

## Triggering Minimum Wage and Overtime with the Swipe of a Credit Card

Many nonprofits are unaware that whether an employee is required to be paid minimum wage and overtime may turn on their credit card policy. An employee's use of a credit card to process a client or customer's purchases or payments may transform that employee into a "covered individual" under the Fair Labor Standards Act. That means the employee must be paid minimum wage and time and a half for overtime hours.

Nonprofits are typically exempt from the Fair Labor Standards Act (FLSA or Act) because they do not engage in "business". This means they are not subject to the Act's "enterprise coverage" and do not have to pay their employees minimum wage or overtime. With tight budgets and shoestring operations, many nonprofits find this enterprise exemption vital.

However, particular employees of a nonprofit may still be covered by the FLSA under what is called *individual coverage*, when that employee engages in "interstate commerce." And interstate commerce can appear in the most curious of forms.

"Interstate commerce," may bring to mind trucking or selling and shipping across state lines. But the Department of Labor (Department) does not limit its definition to physical cross-country operations. Rather, the Department defines interstate commerce as including "transacting business via interstate *telephone calls or the U.S. Mail...*, *ordering or receiving goods* from an out-of-state supplier, or handling the accounting or bookkeeping for such activities." [Department Fact Sheet #3](#). So an employee who regularly handles interstate phone calls or uses the internet may qualify for individual coverage under the FLSA, even though the nonprofit is exempt as an enterprise.

In addition, according to the Department, engaging in interstate commerce also includes the "handling of credit card transactions since that involves the interstate banking and finance systems." Fact Sheet #3. As examples, the Department cites the waitress or cashier that takes customer credit cards to pay for a meal. [Factsheet #2](#), [FSLA Adviser](#).

In the nonprofit context, church bookstores and coffee shops, camp snack shops and gift stores all employ individuals that process credit card purchases—these individuals are potentially engaging in interstate commerce and need to be paid minimum wage and overtime, where applicable. This rule likewise applies to the church employee ordering supplies, books, or curricula. (Note that under a separate rule—the "ministerial exception"—those individuals engaging in ministry, such as church music directors, child or youth ministers, etc., may be exempt.)

The Department does acknowledge that "isolated, sporadic, or occasional" commerce is not covered by the Act, but if the activity is "regular and recurring", "even though small in amount", it is covered. [Fact Sheet #3](#); 29 CFR 776.3. *See eg, Owusu v. Corona Tire Shop*, 2013 U.S. Dist. LEXIS 55381 (E.D.N.Y. Apr. 15, 2013)(occasional use of business' credit card machine to ring up customers did not mean employee was participating in "interstate commerce.").

While Department regulations and interpretations of statutes are not controlling, most courts defer to them. That means that a particular court would probably agree with a Department interpretation of interstate commerce and hold that the FLSA applies to employees engaging in customer credit card transactions. At least one court has declined to do so. *See Thorne v. All Restoration Servs.*, 448 F.3d 1264, 1267 (11th Cir. Fla. 2006) (declining to decide “that credit card transactions alone could constitute an instrumentality of interstate commerce”). But there is scant caselaw holding either way.

Once an employee engages in interstate commerce, the Act’s coverage extends beyond just the hours at the register. If an employee works some hours in the church coffee shop, for example, and additional hours elsewhere, *all* the employee hours are governed by the minimum wage and overtime rules. Where the credit card transactions are “regular and recurring”, the *employee* falls under the Act’s individual coverage and even hours not strictly engaged in credit card transactions are covered by the Act. So the church or nonprofit would have to pay the employee minimum wage for all hours worked and overtime for hours over 40.

There are some options for nonprofit employers to avoid coverage under the Act:

- ) *Cash only.* Some employers opt for a “cash only” policy to avoid falling under the Act.
- ) *Use exempt employees.* Another option is to assign only “exempt” employees to the cash register function—those employees who are already paid a salary and are already exempt from overtime regulations.
- ) *Pay minimum wage.* Pay your coffee bar and bookstore employees minimum wage and strictly limit overtime hours.
- ) *Use volunteers.* Establish a clearly written policy that those who serve are doing so as a church volunteer without any expectation of compensation.

The Department of Labor’s enforcement of the FLSA is fraught with traps for the unwary. Nonprofits should regularly review their employee job classifications and the activities their employees engage in to ensure that they don’t run afoul of the minimum wage and overtime requirements. A quick review by legal counsel at the outset can save costs, penalties and headaches later on.



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