



FLSA2018-29

December 21, 2018

Dear **Name***:

This letter responds to your request for an opinion concerning whether certain members of a religious organization are employees within the meaning of the Fair Labor Standards Act (FLSA). This opinion is based exclusively on the facts you have presented and applies only to the members described below. You represent that you do not seek this opinion for any party that the Wage and Hour Division (WHD) is currently investigating or for use in any litigation that commenced prior to your request.

BACKGROUND

As explained in your letter, the members of the religious organization you represent gather in small communities, typically 150 to 300 people, dedicated to sharing “in a community of goods.” In so doing, they aim to emulate the early Christian communities described in the Book of Acts. *See, e.g.,* Acts 4:32 (Revised Standard Version) (“[N]o one said that any of the things which he possessed was his own, but they had everything in common.”). Members give all of their personal property and funds to the community when joining, and accumulate none thereafter. Members dedicate themselves to one another freely in an egalitarian relationship. They live as families in modest quarters with no rank or entitlement among members. Shared communal kitchens join most of their homes. Members gather together several times each week for shared meals and religious services.

The members work to sustain themselves, their children, and those who cannot work. Members hold as a religious tenet that work is “indivisible from prayer” and a “form of worship” that cannot be reduced to “contractual obligations” or “relationships based on control, as between a master and servant.” Consistent with another of their religious tenets, members receive food, shelter, medical care, and funds for personal subsistence “not as a right or in proportion to services rendered, but according to need.” Older and disabled members participate as they are able, even when work may progress more efficiently without their participation. The elderly and infirm receive care without regard to their ability to work.

Members cultivate the communities’ farms and gardens, which are the source of most of the communities’ food. Some members work in the communities’ schools, kitchens, and laundries. Members who have received outside professional training provide dental and medical care. Some members work in two onsite ventures that generate income for the community: a venture that manufactures devices that help children and adults with disabilities become more mobile, and a venture that makes wood furniture for children and schools. The ventures are nonprofit

entities wholly owned by an apostolic organization with a “common treasury,” as the term is used in 26 U.S.C. § 501(d).¹

GENERAL LEGAL PRINCIPLES

The FLSA, as a general matter, requires employers to pay employees for their work. 29 U.S.C. § 206(a). As the Supreme Court has held, however, “[a]n individual who, ‘without promise or expectation of compensation, but solely for his personal purposes or pleasure, worked in activities carried on by persons either for their pleasure or profit,’ is outside the sweep of the Act.” *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 295 (1985) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)). Additionally, the FLSA does not apply to religious ministers serving in that capacity. *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); cf. *Hosanna-Tabor Evangel. Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012) (applying ministerial exception grounded in the Religion Clauses of the First Amendment to federal employment discrimination laws); *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). This is consistent with WHD’s own guidance, which provides that “[p]ersons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by their church or religious order shall not be considered to be ‘employees.’” Field Operations Handbook (FOH) 10b03(b). An entity may invoke the ministerial exception if its “mission is marked by clear or obvious religious characteristics.” *Shaliehsabou*, 363 F.3d at 310. The ministerial exception is available regardless of whether the entity is a covered enterprise under the FLSA. See *id.* at 299 (applying the ministerial exception to a Jewish nursing home that conceded it was a covered enterprise under the FLSA).

OPINION

Assessing the entirety of the facts that you have provided, your clients’ members are not subject to the FLSA. Their activities do not fit any “traditional employment paradigm covered by the Act,” *Harker v. State Use Indus.*, 990 F.2d 131, 133 (4th Cir. 1993), or “work or employment ... as those words are commonly used,” *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944). As an initial matter, we note that the community members do not work at a for-profit enterprise and do not expect to receive compensation in exchange for their services, which are factors that indicate they are not employees under the FLSA. *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 763 (6th Cir. 2018) (concluding that religiously motivated volunteers were not employees because they did not “expect to receive compensation”). These

¹ The IRS issued a private letter ruling in 1997 advising that the members’ earnings on behalf of the religious organization were exempt from Federal Insurance Contributions Act (FICA) taxes. FICA taxes “wages” earned in “employment,” see 26 U.S.C. §§ 3101, 3102, 3111, 3121(a), (b); however, since the members have taken a vow of poverty and have no right to the earnings except modest sustenance, their work was deemed service to a religious order and excluded from FICA’s definition of “employment,” see *id.* § 3121(b)(8)(A). The IRS also advised that the religious organization was exempt from the Federal Unemployment Tax Act (FUTA). FUTA taxes employees’ wages, see *id.* § 3301, but excludes service performed by organizations exempt under § 501(d), as long as the remuneration for those services is less than \$50, see *id.* § 3306(c)(10)(A). Because the members received support even when unable to work and according to their need rather than in proportion to their services, the IRS concluded that the members received no remuneration at all and were therefore exempt.

considerations are relevant regardless of whether the members' motivation to live in this manner is based on religious conviction, as here, or on a secular ideology, as might be true in other cases, as long they have chosen to donate their services free of coercion by the community. See *Alamo Found.*, 471 U.S. at 300–02 & n.22; *Cathedral Buffet*, 887 F.3d at 767. We see no evidence of coercion in the facts you have provided. Your client's members differ significantly from the workers at issue in *Alamo Foundation*, particularly with respect to their receipt of benefits. The Alamo Foundation operated commercial businesses staffed by "associates" who allegedly expected and received "in-kind benefits" in exchange for their services. 471 U.S. at 301 n.22. They were "'fined' heavily for poor job performance, worked on a 'commission' basis, and were prohibited from obtaining food from the cafeteria if they were absent from work—even if the absence was due to illness or inclement weather." *Id.* Nothing in your letter suggests remotely similar practices; to the contrary, your letter states that members receive food, shelter, medical care, and funds for personal subsistence "not as a right or in proportion to services rendered, but according to need." Moreover, unlike your client, the Alamo Foundation did not expressly invoke the exception under FOH 10b03 and had an implied agreement for compensation with its workers that ultimately gave rise to an employment relationship. *Id.* at 301–05.

Additionally, even if they might otherwise be considered employees under the FLSA, we believe your client's members fall squarely within the ministerial exception recognized in *Hosanna-Tabor*. Although there is "no rigid formula" for determining who qualifies for the ministerial exception, *Hosanna-Tabor*, 565 U.S. at 190, your clients' members' way of life resembles that of a monastic community. Given the egalitarian relationships among the members, it is difficult to distinguish them from the nuns, monks, and others who believe themselves called to lead lives of service and are exempted from the FLSA even when they comprise the totality of the religious community and are not just in positions of ecclesiastical leadership. Consistent with their vow of poverty, members in your client's communities share all in common, grow most of their own food, house themselves, share kitchens, gather together often for meals and for worship, and provide for most of their own education, healthcare, and other necessities. Imposing the FLSA on these members and their community would force them to recognize private property, wages, and hierarchical economic relationships among members—vitiating their central religious tenets. "The vow of poverty is a hallowed religious observance; an intent to destroy it cannot reasonably be ascribed to the draftsmen of the Fair Labor Standards Act." *Schleicher*, 518 F.3d at 476. Members of these communities are "[p]ersons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations," whom FOH 10b03(b) confirms are not employees under the FLSA.

This holds true for the community members working at your client's two nonprofit, income-generating ventures. Given the facts you have provided, the members' work at the ventures is an inextricable part of their religious communal life: to them, work is "indivisible from prayer" and a "form of worship." See *Schleicher*, 518 F.3d at 476–77 (holding that the FLSA did not apply to ministers of the Salvation Army in part because "salvation through work is a religious tenet of the Salvation Army" and their supervision of thrift shops and sales had "a spiritual dimension"); cf. *Alcazar*, 627 F.3d at 1292 ("A church may well assign secular duties to an aspiring member of the clergy, either to promote a spiritual value (such as diligence, obedience, or compassion) or to promote its religious mission in some material way."). Of course, community members may provide services for which a potentially competing enterprise elsewhere in the economy compensates its employees. But that fact establishes at most that the income-generating ventures

of the community might be enterprises under the FLSA; it does not transform the community members into employees under the FLSA. *See Alamo Found.*, 471 U.S. at 299 (“An individual may work for a covered enterprise and nevertheless not be an employee.”); *Cathedral Buffet*, 887 F.3d at 765 (holding that volunteers at a church-operated restaurant were not employees even though the restaurant was a covered enterprise). To conclude otherwise would improperly extend the FLSA to govern a wide variety of volunteer, religious, and other activities to which it does not apply. *See, e.g., Cathedral Buffet*, 887 F.3d at 768 (“These activities could all be seen as competing with other businesses, yet they are still exempted from FLSA coverage because the workers do not expect to receive an economic benefit in return for their service. A church van competes with a taxi service. A Catholic fish fry competes with a fast food restaurant. A volunteer homebuilding project competes with a construction company.”); *Schleicher*, 518 F.3d at 476 (“No one could think the curious precapitalist economy of a monastery an ordinary commercial activity actuated by a business purpose.”); FOH 10b03(c); WHD Opinion Letter FLSA2006-18, 2006 WL 1836646, at *1 (confirming that the FLSA does not apply when people freely volunteer time to religious, charitable, civic, humanitarian, or other organizations as a public service).

We trust that this letter is responsive to your inquiry.

Sincerely,

A handwritten signature in black ink, appearing to read "Bryan L. Jarrett". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Bryan L. Jarrett
Acting Administrator

***Note: The actual name(s) was removed to protect privacy in accordance with 5 U.S.C. § 552(b)(7).**