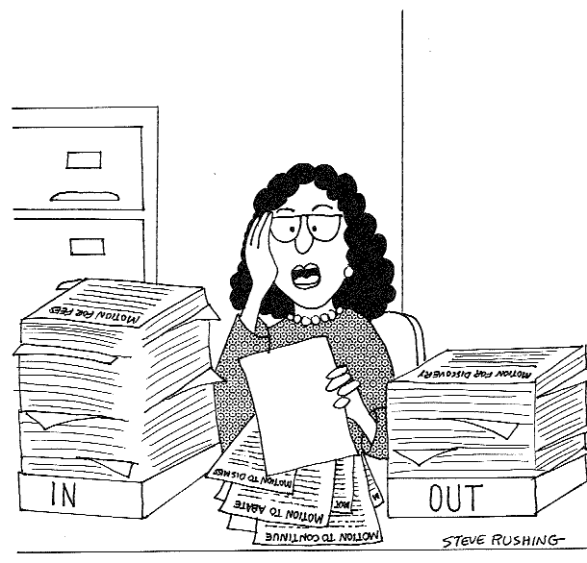
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