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# Employment Trends

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## EMPLOYMENT TRENDS

### I. INTRODUCTION

It's always difficult to do an "employment trends" paper because you're both expected to cover the field of all important topics as well as have something unique to say. This means that the paper will have a different focus than the speech. First, I'll provide an overview of the FLSA's exemption requirements and the upcoming change to the salary basis amount, then briefly cover unionization and ai, before diving deeper into a recent United States Supreme Court case that will likely reshape the law of religious discrimination and accommodation.

### II. DEPARTMENT OF LABOR – FAIR LABOR STANDARDS ACT

#### A. THE "SALARY BASIS"

##### 1 Salary Does Not Equal Exempt

Contrary to popular belief, the mere fact that an employee is paid a salary does not mean the employee is "exempt" from the minimum wage and overtime provisions of the FLSA.<sup>1</sup> Rather, an employee must have a "primary duty" that fits within one of the enumerated exemptions—the most common being executive, learned professional, creative professional, computer professional, administrative, and outside sales—and be paid a salary.<sup>2</sup>

##### 2 Job Duties, Not Job Titles, Control

Job titles do not determine whether an employee is exempt; the employee's actual primary duty does.<sup>3</sup> An employee's "primary duty" is the principal, main, major or most important duty the employee performs.<sup>4</sup> While the amount of time an employee spends performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee, time alone is not the sole test and nothing in the FLSA requires that exempt employees spend more than 50 percent of their time performing

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<sup>1</sup> 29 U.S.C. § 213.

<sup>2</sup> Teachers, doctors, lawyers, and outside sales employees are exempt even without a salary, provided the other elements of exemption are met. See 29 C.F.R. §§ 541.303(d) (teachers), 541.304(d) (doctors and lawyers), and 541.500(c) (outside sales). Likewise, computer professionals can be exempt even if paid on an hourly basis, provided they are paid \$27.63 per hour. 29 C.F.R. § 541.400(b). In addition, administrative employees and professional employees (but not executive employees) may be paid on a "fee basis" and still be exempt. See 29 C.F.R. §§ 541.200(a)(1) (administrative) and 541.300(a)(1) (professional). Given that the fee basis method of compensation is far less common than the salary basis, this paper focuses on salary basis.

<sup>3</sup> 29 C.F.R. § 541.2.

<sup>4</sup> 29 C.F.R. § 541.700(a).

exempt work.<sup>5</sup> It should also be remembered that an exemption is just that: an exemption. The burden is on the employer to prove it applies, and courts frequently interpret the FLSA narrowly and in favor finding against exemption.<sup>6</sup> Employers should also remember that the Department of Labor (“DOL”) almost always takes the narrowest view possible of any exemption, such that an employer will likely have to fight to prevail in any case where the applicability of the exemption is a close call.

With those basics in place, a brief summary of the exemptions follows:

1. **Executive** – An employee: (1) whose primary duty consists of the management of the enterprise or a customarily recognized unit thereof; (2) who customarily and regularly direct work of two or more other employees; and (3) who has the authority to hire or fire other employees or have their recommendations regarding hiring, firing, and advancement, promotion, or any other change of status given particular weight.<sup>7</sup>
2. **Administrative** – An employee whose primary duty: (1) consists of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and (2) includes the exercise of independent judgment and discretion with respect to matters of significance.<sup>8</sup> The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision, although their decisions or recommendations may be reviewed at a higher level.<sup>9</sup> The concept of “judgment and discretion” is a bit more difficult to master. Put very simply, judgment and discretion is not the same thing as knowledge and skill.<sup>10</sup> Instead, it means comparing and evaluating possible courses of conduct, and acting or making a decision after those various possibilities have been considered.<sup>11</sup>
3. **Learned Professional** – An employee whose primary duty is the performance of work as a learned professional requiring knowledge of an

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<sup>5</sup> 29 C.F.R. § 541.700(b). Note, however, that some states (e.g., California) require that an employee spend at least 50% of his or her time performing exempt work to be considered exempt. *See, e.g.*, Cal. Lab. Code, § 515(e) (West 2013).

<sup>6</sup> *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (Section 213 exemptions should be “narrowly construed against the employers” and limited to those “plainly and unmistakably” within their terms).

<sup>7</sup> 29 C.F.R. § 541.100(a).

<sup>8</sup> 29 C.F.R. § 541.200(a).

<sup>9</sup> 29 C.F.R. § 541.202(c).

<sup>10</sup> 29 C.F.R. § 541.202(e).

<sup>11</sup> 29 C.F.R. § 541.202(a).

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