

Constitutional Musing - Note # 24 Employer of a Minister

Issued August 2009

There are at least three possible answers to the question of who is the employer of a Presbyterian church pastor: independent contractor, the presbytery, or the session. Although many ministers are uncomfortable using secular terminology to describe their working relationships, it is assumed in this paper that one uses secular categories in responding to lawsuits in secular courts or in responding to Internal Revenue Service inquiries, which are a couple of the venues when this question may arise. Ordinarily, the advice of the Office of the General Assembly is that our polity provides some basis that either the presbytery or the session is the legal employer.

The Internal Revenue Service uses a test it has derived from various court decisions to determine whether sufficient control is present to establish an employer-employee relationship. This test evaluates behavioral control, financial control, and the type of relationship demonstrated by the parties. Descriptions of this test as applied to ministers are found in *Abingdon Clergy Income Tax Guide* (Abingdon Press), *Church and Clergy Tax Guide* (Christian Ministry Resources), and *Legal Resource Manual for Middle Governing Bodies and Churches* (www.pcusa.org/legal). The test is used to determine whether the minister is to report income as an employee or as self-employed and whether the employer should issue a W-2 rather than a 1099.

This test is also useful for considering who is the employer of a Presbyterian pastor. The factors are not all equally applicable to the relationship of minister, session and presbytery. Ignoring for this purpose certain distinctions among session, congregation and trustees, such as the election of the minister by the congregation, the most significant factors are:

- (1) The minister does not own and control the workplace and its furnishings and equipment.
- (2) Although the minister determines the content of preaching and teaching, the session makes all major program decisions and schedules the times facilities are available.
- (3) The session determines the personnel policies and job descriptions of staff, G-10.0102n. The authority of the pastor to hire and fire others exists only by delegation from the session and may be very limited.
- (4) The session makes recommendations as to the adequacy of the pastor's compensation G-10.0102n.
- (5) The minister generally works exclusively in one or two congregations, is paid a salary and expenses, and is not continually marketing professional services to an unlimited clientele.
- (6) Although sessions are typically lax in requiring detailed reports of the pastor's work, there is no question that reports may be required. The relationship of the pastor and session in all areas of the congregation's worship, program and pastoral care is a continuing exchange.

- (7) Means and methods are not precisely controlled as in assembly line work, but the use of the minister's time in leading worship, teaching, visiting, counseling, and community service is subject to evaluation by the session if the session chooses to do it.

This analysis using the Internal Revenue Service's test is in keeping with a 1995 decision of the 4th Circuit Court of Appeals which addressed the issue of whether United Methodist clergy could file tax returns as self-employed for income tax purposes and use Schedule C. (*Weber v. Commissioner*, 60 F.3d 1104) The court determined that the Rev. Weber was an employee for income tax purposes. A similar decision would likely be rendered in a Presbyterian clergy case. For more information regarding this decision, see *Abingdon Clergy Income Tax Guide* (Abingdon Press), *Church and Clergy Tax Guide* (Christian Ministry Resources), and *Legal Resource Manual for Middle Governing Bodies and Churches* (www.pcusa.org/legal).

Some ministers argue that in secular terms a minister of the Word and Sacrament is a **self-employed professional**. This is how ministers are considered for purposes of the Self-Employment Contributions Act and for federal income tax withholding. It is also consistent with a theological doctrine of the minister's call and accountability to Jesus Christ. The minister, in this view, is a completely free agent, and therefore there is no employer to be held liable for the minister's actions. It is a very rare situation where a PC(USA) minister will meet all the criteria for being labeled an independent contractor. The *Weber* decision provides valuable analysis of the criteria. Some tent-makers may find that they meet these criteria as an independent contractor.

Also note, our theology makes such a claim difficult. The Reformed doctrine of the minister generally, and the provisions of the *Book of Order* at G-6.0201 and throughout, exclude this notion of the minister as a free agent. The work of a Presbyterian minister must be carried out in accountability to the presbytery and to organizations, agencies, and institutions, G-11.0403d, and, when the minister serves a congregation, to the session, G-10.0102n.

Some ministers may argue that the **presbytery is the employer**. The presbytery has responsibility and power to ordain, receive, dismiss, install, remove, G-11.0103n and discipline ministers D-3.0101b. Acting as a whole or through its committee the presbytery examines ministers, G-11.0402, advises congregations regarding any candidate or minister whose name is contemplated for nomination to the congregation, G-11.0502d, and approves the calls of ministers to their positions, G-11.0103n.

The minister is a member of the presbytery and is subject to review by the presbytery according to criteria established by the Presbyterian Church (U.S.A.), G-11.0403. In addition, the presbytery has a responsibility to visit sessions and inquire into the mission and ministry of the congregation, and to intervene in disputes between ministers and churches, G-11.0502.a,c,i.

Due to these functions by the presbytery, neither the session nor the congregation has complete authority to hire and fire. For these reasons, it could be argued that the presbytery is the employer of the minister, but we believe this is not the case. More will be said about the relation of the presbytery to the session and the minister following discussion of the session and minister. (See also the chart at the end of this Musing.)

The advice being given here is that the **session is the employer** of the pastor and other ministers on the church staff. The relationship of the presbytery in all of the areas listed by the IRS is one of providing consultation and guidance, and ultimately, of dispute resolution with a

right to intervene. The presbytery is not continually involved in the administration and supervision of ministerial personnel, and under G-11.0103s of the *Book of Order*, is not permitted to intervene in the powers of the session without good cause.

On this analysis, the session's responsibility for the mission and government of the particular church, G-10.0102, makes it, for secular law purposes, in the day to day work of the church, the employer of the pastor and other ministers. The presbytery's relationship of oversight and evaluation of both the minister and the session makes it a partner with them.

One other issue that often arises in pastoral dissolution is secular remedies available to ministers whose relationship with a congregation is being terminated. In most states, secular lawsuits will not be entertained by a secular court, which normally cite the “Ministerial Exception” in dismissing such claims, pointing ministers back to the polity described below. If the presbytery or session is sued by a minister, the General Counsel’s office and the Department of Constitutional Services stand ready to assist your lawyer.

We hope the following list will help provide some clarity to those attempting to trace the lines of accountability and the standards to be applied to the work of ministers of the Word and Sacrament:

Standard of Character and Competencies Required:

G-6.0101	Christ's ministry the basis of all ministry
G-6.0106	Gifts and requirements
G-6.0201	Ministers and presbytery
G-6.0202	Pastors, associate pastors
G-6.0203	Teachers, chaplains, and others
G-6.0108	Freedom and bounds of conscience
G-11.0403	Criteria for ministry

Congregation in the Call System

G-6.0107	Election of officers by the people
G-7.0304a(2), & (3)	Calling and terms of call, full disclosure
G-14.0531	Election of PNC
G-14.0532	Confer with COM

Session in Oversight

G-10.0102	Responsibilities and powers belong to session, not pastor alone
G-10.0102m & n.	Administration of program and management of property
W-1.4001 – W-1.4004	Oversight of Worship
W-1.4005	Responsibilities of pastor not subject to session

Presbytery in the Call System, and in Oversight

G-6.0201	Presbytery designates ministers to work helpful in presbytery’s mission, for which ministers shall be accountable.
G-6.0702	Persistence in disapproved work
G-9.0407, G-9.0408	Presbytery administrative and special review
G-11.0103g,k,l,n,o,p, & q	Pastoral care for churches, install and discipline ministers and designate their work, full disclosure
G-11.0402, G-9.0403	Examine ministers, guided by the criteria for ministry.
G-11.0408, G-11.0409, G-11.0410, G-11.0411	Validate the ministries
G-14.0532	Call is not issued until approved by presbytery.
D-3.0103b	Presbytery has original jurisdiction in disciplining minister members

Committee on Ministry

G-11.0502

Visit the ministers, receive reports, recommend calls, counsel with PNC, advise regarding "the merits, availability, and suitability" of any candidate or minister," counsel with sessions regarding ministers, mediate differences.

G-11.0503

Open to communication with ministers and elders on session.