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FLSA RESTRICTIONS ON VOLUNTEERISM: THE INSTITUTIONAL AND INDIVIDUAL COSTS IN A CHANGING ECONOMY

INTRODUCTION

The Fair Labor Standards Act (FLSA) of 1938¹ governs the employment of persons engaged, either individually or through an enterprise, in interstate commerce.² An individual defined as an "employee" within the meaning of the Act must be compensated according to the Act's mandatory minimum wage provisions, despite the individual's wish to volunteer and forego compensation.³ Department of Labor (DOL) publications and federal court cases discussing employment relationships covered by the FLSA drastically limit acceptable volunteer activities.⁴ Examples of permissible volunteer activities include those involving students enrolled in internship programs, trainees, and bona fide administrators and executives.⁵ Other individuals, such as office workers, who volunteer in a productive capacity at either a nonprofit or a for-profit corporation, fall beyond the scope of the Act's exemptions.⁶

At the root of this limitation on permissible volunteer activities is the fear that employers will wield superior bargaining power to

¹ 29 U.S.C. §§ 201-219 (1988 & Supp. 1990).

² WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR, EMPLOYMENT RELATIONSHIPS UNDER THE FAIR LABOR STANDARDS ACT (WH Pub. 1297, 1985) [hereinafter EMPLOYMENT RELATIONS SUPPLEMENT]. The FLSA's coverage extends to both public and private sector employees. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (holding that the Constitution does not bar the application of the FLSA to state and local governments). For a discussion of *Garcia*, see Terence G. Connor & Ronald Witkowski, *Garcia v. San Antonio Metropolitan Transit Authority: Public Employers Meet the FLSA*, FLA. B. J., July-Aug. 1985, at 33; see also James S. Maloney & Victoria M. Bunsen, *The Fair Labor Standards Act: Criminal and Civil Liability*, 14 COLO. LAW. 1802, 1802 (1985) (discussing criminal and civil liability resulting from employer non-compliance with FLSA standards); Linda S. Vanden Heuvel, *Public Employers Subject to Fair Labor Standards Act*, WIS. B. BULL., Oct. 1985, at 17 (discussing the ramifications of the FLSA extension to government workers).

³ See 29 U.S.C. §§ 201-219; see also *Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 265 (3rd Cir. 1990) (holding that an employer and employee cannot abridge FLSA minimum wage and overtime provisions by contract and that statutory rights prevail over any collective bargaining agreement); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153, 1158 (D.C. Cir. 1975) (FLSA principles apply despite contrary custom or agreement).

⁴ See *infra* notes 84-113, 130-83 and accompanying text.

⁵ EMPLOYMENT RELATIONS SUPPLEMENT, *supra* note 2, at 1.

⁶ *Tony & Susan Alamo Found. v. Secretary of Labor*, 471 U.S. 290 (1985); see *infra* notes 152-67 and accompanying text. The term "productive work" is used throughout this Note to describe any work performed by an individual who generates productive output for an organization.

coerce prospective employees into working for substandard or no compensation.⁷ Attempts to limit employer coercion, however, have barred many individuals from performing volunteer services in which coercion plays no role. As a result, these individuals must often forego valuable training experiences.⁸ The adverse effects of limitations on volunteer activities are not exclusive to individuals; nonprofit organizations also suffer under the current state of the law. While such organizations desperately need volunteers to maintain their labor-intensive services without incurring substantial additional costs, the DOL will not permit them to employ volunteers to perform work that falls outside the FLSA's narrow category of permissible volunteer activities.⁹ An examination of the Act and the congressional intent behind its passage, however, strongly suggests that Congress did not intend the FLSA to prevent such volunteer services.

Congress enacted the FLSA as an anti-poverty device designed to ameliorate the economic and social conditions running rampant in the wake of the Great Depression.¹⁰ While the social conditions that gave rise to its original passage have since changed, the Act currently remains largely unaltered.¹¹ Both the federal courts and the DOL have extended the FLSA far beyond its intended reach. In so doing they have prohibited many volunteer activities in violation of both the legislative intent and the social policy that gave rise to the Act.¹² This Note argues that Congress should amend the FLSA to allow individuals to perform volunteer services that are currently prohibited but yet are consistent with the Act's original purpose.

The FLSA currently allows an individual, acting as a trainee, to volunteer her services as long as she meets six criteria. The DOL believes that by imposing this test it can adequately guard against employer coercion. This Note argues that through a slight modification of the FLSA's trainee test the DOL can also insure that an individual who volunteers her services in a currently prohibited capacity is similarly shielded from employer coercion.

Part I of this Note assesses our nation's need for volunteers. Part II examines the pre-FLSA background and the legislative intent behind the Act's passage, and discusses the Act's enforcement procedures, definitions, and exceptions. Part III considers the federal courts' interpretations of the FLSA. Part IV presents three hy-

7 See *infra* notes 69-75 and accompanying text.

8 See *infra* notes 27-48 and accompanying text.

9 See *infra* notes 13-26 and accompanying text.

10 See *infra* notes 58-61 and accompanying text.

11 See *infra* note 62 and accompanying text.

12 See *infra* notes 130-73 and accompanying text.

potheticals that illustrate problems arising under the courts' and the DOL's current views of the Act. Finally, Part V proposes a test designed to guard against employer coercion without banning all nonexempt volunteers from engaging in productive activity.

I

THE NEED FOR VOLUNTEERS

A. The Need for Volunteers at Nonprofit Institutions

Our nation's ability to provide greatly needed social services is undercut by a scarcity of available resources.¹³ Nonprofit organizations, historically the major source of such social services, rely heavily on government funding as their principal source of income.¹⁴ Federal budget cuts, however, have placed tremendous pressure on charitable organizations struggling to maintain adequate social services.¹⁵ From 1982 to 1988, direct federal support to non-profit organizations decreased by \$26.7 billion, or 23%.¹⁶ To compensate for these cuts in federal spending, many nonprofit organizations reluctantly have begun charging fees for their services.¹⁷

Facing acute funding shortages, nonprofit organizations must seek less expensive ways to maintain their labor-intensive services.¹⁸ At the same time, these institutions must also raise salaries to competitive levels in order to attract competent employees.¹⁹ This competition with the for-profit sector creates a tremendous incentive for nonprofit organizations to attract volunteers to perform productive work.²⁰ While nonprofit organizations need such noncompensatory services, most have experienced a dearth in volunteer labor.²¹

¹³ Carol L. Couch, *Volunteer Service in the Nonprofit Sector: Meeting the Challenge*, 11 J. LEGIS. 441, 441 (1984). A depressed economy magnifies this problem because former contributors often become the recipients of social service provided by nonprofit organizations. See David Haldane, *United Way Dips Into Reserves To Aid 36 Agencies*, L.A. TIMES, Sept. 10, 1992, at B1 (noting that the economy has created a "charity drought").

¹⁴ *State of the Nonprofit Sector, 1989: Hearing Before the Subcomm. on Commerce, Consumer Protection, & Competitiveness of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 10 (1989) (statement of Lester M. Salamon, Director of the John Hopkins Institute for Policy Studies) [hereinafter *Nonprofit Sector*].

¹⁵ *Id.* at 34.

¹⁶ *Id.* Funding for some social service organizations has fallen 30% or more since 1980. *Id.*

¹⁷ *Id.* at 53. "In other words, under the pressure of the government cuts, nonprofit organizations [have been] finding it necessary to become more commercial in their operations in order to survive." *Id.*

¹⁸ Couch, *supra* note 13, at 411-12. See generally VIRGINIA A. HODGKINSON ET AL., *THE FUTURE OF THE NONPROFIT SECTOR* (1989) (identifying, reviewing, and defining major problems and current trends facing the nonprofit sector).

¹⁹ Couch, *supra* note 13, at 441-42.

²⁰ *Id.*

²¹ *Id.* at 443. Although an estimated thirty-eight million Americans perform various volunteer services, the supply of volunteer labor remains far from adequate. See

In an effort to maintain services without substantially increasing costs, nonprofit organizations such as the United Way and the American Red Cross have, in the last decade, redoubled their efforts to attract volunteers.²² The Reagan Administration assisted such institutions by appealing to civic consciousness and altruism, and even proclaimed May 1, 1983 through April 30, 1984, "the National Year of Voluntarism."²³ President Reagan also appointed a task force calling for government to remove impediments and create incentives for increased volunteerism.²⁴ President Bush, a "staunch believer in the redemptive qualities of doing good for others," has extended this call for increased volunteerism into the 1990s.²⁵ Nevertheless, FLSA statutory impediments still exist, prohibiting individuals from volunteering their services to generate productive output in any business activity.²⁶ Organizations will never satisfy their need for volunteer labor if the federal courts and the DOL continue to prohibit individuals from volunteering their services in a productive capacity.

B. The Individual's Need to Volunteer

The current state of the law harms not only nonprofit organizations, but also certain classes of individuals seeking to volunteer. For example, volunteer work may be the best way for individuals with handicaps to learn skills and "prove" themselves as competent

U.S. DEP'T OF LABOR, THIRTY EIGHT MILLION AMERICANS DO VOLUNTEER WORK (1990); see also BURTON A. WEISBROD, THE NONPROFIT ECONOMY 130 (1988) (citing a 1982 survey that identifies greater reliance on volunteer labor as "the single most frequently reported coping strategy" for nonprofit organizations).

²² *Id.* See generally SUSAN J. ELLIS & KATHERINE H. NOYES, BY THE PEOPLE (1990) (chronicling the history of American volunteerism in such areas as labor, education, child care, religion, civil rights, social welfare services, and government); LIBRARY OF CONGRESS, GIVING AND VOLUNTEERING IN THE UNITED STATES: FINDINGS FROM A NATIONAL SURVEY (1988) (surveying volunteer participation and charitable contributions at nonprofit organizations throughout the 1980s); MICHAEL P. VAN BUREN, REACHING OUT: AMERICA'S VOLUNTEER HERITAGE (1990) (detailing the history of American volunteerism).

²³ Couch, *supra* note 13, at 443. It is interesting to note, however, that "[a]lthough strongly committed conceptually to encouraging the voluntary sector, the Reagan administration . . . subsumed its policy toward the voluntary sector under its overall economic program, which called for substantial cuts in government spending and in tax rates in order to stimulate economic growth." *Nonprofit Sector*, *supra* note 14, at 175 (statement of Lester M. Salamon).

²⁴ Couch, *supra* note 13, at 446. See generally ALAN J. ABRAMSON & LESTER M. SALAMON, THE NONPROFIT SECTOR AND THE NEW FEDERAL BUDGET (1986) (detailing the impact of the Reagan Administration's federal budget cuts on the nonprofit sector).

²⁵ Jeffrey L. Sheler et al., *The Push for National Service*, U.S. NEWS & WORLD REP., Feb. 13, 1989, at 20. President Bush for example, proposed a \$35-\$45 million Youth Engaged in Service Program (YES) to encourage volunteer service in community groups. *Id.*

²⁶ See *infra* notes 76-113 and accompanying text.

workers. Many individuals with disabilities, however, believe that employer prejudice renders them unable to obtain competitive employment positions.²⁷ Although employers claim to hire on a non-discriminatory basis, statistical evidence suggests otherwise. According to 1980 census data,²⁸ 65.5% of working-age males with disabilities and 80.6% of working-age females with disabilities are unemployed.²⁹ While individuals with disabilities comprise almost 9% of the working-age population, only 27% of these individuals are actually working.³⁰ Although many individuals with disabilities are quite capable of maintaining competitive employment, employers are often reluctant to offer them a job.³¹ Employer prejudice, however, is not the only factor affecting these statistics; while many individuals with disabilities are, indeed, employable, they sometimes lack adequate skills to succeed in the workforce.³²

In order for individuals with disabilities to become more marketable, they must acquire abilities and skills through education and training.³³ Office work utilizing electronically based employment

²⁷ RICHARD ROESSLER & BRIAN BOLTON, UNIVERSITY OF ARKANSAS VOCATIONAL REHABILITATION OF INDIVIDUALS WITH EMPLOYABILITY SKILL DEFICITS at i (1984). Arkansas Rehabilitation Services studied 57 former rehabilitation clients and reported on their employability, skill training, and job placement needs. *Id.*; see also HAROLD E. YUKER, ATTITUDES TOWARDS PERSONS WITH DISABILITIES 251 (1988) (citing one study that revealed that 47% of individuals with disabilities believe that employers deem them incapable of satisfactory work performance because of their disabilities).

²⁸ Census data from 1990 regarding employment of individuals with disabilities is not yet available.

²⁹ ROESSLER & BOLTON, *supra* note 27, at 1.

³⁰ IAN MORRIS ET AL., THE FUTURE OF WORK FOR DISABLED PEOPLE 38 (1986). See generally ROBERT L. BENNEFIELD & JOHN M. MCNEIL, U.S. DEP'T OF COMMERCE LABOR FORCE STATUS AND OTHER CHARACTERISTICS OF PERSONS WITH A WORK DISABILITY, 1981 TO 1988 (Bureau of the Census, Series P-23, No. 160, 1989) (containing detailed U.S. statistics on the employment of individuals with a work disability); COMPETITIVE EMPLOYMENT ISSUES AND STRATEGIES (Frank R. Rusch ed., 1986) (overviewing available research on the employment of individuals with handicaps); DISABILITY AND WORK: INCENTIVES, RIGHTS, AND OPPORTUNITIES (Carolyn L. Weaver ed., 1991) (assessing what is needed to get more individuals with disabilities into the workforce); ECONOMICS, INDUSTRY, AND DISABILITY at xv (William E. Kiernan & Robert L. Schalock eds., 1989) ("By focusing on economics, industry, and persons with disabilities, this book addresses key issues in the employment picture for adults with severe disabilities.").

³¹ See LANCE DU RAND & JOHN DU RAND, THE AFFIRMATIVE INDUSTRY 8 (1978) ("If these individuals [with disabilities] are to break the debilitating stigma under which they have been forced to live, a stigma of incompetence and dependency, then they must be involved in competent and socially recognizable activity.").

³² ROESSLER & BOLTON, *supra* note 27, at 3; see PAUL WEHMAN, COMPETITIVE EMPLOYMENT: NEW HORIZONS FOR SEVERELY DISABLED INDIVIDUALS 4 (1981) (noting that "the Connecticut Division of Vocational Rehabilitation has pointed out that of approximately 12,000,000 potentially employable disabled persons only 4,100,000 are actually working.").

³³ MORRIS, *supra* note 30, at 40; see also WEHMAN, *supra* note 32, at ix (indicating that several studies have demonstrated that even individuals with severe disabilities can maintain competitive employment after acquiring necessary skills).

situations, such as data entry, constitutes tasks that individuals with disabilities can complete successfully. Relevant and quality career education and training programs, however, are often unavailable to individuals with disabilities.³⁴ By allowing organizations to accept volunteers with disabilities, the DOL and the federal courts can increase the educational opportunities of some individuals through on-the-job training programs. Such volunteer opportunities might allow individuals to prove their "employability" to potential employers, thus increasing their chances of obtaining future gainful employment, and reducing employer prejudice.³⁵

Similarly, individuals who become disabled during their lifetime face problems in re-entering a job market where employer prejudice abounds. Researchers at the Will Menninger Center for Applied Behavioral Sciences estimate that every year over 569,000 workers suffer serious physical disabilities that render them unable to work for five months or longer.³⁶ This number is projected to increase thirty-five percent by the year 2020.³⁷ Employers seldom expend much energy in helping employees return to work after their rehabilitation, and only forty-eight percent of these workers actually do return to work.³⁸ One reason given for this low return rate is widespread employer belief that employees with disabilities cannot maintain adequate production levels, even after a period of

It is clear that a primary barrier to community integration is *not* the skills deficits of severely developmentally disabled individuals, but the lack of sufficient integrated community vocational, residential, and recreational opportunities and the absence of appropriate programs to train them in the skills necessary to gain access to these communities.

Id.

³⁴ MORRIS, *supra* note 30, at 45. See generally MICHAEL J. FITZGERALD, *THE HANDICAPPED INDIVIDUAL AS AN ALTERNATIVE SOURCE OF LABOR* (1989) (evaluating both the potential of individuals with disabilities to succeed in the workforce and the need for employers to recognize this potential); THOMAS H. POWELL, *SUPPORTED EMPLOYMENT: PROVIDING INTEGRATED EMPLOYMENT OPPORTUNITIES FOR PERSONS WITH DISABILITIES* (1991) (studying the beneficial training effects of integrating individuals with disabilities into office settings).

³⁵ See NATIONAL REHABILITATION ASSOCIATION, *EMPLOYMENT AND DISABILITY: TRENDS AND ISSUES FOR THE 1990s* 54 (Leonard G. Perlman & Carl E. Hansen eds., 1990) (noting that "[t]he success of workers with disabilities will depend greatly upon improved employer attitudes," and that "[a]s more individuals with disabilities enter the work force and are seen as competent workers, improvements in hiring practices should occur.").

³⁶ EDWARD J. HESTER ET AL., *ATTITUDES OF EMPLOYERS AND REHABILITATION PROFESSIONALS TOWARD EMPLOYEES WHO BECOME DISABLED* vii (1988).

³⁷ *Id.*

³⁸ *Id.* at 1; see also MONROE BERKOWITZ & M. ANNE HILL, *DISABILITY AND THE LABOR MARKET: ECONOMIC PROBLEMS, POLICIES, AND PROGRAMS* (1989) (summarizing papers presented at a meeting on the economics of disability held in Washington, D.C. on April 9 and 10, 1985, and sponsored by the Bureau of Economic Research of Rutgers University). See generally *ECONOMICS, INDUSTRY, AND DISABILITY*, *supra* note 30 (discussing the employment of individuals with disabilities after their rehabilitation).

recuperation.³⁹ Allowing individuals to volunteer part-time during, or even after, their rehabilitation may help reduce employer prejudice by giving individuals with disabilities an opportunity to prove that they can continue to perform adequately after becoming disabled.⁴⁰

Recent college graduates also suffer from the prohibition on volunteering in a productive capacity. Graduates face obstacles while seeking employment in their field of study and often must take positions in areas in which they receive no relevant career training and experience.⁴¹ Between 1960 and 1980, employment opportunities for recent graduates declined in terms of jobs secured.⁴² A substantial number of recent graduates were forced to take lower-level positions in which a college education was unnecessary and even detrimental to satisfactory work performance.⁴³ This situation did not improve during the next decade. In 1987, approximately thirty-six percent of college graduates who found employment within one year of graduation reported that their jobs were not related to their field of study.⁴⁴ In 1990, graduates of New England colleges faced even more grim prospects of finding career-related employment, and, as a result, many were forced to consider a variety of career and advancement opportunities outside their course of study.⁴⁵ College graduates who enter the job market throughout the next two decades will likely encounter an even more competitive job market.⁴⁶ If the DOL and the federal courts allow recent graduates to volun-

³⁹ HESTER ET AL., *supra* note 36, at 17-19.

⁴⁰ See VOCATIONAL REHABILITATION AND SUPPORTED EMPLOYMENT (Paul Wehman & M. Sherill Moon eds., 1988) (showing the potential for individuals with disabilities to perform well in the workforce, even during their rehabilitation).

⁴¹ See generally BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OUTLOOK FOR NEW ENGLAND COLLEGE GRADUATES: 1990 (U.S.D.L.-18, 1990) [hereinafter, NEW ENGLAND GRADUATES]; JOANELL PORTER, U.S. DEP'T OF EDUCATION, OCCUPATIONAL AND EDUCATIONAL OUTCOMES OF 1985-86 BACHELOR'S DEGREE RECIPIENTS (1989) [hereinafter OCCUPATIONAL AND EDUCATIONAL OUTCOMES]; RUSSELL W. RUMBERGER, STANFORD UNIVERSITY SCHOOL OF EDUCATION REPORT NO. 83-A3, THE JOB MARKET FOR COLLEGE GRADUATES, 1960-1990 (1983). For a discussion of the beneficial educational effects of volunteerism, see CECILIA I. DELVE ET AL., COMMUNITY SERVICE AS VALUES EDUCATION (1990).

⁴² RUMBERGER, *supra* note 41, at 1-2.

⁴³ *Id.* at 9-10. In 1960, approximately two-thirds of college graduates held professional and managerial positions, while one-third were employed in positions such as secretaries and service workers. By 1970, this situation improved, as three out of four college graduates held high level jobs. In 1980, however, job opportunities for young college graduates had fallen below both 1970 and 1960 levels. *Id.*

⁴⁴ OCCUPATIONAL AND EDUCATIONAL OUTCOMES, *supra* note 41, at iv. "Approximately 86 percent of all 1985-86 bachelor's degree recipients were employed [one] year after graduation." *Id.* at iii.

⁴⁵ NEW ENGLAND GRADUATES, *supra* note 41, at 1.

⁴⁶ Kristina J. Shelley, *The Future of Jobs for College Students*, MONTHLY LAB. REV., July, 1992, at 13.

teer in productive capacities that are relevant to their career aspirations, these volunteers could receive valuable experience that might lead to advancement opportunities.

The DOL and the federal courts, however, consistently refuse to allow such individuals to volunteer to perform productive work. This refusal stems from Congress's desire to enact an anti-poverty device designed to prevent employer coercion, which was rampant when the FLSA became law.⁴⁷ An examination of the background of the Act and the Congressional intent behind its passage, however, suggests that Congress did not intend for the Act to be applied strictly in situations where there is no evidence of employer coercion.⁴⁸

II

THE FAIR LABOR STANDARDS ACT

A. The Historical Background of the Fair Labor Standards Act

In the early nineteenth century, various craft groups began to petition their employers to limit their work days.⁴⁹ By the mid-1800s, states began passing legislation that established a maximum of eight to ten hours of work per day.⁵⁰ These statutes, however, failed to punish noncompliance.⁵¹ It was not until the early 1900s that the Supreme Court upheld legislation regulating hours worked.⁵² Throughout the next thirty years, several states attempted to pass minimum wage laws, but two Supreme Court decisions rejecting such legislation as violating substantive due process left wages free from both national and local regulations.⁵³

[A]pproximately 7 of 10 college graduates joining the labor force during [this] period can expect to enter jobs requiring [sic] a college degree . . .

In 1990, about 5.8 million college graduates were "educationally underutilized," that is, they were employed in positions that usually do not require a college degree or were unemployed at the time of the survey . . . [A] large number of graduates were in jobs that do not require a 4-year degree because they could not find college-level jobs.

Id.

⁴⁷ See *infra* notes 69-75 and accompanying text.

⁴⁸ See *infra* notes 49-75 and accompanying text.

⁴⁹ ROBERT N. COVINGTON & ALVIN L. GOLDMAN, LEGISLATION PROTECTING THE INDIVIDUAL EMPLOYEE 176 (1982).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *Bunting v. Oregon*, 243 U.S. 426, 438 (1917) (upholding limits on hours worked "in mills, factories, and manufacturing establishments" as a valid exercise of the police powers of the state); *Muller v. Oregon*, 208 U.S. 412, 423 (1908) (upholding legislation regulating maximum workday hours for women working in laundries).

⁵³ COVINGTON & GOLDMAN, *supra* note 49, at 177; see also *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936) (invalidating New York minimum wage law); *Adkins v. Children's Hospital*, 261 U.S. 525, 555 (1923) (finding a District of Columbia

In 1937, however, the Supreme Court, in *West Coast Hotel Co. v. Parrish*,⁵⁴ found that minimum wage laws were indeed compatible with due process of law. The Court was asked to consider the constitutionality of a Washington State law establishing minimum wages and maximum hours for female employees.⁵⁵ In upholding the wage and hour legislation, the Court concluded that a state legislature may consider the fact that women as a class receive less pay, have relatively weak bargaining power, and are ready victims for employer coercion.⁵⁶ Protecting women from coercive employers, the Court reasoned, is a proper exercise of a state's police power.⁵⁷

The Supreme Court's decision in *West Coast Hotel*, combined with widespread unemployment and the employer abuses of the Depression era, prompted Congress to enact federal legislation regulating hours worked and establishing minimum wages.⁵⁸ In an attempt to liberate America from the effects of the Depression, President Roosevelt and his advisors proposed legislation designed to improve living standards and to promote economic recovery.⁵⁹ On May 24, 1937, President Roosevelt urged Congress to enact legislation "to help those who toil in factory and on farm" to obtain "a fair day's pay for a fair day's work."⁶⁰ In 1938, after a year of legislative struggle over the form of the proposed bill, Congress enacted the Fair Labor Standards Act.⁶¹

Congress has amended the original Act, which embraces wage, hour, and child labor regulation, eight times, and has extended its coverage to over seventy-three million American workers.⁶² Coverage includes employees of enterprises engaged in interstate com-

minimum wage law violative of due process for its failure to consider the value of services rendered).

⁵⁴ 300 U.S. 379 (1937).

⁵⁵ *Id.* at 380.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ RONNIE STEINBERG, *WAGES AND HOURS: LABOR AND REFORM IN TWENTIETH-CENTURY AMERICA* 109-15 (1982); see JOSEPH E. KALET, *PRIMER ON WAGE & HOUR LAWS* 3 (1990) (stating that "the Great Depression led to widespread unemployment, the scarcity of jobs was perceived as an invitation to wage abuses by employers who knew that it was a 'buyer's market' for labor, particularly since many industries were not covered by either state or federal wage-hours laws."); see also Willis J. Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 *LABOR L.J.* 715 (1988) (citing the National Industrial Recovery Act, which Congress later repealed, as a strong precedent for the FLSA).

⁵⁹ Nordlund, *supra* note 58, at 719.

⁶⁰ Joseph V. Lane, Jr., *Is the Fair Labor Standards Act Fairly Construed*, 13 *FORDHAM L. REV.* 60, 65 (1944); see also Stephen G. Wood & Mary Anne Q. Wood, *The Fair Labor Standard Act: Recommendations to Improve Compliance*, 1983 *UTAH L. REV.* 529, 530 (1983) (noting that the FLSA is often called "the original anti-poverty law").

⁶¹ COVINGTON & GOLDMAN, *supra* note 49, at 179.

⁶² See UNITED STATES GENERAL ACCOUNTING OFFICE, *FAIR LABOR STANDARDS ACT: SELECTED ADMINISTRATIVE ISSUES* I (1988).

merce or in the production of goods for travel in interstate commerce.⁶³ The Act affects both private and public sector employees⁶⁴ and places a floor under wages and a ceiling over hours worked.⁶⁵ The FLSA also details various exemptions from coverage and provides procedures for the administration and enforcement of the Act.⁶⁶ The Act is silent, however, on many aspects of employment, including:⁶⁷ vacation, holiday, severance, and sick pay; length of vacation periods; overtime pay for weekends and holidays; raises; and fringe benefits.⁶⁸

B. The Legislative Intent Behind the Fair Labor Standards Act

In passing the Fair Labor Standards Act, Congress sought to promote "simple, humanitarian, objectives . . ." by establishing minimum wages, discouraging unusually long work weeks, and eliminating oppressive child labor.⁶⁹ Congress intended for the Act to be "the most comprehensive and pervasive federal statute in this area."⁷⁰ A Senate committee report describing the legislation

⁶³ *Id.* Congress first amended the Act in 1949 and increased the minimum wage from 40 cents to 75 cents an hour. *Id.* at 178. In 1961, Congress raised the minimum wage to \$1.25 and broadened the Act to include enterprises with gross annual revenue of \$1 million and at least one employee engaged in commerce or in the production of goods for commerce. In 1966, Congress again amended the FLSA. An equal pay for equal work standard known as the "Equal Pay Act" was added to protect female employees, and coverage was extended to state and local government employees. The 1966 amendments also extended coverage to some classes of federal employees, including employees of naval facilities and the Armed Forces. *Id.* at 178-79. Congress also lowered the annual volume of sales needed to bring an enterprise under the Act and modified some previous exemptions. These amendments also extended the FLSA to state and local hospitals and educational institutions. With its 1974 amendments, Congress brought virtually all federal and state employees under the Act's coverage. In 1977, new minimum wage rates were adopted. The 1985 amendments brought state and local government employees under the Act's coverage. KALET, *supra* note 58, at 4-5. The FLSA Amendments of 1989, the most recent amendments, raised the hourly minimum wage to \$4.25, established a subminimum training wage for teenage workers, increased the amount of tip credit that can be applied to a worker's minimum wage, and modified the definition of "covered enterprise" to include all institutions with a volume of business in excess of \$500,000 per year. *Id.*

⁶⁴ 29 U.S.C. § 203(d). The FLSA treats employees of public agencies as government employees. *Id.* For a discussion of the FLSA's application to state and local government workers, see Austin J. Murphy & Don Nickles, *The Fair Labor Standards Act Amendments of 1985*, 37 LABOR L.J. 67 (1986); Todd D. Steenson, *The Public Sector Compensatory Time Exception to the Fair Labor Standards Act: Trying to Compensate for Congress's Lack of Clarity*, 75 MINN. L. REV. 1804 (1991).

⁶⁵ 29 U.S.C. § 203.

⁶⁶ 29 U.S.C. §§ 211-19.

⁶⁷ See BETTY S. MURPHY & ELLIOT S. AZOFF, *GUIDE TO WAGE AND HOUR REGULATION* 3 (1987).

⁶⁸ *Id.*

⁶⁹ See RAYMOND S. SMETHURST & REUBEN S. HASLAM, *CASES ON FAIR LABOR STANDARDS ACT OF 1938 FOREWORD* (1949).

⁷⁰ KALET, *supra* note 58, at v.

stated that this law would not affect most employers' and employees' right to contract for their own terms of employment.⁷¹ The report further noted that "[i]t is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage."⁷² Similarly, the House Committee on Labor's report indicated that the House of Representatives also intended the legislation to affect only the most poorly paid and overworked employees.⁷³ Indeed, Congress intended the FLSA to ameliorate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well being . . ." without "substantially curtailing employment or earning power."⁷⁴ Despite the clear language of the congressional reports, the Department of Labor and most federal and state courts have ignored Congress' original, narrow intent and imposed mandatory minimum wage provisions on all individuals considered "employees" under the FLSA.⁷⁵

⁷¹ S. REP. NO. 884, 75th Cong., 1st Sess. 3 (1937). *But see* *Vadino v. A. Valey Eng'rs*, 903 F.2d 253, 265 (3rd Cir. 1990) (holding that FLSA provisions cannot be abridged by contract).

⁷² *See* S. REP. NO. 884, *supra* note 71, at 3-4.

⁷³ *See* H.R. REP. NO. 1452, 75th Cong., 1st Sess., at 9 (1937) (noting that the FLSA "only attempts in a modest way to raise the wages of the most poorly paid workers and to reduce the hours of those most overworked.").

⁷⁴ BELTON M. FLEISHER, MINIMUM WAGE REGULATION IN THE UNITED STATES 5 (1983) (quoting MINIMUM WAGE STUDY COMMISSION, REPORT OF THE MINIMUM WAGE STUDY COMMISSION 3 (1981)).

⁷⁵ *See infra* notes 130-73 and accompanying text. The FLSA has nevertheless proven to be somewhat ineffective as an anti-poverty device and has had the unintended effect of decreasing, rather than increasing, employment opportunities. *See* FLEISHER, *supra* note 74, at 77. Fleisher evaluates the minimum wage law's success as an "anti-poverty device" and concludes that minimum wage costs substantially outweigh any modest benefits that might result from their application. *Id.* at 10. Companies, in response to increases in the minimum wage, may be forced to fire some of their low-wage workers, with this reduction in employment leading to decreased production. *Id.* at 11. Employees who remain may receive fewer fringe benefits and work under less desirable conditions. Furthermore, these low-wage workers may have to obtain employment at establishments that are not subject to the FLSA, where they will receive subminimum wages. Fleisher also observes that these individuals may lose valuable workforce experience, thus reducing their future earning power and increasing their chances of falling into poverty later in life. Fleisher refers to a "preponderance of evidence . . . that the economy-wide and industry-specific disemployment effects of minimum wages on all minimum wage workers as well as on youth is to reduce average earnings, contrary to the intent of the law." *Id.* at 63-64. Fleisher concludes that federal minimum wage legislation has failed as an anti-poverty device, and suggests that Congress should freeze the current minimum wage permanently. *Id.* at 77.

Minimum wage legislation may produce even more negative effects in the years ahead. *See* BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 8 (1992). In 1990, 125 million workers comprised the civilian labor force. The DOL projects that this figure will increase to 151 million individuals by the year 2005. This increase amounts to slightly more than one-half of the increase that

C. The Establishment of the Employer-Employee Relationship

The Fair Labor Standards Act defines an "employee" as "any individual employed by an employer."⁷⁶ "Employ" is defined as "to suffer or permit to work."⁷⁷ The Act defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee."⁷⁸ When an employer "suffers" or "permits" another to work, an employment relationship under the FLSA results, regardless of the parties' intentions.⁷⁹

In determining whether an employer-employee relationship exists within the meaning of the Act, courts look to the particular facts surrounding the relationship.⁸⁰ For example, courts employ an "economic realities" test to determine whether an individual is an "employee" or an "independent contractor" exempt from the Act's provisions.⁸¹ Relevant factors include the degree of employer control over the work performed, the employee's opportunity for profit and loss, the employee's investment in equipment and materials used to perform the work, the skill required to perform the work, the duration of the working relationship, and the level of service

the United States experienced from 1975-90. *Id.* at 10. In 1990, the poverty rate remained disturbingly high, even after a seven-year economic expansion. *See* SAR A. LEVITAN & FRANK GALLO, *WORKFORCE STATISTICS: DO WE KNOW WHAT WE THINK WE KNOW—AND WHAT SHOULD WE KNOW?* vii (1989). Throughout this period of economic expansion, wage and productivity growth remained sluggish, and skill deficiencies plagued many workers. *Id.* at 1. Because the FLSA is proving ineffective as an anti-poverty device, it is unwise for federal courts and the DOL to construe the Act narrowly and prevent beneficial volunteer activities that increase both employer productivity and employee skills. *See also* AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, *MINIMUM WAGE LEGISLATION 1* (1977) (exploring the "perverse effect" that minimum wage legislation may have on the distribution of income).

⁷⁶ 29 U.S.C. § 203(e)(1).

⁷⁷ 29 U.S.C. § 203(e)(2)(B); *see* *Hill v. U.S.*, 751 F.2d 810, 812 (6th Cir. 1984), *cert. denied*, 474 U.S. 817 (1985) (defining "work" as "physical or mental exertion for employer's benefit as well as standby or waiting time.").

⁷⁸ 29 U.S.C. § 203(d). The definition of employer "includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization." *Id.*

⁷⁹ *See* MURPHY & AZOFF, *supra* note 67, at 4; 29 U.S.C. § 203(e)(4)(A)(i)-(ii) (Supp. 1992) (excluding from the FLSA's definition of employee "any individual who volunteers to perform services for a public agency which is a State, political subdivision of a State, or an interstate governmental agency" if the individual receives nominal or no compensation for these services, and these services are not the same as are required by her paid employment at the agency). *Id.* Employer coverage under the FLSA is determined by the 1989 amendment establishing a \$500,000 annual gross sales threshold. *Id.* If a firm has less than \$500,000 in annual gross sales, the firm's employees may still be subject to the mandatory minimum wage and overtime requirements of the Act. KALET, *supra* note 58, at 19. Public agencies, hospitals, and health care facilities are not subject to this dollar volume test and therefore are always subject to the Act's provisions, even if their gross income is less than \$500,000. *Id.*

⁸⁰ *See* MURPHY & AZOFF, *supra* note 67, at 4.

⁸¹ *Id.* at 4-5.

provided to integral aspects of the employer's business.⁸² Similarly, the DOL examines all facts and circumstances of a particular case to determine whether or not an individual is an employee or is otherwise covered by an exception to the Act.⁸³

D. The Exceptions

The FLSA maintains a complex scheme of exceptions to the Act for various volunteer services.⁸⁴ Exceptions exist for certain employees in specified industries, as well as for employees having specified responsibilities. Congress created these various exceptions with the belief that coverage of such employees is inconsistent with the FLSA's purpose.⁸⁵ In determining whether an individual is a "volunteer" rather than an "employee" under the Act, the DOL considers who receives the benefits of the individual's work, how long it takes to render the services, and whether the services are typical volunteer activities.⁸⁶ "Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered as employees of the religious, charitable and similar nonprofit corporations which receive their services."⁸⁷ Examples of such volunteers include students volunteering at nursing homes and hospitals, parents assisting at their children's schools, and camp counselors participating in youth programs.⁸⁸ The DOL reasons that these duties do not establish an employer-employee relationship because the volunteer does not expect compensation for her services and is working toward

⁸² *Id.* at 5 (citing *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 n.14 (9th Cir. 1979)).

⁸³ *Id.* at 6.

⁸⁴ Some exceptions suspend only the minimum wage and overtime requirements, while others suspend the minimum wage, overtime, equal pay, and child labor requirements. KALET, *supra* note 58, at 25-26.

⁸⁵ *Id.*

⁸⁶ *Id.* "Exemptions are figured on a workweek basis. Varying duties may mean that an employee is exempt in one week and not the next." *Minimum Wages and Overtime Pay*, 235 LAB. L. REP. 11 (CCH) (April 5, 1991).

⁸⁷ EMPLOYMENT RELATIONS SUPPLEMENT, *supra* note 2, at 6.

⁸⁸ *Id.* at 6-7. Apart from these narrow exemptions, the DOL does not otherwise distinguish between for-profit and nonprofit corporations; therefore, the same stringent rules apply to both corporate forms. See S. Rep. N. 1487, 89th Cong., 2d Sess. 10 (1966), reprinted in 1966 U.S.C.A.N. (80 Stat.) 3002, 3010 (stating that, because nonprofit corporations are engaged in competition with for-profit corporations coverage of a nonprofit corporation furthers the purpose of the FLSA to eliminate unfair competition in interstate commerce); see also 29 C.F.R. § 779.214 (1991) (defining "business purpose" as including commercial activities performed for charitable organizations). On two occasions, Congress rejected proposals to exempt nonprofit organizations from FLSA coverage. See 106 CONG. REC. I6703-04 (1960) and 107 CONG. REC. 6254-55 (1961).

humanitarian objectives.⁸⁹ An employee is not displaced when these services are performed, and the donated services are “not considered compensable ‘work.’”⁹⁰

Also exempt from the FLSA’s definition of “employee” 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 in schools, hospitals and other institutions operated by the church or religious order.”⁹¹ Because these individuals expect no compensation and are working exclusively for “their own advantage,” they fall outside of the Act.⁹²

The DOL has also carved out exceptions for individuals with disabilities, trainees, and student learners in order to “prevent curtailment of opportunities in employment.”⁹³ For example, the FLSA allows an employer to apply to the DOL for a “special minimum wage” certificate entitling it to pay an individual with a disability a subminimum wage.⁹⁴ In determining whether to certify the employer to pay a subminimum wage, the DOL considers whether an individual’s skills are commensurate with the minimum wage.⁹⁵ If the individual’s earning capacity is not impaired in relation to the work performed, the DOL will deny certification and require the employer to pay the individual at least the applicable minimum wage.⁹⁶ If the individual’s productivity is inferior to that of a nondisabled worker performing the same type of work, the DOL may authorize the employer to pay a special minimum wage that is commensurate with the individual’s skills.⁹⁷

Another exception to the Act exists for “trainees.”⁹⁸ Six criteria are used to determine whether an individual is a trainee and thus exempt from the FLSA wage provisions.⁹⁹ In order to be consid-

⁸⁹ EMPLOYMENT RELATIONS SUPPLEMENT, *supra* note 2, at 6.

⁹⁰ *Id.*

⁹¹ *Id.* at 7.

⁹² *Id.* If these same individuals seek employment with “a State or secular institution,” an employer-employee relationship is established, and these individuals must be compensated regardless of their religious objectives. *Id.*

⁹³ *Minimum Wages and Overtime Pay*, *supra* note 86, at 18.

⁹⁴ 29 C.F.R. § 525 (1989).

⁹⁵ 29 C.F.R. § 525.3(i) (1989).

⁹⁶ *Id.*

⁹⁷ *Id.* §§ 525.3(i), 525.12. In considering whether or not to certify an employer, the DOL considers the nature and extent of the individual’s disability, the prevailing rates of pay for experienced individuals who are not disabled, the output of both the individuals with disabilities and those without, and the wage rates that the employer is requesting in comparison to the wage rates paid to individuals without disabilities for comparable work. § 525.12.

⁹⁸ EMPLOYMENT RELATIONS SUPPLEMENT, *supra* note 2, at 4-5.

⁹⁹ *Id.*

ered a trainee and not an employee under the Act, an individual must meet all six of the following criteria:

- (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) the training is for the benefit of the trainees . . . ;
- (3) the trainees . . . do not displace regular employees, but work under their close observation;
- (4) the employer that provides the training derives no immediate advantage from the activities of the trainees . . . ; and on occasion his operations may actually be impeded;
- (5) the trainees . . . are not necessarily entitled to a job at the conclusion of the training period; and,
- (6) the employer and the trainees . . . understand that the trainees . . . are not entitled to wages for the time spent in training.¹⁰⁰

"Student learners" also fall under an FLSA exception to the definition of "employee."¹⁰¹ The implementing regulations define a "student learner" as "a student who is receiving instruction in an accredited school, college or university and who is employed on a part-time basis, pursuant to a bona fide vocational training program."¹⁰² When hiring a student learner under this FLSA exception, the employing agency must apply for a special certificate entitling the employer to pay a subminimum wage.¹⁰³ The Department of Labor exempts student learners from the FLSA's requirements because it views the learner as deriving an educational benefit from the work, which may lead to future, gainful employment.¹⁰⁴

As a basic rule, individuals employed in a "bona fide executive, administrative, or professional capacity (including . . . academic administrative personnel or teacher[s] . . .)" and outside sales people are also exempt from the minimum wage and overtime requirements of the Act if they meet the tests set forth for each category.¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ 29 C.F.R. § 520.2(a) (1991).

¹⁰² *Id.* § 520.2(a).

¹⁰³ *Id.* § 520.3(a).

¹⁰⁴ See 29 U.S.C. § 214(a) (Supp. 1992).

¹⁰⁵ 29 U.S.C. § 213(a)(1) (Supp. 1992); see also MURPHY & AZOFF, *supra* note 67, at 11-12 (describing the criteria that individuals must satisfy in order to qualify as executive employees, administrative employees, and professional employees); *Minimum Wages & Overtime Pay*, *supra* note 86, at 11-15 (describing the specific duties, responsibilities, and salary standards for the three "white collar" categories). Other exceptions include individuals employed at amusement parks or seasonal recreational establishments, fishermen, persons working for a newspaper whose circulation is under four thousand, and telephone operators. *Id.* at 11. Also excluded are seamen, babysitters, outside buyers of dairy products, and employees of common carriers. *Id.* at 11-12. Announcers, news editors, and chief engineers at a radio or television station in a town with a population of under 100,000 residents, unless the town is part of a larger metropolitan area, or a town that has under 25,000 residents and is at least 40 airline miles from a major metropoli-

These are known as the “white-collar exemptions.”¹⁰⁶ Individuals are exempt from the Act’s requirements if they allocate less than forty percent of their weekly hours “to activities not directly or closely related to the performance of executive or administrative activities.”¹⁰⁷

The DOL also exempts independent contractors from FLSA coverage because the unusual degree of independence enjoyed by the contractor is contrary to an employer-employee relationship.¹⁰⁸ The DOL applies an “economic realities” test that considers whether the worker is economically dependent for her livelihood upon the employer to whom she renders service.¹⁰⁹ If the DOL finds a very low degree of economic dependence, the DOL will usually deem the worker an independent contractor who is thus exempt from the Act’s provisions.¹¹⁰ All other non-exempt individuals¹¹¹ are assumed to be employees covered by the Act.¹¹² The DOL and the federal courts strictly construe the Act’s exemptions and resolve any doubt in favor of employee coverage.¹¹³

tan city, are exempt as well. 29 U.S.C. § 213 (b)(9) (1988). Persons engaged in the transportation industry, some agricultural workers, taxicab drivers, volunteer firemen, individuals employed in domestic service, and operators of movie theaters are also exempt. *Id.* § 213(a)-(b). For more information on the FLSA’s exemptions for agriculture workers, see Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649 (1989); Phillip L. Kunkel, *American Agricultural Law Association Symposium*, 12 HAMLINE L. REV. 477 (1989).

¹⁰⁶ KALET, *supra* note 58, at 26.

¹⁰⁷ 29 U.S.C. § 213(a)(1) (1988).

¹⁰⁸ *Id.* § 213(a).

¹⁰⁹ KALET, *supra* note 58, at 32; see CHARLES G. BAKLAY, JR. & JOEL M. GROSSMAN, *THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS* 16-21 (1991) (describing the application of the “economic realities” test to independent contractors).

¹¹⁰ KALET, *supra* note 58, at 32; see *Huntley v. Grunn Furniture Co.*, 79 F. Supp. 110, 114 (W.D. Mich. 1948) (holding that the Act’s definition of employee does not include an individual over whose hours the employer has no control and has no obligation to pay wages).

¹¹¹ See *Minimum Wages and Overtime Pay*, *supra* note 86, at 11-12. Other individuals are exempt from the full overtime requirements of the FLSA. Such individuals include employees of certain motor carriers, some employees of railroads, express companies, water carriers, and air carriers. *Id.* at 12. Partial overtime pay exemptions are extended to various employees, including law enforcement and fire fighting personnel, private hospital and nursing home employees, wholesale petroleum distributors, some union members pursuant to their employment contracts, and commission employees of retail service establishments. *Id.*

¹¹² See *Powell v. United States Cartridge Co.* 339 U.S. 497, 517 (1950) (holding that, in the absence of an express exemption, courts must assume that Congress did not intend to exclude such individuals); see also *Bowie v. Gonzales*, 117 F.2d 11, 16 (1st Cir. 1941) (holding that exemptions must not be construed beyond their literal interpretation).

¹¹³ See *Calaf v. Gonzalez*, 127 F.2d 934 (1st Cir. 1942).

E. Enforcement of the Fair Labor Standards Act

In order to enforce the Act's mandatory minimum wage and overtime provisions, Congress created detailed administrative and enforcement procedures for the FLSA.¹¹⁴ The President authorizes the Secretary of Labor to administer the Act.¹¹⁵ The Secretary of Labor, through her designated representative, the Wage and Hour Division,¹¹⁶ investigates employment practices to determine FLSA violations.¹¹⁷

Employers who are subject to the Act's provisions must keep records of wages.¹¹⁸ If a violation is alleged, the employer must submit the records to the Secretary of Labor "as necessary or appropriate for the enforcement of the provisions of this [Act]."¹¹⁹ Most employers must also "post a notice in the workplace informing employees of the applicability of the [Act's] minimum wage and overtime provisions."¹²⁰ One or more employees, for themselves or for those similarly situated, may bring suit against their employer for violations of the Act in a federal or state court of competent jurisdiction.¹²¹ Alternatively, the Secretary of Labor may bring suit in fed-

¹¹⁴ 29 U.S.C. §§ 204-218 (1988).

¹¹⁵ 29 U.S.C. § 204(a) (1988).

¹¹⁶ See EMPLOYMENT RELATIONS SUPPLEMENT, *supra* note 2, at 1. The Wage and Hour Division administers the Act "with respect to private employment, State and local government employment, and Federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission and the Tennessee Valley Authority. The Office of Personnel Management is responsible for administering the Act with regard to all other Federal employees." *Id.*; see also UNITED STATES GENERAL ACCOUNTING OFFICE, FAIR LABOR STANDARDS ACT: SELECTED ADMINISTRATIVE ISSUES (1988) [hereinafter GAO SELECTED ISSUES] (providing specific information regarding background and statistical information about the DOL's enforcement of the FLSA).

¹¹⁷ 29 U.S.C. § 211(a) (1988). "While most investigations originate from complaints, Wage and Hour also initiates its own investigations, known as directed investigations." GAO SELECTED ISSUES, *supra* note 116, at 6 n.1. In 1987, the Wage and Hour divisions conducted 42,367 FLSA investigations. *Id.* at 6. In 1984, the DOL conducted over 73,000 compliance investigations and disclosed \$130 million in unpaid wages. See *Minimum Wages & Overtime Pay*, 688 LAB. L. REP. 3 (CCH) (May 3, 1985). For a discussion of early employer violations of the FLSA, see Albert B. Gerber & S. Harry Galfand, *Employees' Suits under the Fair Labor Standards Act*, 95 U. PA. L. REV. 505 (1946).

¹¹⁸ 29 U.S.C. § 211(c) (Supp. 1992).

¹¹⁹ *Id.* The employer is also required to keep information on employees who are exempt from the minimum wage and overtime provisions of the FLSA. 29 C.F.R. § 516.11 (1991). If all of the employer's employees are exempt from the FLSA, however, the employer is not required to keep the records required by the Act. 29 C.F.R. § 516.1 (1991).

¹²⁰ MURPHY & AZOFF, *supra* note 67, at 58.

¹²¹ 29 U.S.C. § 216(b) (Supp. 1992). MURPHY & AZOFF, *supra* note 67, at 61. Although class action suits cannot be brought under the Act, employees may bring "collective actions" in which other "employees . . . 'opt in' to be bound by the judgment." 29 U.S.C. § 216(b) (Supp. 1992). If an employee chooses to become a "party plaintiff" to a suit, she must file a decree of consent with the court in which the action is brought. *Id.*

eral court seeking civil remedies, subject to a two-year statute of limitations,¹²² for violations of the Act's wage and hour provisions.¹²³ If the Secretary of Labor files a complaint seeking injunctive relief for violations of the minimum wage or overtime provisions, an employee's right to bring suit is terminated.¹²⁴ The Secretary of Labor may also seek back wages for noncompliance with the Act.¹²⁵ Damages awarded include reasonable attorneys' fees and costs.¹²⁶

Upon conviction for violating the minimum wage and overtime provisions of the FLSA, an employer will "be subject to a fine of not more than \$10,000, or to imprisonment for not more than six months, or both."¹²⁷ The employer is also liable to the affected employee for unpaid minimum or overtime wages, as well as liquidated damages.¹²⁸ An employer who unlawfully discharges or discriminates against an employee for exercising rights covered by the Act is liable for legal and equitable relief, "including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages."¹²⁹

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CASE LAW INTERPRETING THE FLSA

In the 1947 case of *Walling v. Portland Terminal Co.*,¹³⁰ the Supreme Court considered whether railroad workers taking a course in practical training were employees under the FLSA. The railroad company required prospective yard brakeman to complete a week-long, unpaid training course before it would accept an appli-

¹²² *Id.* § 216.

¹²³ 29 U.S.C. § 217. The 1963 amendments that require equal pay for equal work (the Equal Pay Act of 1963, 29 U.S.C. § 206) are enforced by private parties.

¹²⁴ 29 U.S.C. § 216(c). However, if an FLSA cause of action arises from a "willful violation," a three-year statute of limitations applies. *See* 29 U.S.C. § 255(a).

¹²⁵ 29 U.S.C. § 216(c).

¹²⁶ *Id.* § 216(b). From 1938 until 1987, the Wage and Hour Division of the Department of Labor took over 2.6 million compliance actions. *See* Nordlund, *supra* note 58, at 727. Between 1946 and 1987, damages awarded for back wages exceeded \$2.5 billion. *Id.* at 728. Between 1951 and 1987, over 6.6 million employees were owed back pay for minimum wage violations, and 8.5 million workers were owed back pay due to overtime violations. *Id.* at 727.

¹²⁷ 29 U.S.C. § 216(a). A 1980 study estimated that the noncompliance rate for employers is five percent. *See* Nordlund, *supra* note 58, at 728. *See also* JOHN A. HUGHES, OPERATING UNDER THE FEDERAL WAGE-HOUR LAWS 41 (1968) (stating that only a "small percentage of violations result from an honest disagreement by an employer, whether he is covered by the Fair Labor Standards Act . . . because he believes that his employees are not covered by the act in question or if so, that they are being paid properly.").

¹²⁸ 29 U.S.C. § 216(b) (Supp. 1992).

¹²⁹ *Id.*

¹³⁰ 330 U.S. 148 (1947).

cation for employment.¹³¹ The Court's examination of the FLSA's language and legislative history revealed that imposing a minimum wage on persons with little vocational experience defeated a primary purpose of the Act: "to increase opportunities for gainful employment."¹³²

The Court concluded that the Act's definition of " 'employ' . . . was obviously not intended to stamp all . . . employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another."¹³³ The Court stated that an individual "who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit" was not an employee covered by the Act if the individual's work served only the individual's own interests.¹³⁴ The Supreme Court further stated that Congress did not intend the Act to penalize organizations for providing free services and training.¹³⁵ A major factor in the Court's decision was that the employer received "no 'immediate advantage' from any work done by trainees."¹³⁶ The Court thus articulated an exclusive benefits test: if an individual worked "solely" for her personal purpose or pleasure and the employer received no "immediate advantage" from the individual's work, the worker was not an "employee" under the Act.¹³⁷ In refusing to exempt all individuals receiving training, the Court hoped to avoid wholesale evasions that might result from a blanket exemption.¹³⁸

One year after *Walling*, a federal district court in *McComb v. Consolidated Fisheries Co.*¹³⁹ took an even narrower view of the exemptions. The court considered whether the FLSA applied "to certain employees such as a cook, a watchman, maintenance men and certain office employees of a corporation."¹⁴⁰ In concluding that these individuals were employees, the court stated that a strict construction of the Act's exemptions was necessary to ensure liberal cover-

¹³¹ *Id.* at 149.

¹³² *Id.* at 151.

¹³³ *Id.* at 152. The Court interpreted section 14 of the Act as empowering the DOL with the discretion to issue employers certificates to pay student learners, trainees, and handicapped workers subminimum wages. *Id.* at 151.

¹³⁴ *Id.* at 152.

¹³⁵ *Id.* at 153.

¹³⁶ *Id.* The Court further stated that the "Act's purpose as to wages was to ensure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage." *Id.* at 152.

¹³⁷ *Id.* at 153.

¹³⁸ *Id.*

¹³⁹ 75 F. Supp. 798 (D. Del. 1948), *aff'd* 174 F.2d 74 (3d Cir. 1949).

¹⁴⁰ *Id.* at 799-800.

age of the Act “so as to embrace every employer or employee coming reasonably within its scope.”¹⁴¹

In 1971, the United States Court of Appeals for the Fourth Circuit interpreted the exceptions more broadly. In *Isaacson v. Penn Community Services, Inc.*,¹⁴² the court considered whether a conscientious objector working at a nonprofit corporation in lieu of military service was subject to the minimum wage and hour provisions of the FLSA.¹⁴³ The conscientious objector was receiving a subsistence wage for the work he performed in a position that the nonprofit corporation created specifically for volunteers “performing alternative service as conscientious objectors.”¹⁴⁴ Applying the *Walling* rationale, the court found that, since the nonprofit corporation was deriving no “immediate advantage” from the objector’s work, the objector was not subject to the provisions of the Act.¹⁴⁵

In finding that the corporation received no “immediate advantage,” the court created a distinction in the Act’s applicability to nonprofit and for-profit corporations. While it could not be said that the nonprofit corporation “received no benefit from [the conscientious objector’s] services,” the organization’s corporate purpose was beneficial to the public at large, albeit in “a different nature than that of a for-profit enterprise.”¹⁴⁶ In a nonprofit organization, such as a hospital, museum, or school, where individuals often volunteer in well known capacities, “the Wage-Hour Administration has deemed such persons not employees covered by the Act, despite the fact that no single exemption . . . in the Act excludes them.”¹⁴⁷ The court further stated that the principal beneficiary of the relationship was the conscientious objector and not the nonprofit organization.¹⁴⁸

The court thus qualified the Supreme Court’s reasoning in *Walling*. The analysis shifted from who received the *exclusive* benefit of the individual’s work to who received the *principal* benefit.¹⁴⁹ The Fourth Circuit justified this change by arguing that the employment relationship in *Isaacson* was substantially different from that in *Wall-*

¹⁴¹ *Id.* at 800; *see also* *Dole v. Mr. W Fireworks, Inc.*, 889 F.2d 543, 546 (5th Cir. 1990) (holding that courts should construe exemptions to the Act narrowly and that the employer should have the burden of proof), *cert. denied*, 495 U.S. 929 (1990); *Luther v. Z. Wilson, Inc.*, 528 F. Supp. 1166 (S.D. Ohio 1981) (holding that the Act must be narrowly construed).

¹⁴² 450 F.2d 1306 (4th Cir. 1971).

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1307.

¹⁴⁵ *Id.* at 1309.

¹⁴⁶ *Id.* at 1309-10.

¹⁴⁷ *Id.* at 1309.

¹⁴⁸ *Id.* at 1310.

¹⁴⁹ *Id.*

ing. While Penn Community Services was a nonprofit enterprise whose primary corporate purpose was to further the public good, Portland Terminal's primary corporate purpose was profit maximization.¹⁵⁰ Isaacson's "principal benefit" was an "opportunity to perform work of national importance to his liking."¹⁵¹

Nevertheless, in the more recent case of *Tony & Susan Alamo Foundation v. Secretary of Labor*,¹⁵² the Supreme Court failed to distinguish between nonprofit and for-profit corporations, and again applied *Walling's* exclusive benefits test in considering whether associates who worked at a nonprofit religious foundation where they received food and shelter were employees covered by the FLSA.¹⁵³ Most of the Foundation's employees were former drug addicts, derelicts, and criminals. The Foundation fostered the rehabilitation of these individuals by employing them in the "operation of a number of commercial businesses, which include[d] . . . construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy."¹⁵⁴ The Court stated that, since the FLSA contains "no express or implied exception for commercial activities conducted by religious or other nonprofit organizations," activities in a nonprofit setting require compensation if individuals perform them for a "business purpose."¹⁵⁵ The Court held that a business purpose exists "where such organizations engage in ordinary commercial activities, such as operating a printing and publishing plant, the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise."¹⁵⁶

¹⁵⁰ *Id.* at 1309.

¹⁵¹ *Id.* at 1310.

¹⁵² 471 U.S. 290 (1985). See also *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954) (holding that the FLSA applies to a church's employees who print and mail religious literature), *cert. denied*, 347 U.S. 1013 (1954).

¹⁵³ 471 U.S. at 290. "The Statute contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations, and the agency charged with its enforcement has consistently interpreted the statute to reach such businesses." *Id.* at 296-97 (footnote omitted). The Alamo Foundation's purpose for incorporation was to render assistance to the sick and needy. *Id.* at 292. For a discussion of *Tony & Susan Alamo*, see Terry A. Bethel, *Recent Labor Law Decisions of the Supreme Court*, 45 MD. L. REV. 179, 235-39 (1986).

¹⁵⁴ 471 U.S. at 292 (footnote omitted).

¹⁵⁵ *Id.* at 296-97 (footnote omitted).

¹⁵⁶ *Id.* at 297 (quoting 29 C.F.R. § 779.214 (1984)). The following Senate Committee Report, which discusses the "business purpose" requirement, was rejected.

[T]he definition would not include eleemosynary, religious, or educational organizations not operated for profit. The key word in the definition which supports this conclusion is the word "business." Activities of organizations of the type referred to, if they are not operated for profit, are not activities performed for a "business" purpose.

Id. at 297 n.14 (quoting S. REP. NO. 1744, 86th Cong., 2d Sess. 28 (1960)). In 1961, this same amendment was proposed and again rejected. *Id.* at 298 n.17. See also *Souder v.*

Nevertheless, the Court stated that, even though an enterprise falls under the Act's coverage, it does not necessarily follow that the Act covers all of the enterprise's workers.¹⁵⁷ The Court, citing *Wall-ing*, stated that an individual who receives training on the premises of another and works exclusively for her own advantage, such as a student or a trainee, is exempt from the Act's minimum wage and overtime provisions.¹⁵⁸ Although the petitioners intended to receive no monetary compensation for their work, the Court held that the individuals were nevertheless performing business activities which contemplated receipt of food and shelter, benefits which were "wages in another form."¹⁵⁹ Stating that the Act "does not require the payment of cash wages," the Court held the FLSA applicable.¹⁶⁰ Even if the individuals received cash wages, the Court stated that nothing in the Act prevents them from donating these wages to the Foundation.¹⁶¹

Further, the Court stated that even vehement protestations of workers that they are not employees and do not "expect [] compensation" are not dispositive of whether the Act covers the individuals.¹⁶² An employee cannot waive any of the Act's provisions.¹⁶³ According to the Court, the Act's very purpose requires courts to apply it to workers wishing to forego its protection.¹⁶⁴ Indeed, "[i]f an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."¹⁶⁵ The Court, however, stated that "ordinary volunteerism," volunteerism that does not "contemplate compensation," such as driving the elderly to work or serving at soup kitchens, would remain immune from the provisions of the Act.¹⁶⁶ Any "business" or

Brennan, 367 F. Supp. 808 (D.C. Cir. 1973) (holding that mental health institution must pay the minimum wage to their patients who work for purposes of rehabilitation and treatment if they confer an economic benefit on the institution). For a critique of *Souder*, see James G. Blaine & John H. Mason, *Application of the Fair Labor Standards Act to Patient Work Programs at Mental Health Institutions: A Proposal for Change*, 27 B.C. L. REV. 553 (1987).

¹⁵⁷ 471 U.S. at 300.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 301.

¹⁶⁰ *Id.* at 303-04.

¹⁶¹ *Id.*

¹⁶² *Id.* at 301-02.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 302. The Court also stated that "[s]uch exceptions to coverage would affect many more people than those workers directly at issue in this case and would be likely to exert a general downward pressure on wages in competing businesses." *Id.*

¹⁶⁶ *Id.* at 302-03.

"commercial activities" conducted at nonprofit organizations, however, necessarily fall under the Act's mandatory minimum wage and overtime provisions.¹⁶⁷

In 1989, the United States Court of Appeals for the Fourth Circuit, in *McLaughlin v. Ensley*,¹⁶⁸ considered whether trainees at a snack food distributor were entitled to compensation under the FLSA for a week-long orientation program during which they accompanied and assisted experienced routemen.¹⁶⁹ In holding that the trainees were employees within the meaning of the Act, the court applied a principal benefits test by asking whether the trainee or the employer was the principal beneficiary of the work.¹⁷⁰ The court's application of this test weighed the advantages to the employee against the advantages to the employer. The court determined that the distributor received more advantage than the employees from the work because the employees had greater job-specific skills after this training period.¹⁷¹ Furthermore, the employer was able to review job performance for his regular, paid, full-time employees that received help on their routes.¹⁷² While the Fourth Circuit ruling somewhat relaxed the test implemented in *Walling* and reiterated in *Tony & Susan Alamo*, the Supreme Court has decided no cases on point since this decision.

Although decisions subsequent to *Walling* have more narrowly interpreted the meaning of "employee" under the Act, allowing more individuals to volunteer, the test nevertheless remains far too stringent and prevents many individuals from volunteering valuable services, even at nonprofit organizations. Whenever an individual is performing a business activity at a covered enterprise, the employer must compensate the individual for services rendered, regardless of her desire to receive no monetary compensation.¹⁷³

¹⁶⁷ *Id.* at 302.

The Solicitor General states that in determining whether individuals have truly volunteered their services, the Department of Labor considers a variety of factors, including the receipt of any benefits from those for whom the services are performed, whether the activity is less than full-time occupation, and whether the services are of the kind typically associated with volunteer work. The Department has recognized as volunteer services those of individuals who help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth.

Id. at 303 n.25.

¹⁶⁸ 877 F.2d 1207 (4th Cir. 1989).

¹⁶⁹ *Id.* at 1208.

¹⁷⁰ *Id.* at 1209.

¹⁷¹ *Id.* at 1210.

¹⁷² *Id.*

¹⁷³ See *supra* notes 152-67 and accompanying text.

IV

HYPOTHETICALS ILLUSTRATING THE PROBLEM

Federal courts' and the DOL's interpretations of the FLSA have ignored Congress's original intent to protect only the most underpaid and overworked employees who are the targets of employer coercion, and have instead applied the Act's mandatory minimum wage and overtime provisions to all individuals who do not fall squarely within the Act's exceptions. As a result, individuals volunteering to perform business activities at both nonprofit and for-profit enterprises are prohibited from working without compensation, despite their desire not to be compensated. The following hypotheticals will help illustrate the problem with the current state of the law.

Hypothetical #1

A nonprofit organization hires Patricia, an individual with a disability, as a part-time volunteer. In this capacity, Patricia is able to learn office skills through data entry, word processing, filing, research, writing, and other secretarial and clerical work. The nonprofit organization intends to train Patricia for ten hours per week for one year. Patricia will acquire skills that she hopes will make her more marketable in the future if she decides to obtain full-time, paid employment. She does not expect compensation for her volunteer work and does not need the money for her livelihood. Unfortunately, the nonprofit organization does not have sufficient funds to pay Patricia for her services. Therefore, the organization applies to the DOL for a certificate entitling it to pay Patricia a subminimum wage. Because Patricia's skills are at a level commensurate with the minimum wage, the DOL denies the organization certification. The nonprofit organization has no choice but to release Patricia from her volunteer position.

Hypothetical #2

Paul, a computer programmer, recently received a lifesaving kidney transplant through the Kidney Foundation and now wants to aid individuals in similar circumstances. Paul, however, is unable to make a monetary contribution to the Foundation because of his large, outstanding medical bills. Therefore, he offers to install an updated computer system and serve as a part-time office analyst for the Foundation. Because of the depressed state of the economy and employers' beliefs that his disability will hinder his job performance, he is unable to find compensable, part-time work elsewhere. As a result, he decides to volunteer his efforts during his recuperation until he can seek full-time employment. The Kidney Foundation regrettably advises Paul that, although he may make a *monetary* donation, the Department of Labor will prohibit him from donating his

time in a productive capacity. Paul therefore remains idle throughout his recovery.

Hypothetical #3

Judy recently graduated with a communications degree from a reputable university and wants to pursue a career in broadcasting at a television station. After circulating her resume widely, she is unable to obtain employment in this field. Therefore, she takes a sales position at a local car dealership. She then offers to volunteer at a television station so that she can acquire skills, make some connections, and have relevant experience to aid her in acquiring future full-time employment in the television industry. The television station is unable to fund a position for Judy and must decline her offer because she is no longer a student and therefore does not fall under the student exception to the Act. Judy continues to work at the car dealership, where she receives no relevant work experience to fulfill her career aspirations.

No current exemption to the FLSA allows the individuals in the three hypotheticals to volunteer their services. First, an application of the six "trainee" criteria to these situations compels the conclusion that these individuals would be employees and not trainees.¹⁷⁴ The work to be performed is not typical of vocational school instruction. Although the individuals might not work at the same speed as the organizations' full-time employees, the organizations would nevertheless receive some benefit and productive output from the additional work. Second, the individuals would not serve as independent contractors because their work would constitute an integral part of the employers' businesses and the employers would be the providers of all material and equipment used.¹⁷⁵

Supreme Court decisions exploring this issue state that the employer must receive no "immediate advantage" from volunteer work.¹⁷⁶ Since all three organizations would receive a high degree of productive output from the volunteers, the federal courts and the DOL would most likely deem these individuals "employees" subject to the Act's mandatory minimum wage and overtime provisions. After the *Tony & Susan Alamo* decision, the federal courts and the DOL are even more likely to deem these individuals "employees" for purposes of the FLSA because the Court, in that case, added a second prong to its exclusive benefits test.¹⁷⁷ Not only must the employer receive no immediate advantage from the work performed, but the work performed must not be a "business activity." Since the three

¹⁷⁴ See *supra* notes 98-100 and accompanying text.

¹⁷⁵ See *supra* notes 81-82 and accompanying text.

¹⁷⁶ See *supra* notes 130-38, 152-67 and accompanying text.

¹⁷⁷ See *supra* notes 152-67 and accompanying text.

individuals would perform commercial business activities, the employers would be required to compensate these individuals for the work. For the purpose of the statute, it is immaterial that these workers consider themselves volunteers and do not expect or even want monetary compensation.¹⁷⁸

Nevertheless, the refusal to allow these individuals to volunteer their services goes beyond the protection contemplated by Congress in passing the Act. In recommending passage of the Act, the Senate Committee professed its desire not to invade the rights of employers and employees to fix the terms of their employment contracts, if the parties are generally able to bargain over the terms of the contract.¹⁷⁹ Both the Senate and the House stated that the FLSA was drafted to protect only the most poorly paid and overworked workers.¹⁸⁰ The DOL and the federal courts, however, have continued to expand the Act far beyond its intended reach. As a result, those individuals who are both competent to contract with their prospective employers and not dependent on monetary compensation for their livelihood are prevented from performing productive work in a volunteer capacity and must forego opportunities to receive valuable work experience, despite the complete absence of employer coercion.

In *Walling*, the Supreme Court cited another aspect of Congress' intent in passing the Act: "to increase opportunities for gainful employment."¹⁸¹ By subjecting these individuals to the minimum wage and overtime provisions of the Act, neither the Supreme Court nor the DOL is furthering this purpose of the FLSA.¹⁸² The prospective volunteers believe that they are receiving compensation for their services in the form of experience or the fulfillment of humanitarian objectives. Indeed, in all three situations, the individuals are attempting to increase their chances of obtaining future paid employment.

Unless Congress amends the FLSA, Patricia will not acquire office skills that would make her more marketable in the future. Similarly, Paul will not work during his recovery and will probably encounter difficulty in resuming his career after an extended absence from the computer industry. Judy will continue to work at the car dealership, where she will receive no relevant experience and will establish no contacts in the television industry. This lack of experience will most likely hinder their future marketability and, in

178 See *supra* notes 162-65 and accompanying text.

179 See *supra* notes 69-75 and accompanying text.

180 See *supra* notes 72-73 and accompanying text.

181 330 U.S. at 151.

182 See *supra* note 132 and accompanying text.

turn, decrease their prospects for realizing higher wages in the future because of skills deficits. Indeed, none of the individuals is "increas[ing] . . . opportunities for gainful employment."¹⁸³ There is, however, a solution that will both enable these individuals to volunteer their services and safeguard against employer coercion.

V

A PROPOSAL FOR CHANGE

A. Determining the Solution

In her note entitled *The Applicability of the Fair Labor Standards Act to Volunteer Workers at Nonprofit Organizations*,¹⁸⁴ Lisa M. Milani considers how the *Tony & Susan Alamo* decision might dramatically affect volunteers at nonprofit organizations. According to Milani, by adopting the exclusive benefits test, the Supreme Court risks adversely affecting the operations of religious and other nonprofit organizations. She fears that "courts may construe the result . . . to extend coverage to individuals who volunteer . . . and receive or contemplate the receipt of wages only incidentally to the services rendered."¹⁸⁵

Milani applies *Tony & Susan Alamo* to the situation of volunteers at Goodwill, a nonprofit organization whose workers are mostly volunteers.¹⁸⁶ She argues that extending the Court's decision to Goodwill volunteers "would increase the cost of Goodwill's telephone solicitation project, and also lessen the income gained through sales of donated items at Goodwill thrift shops . . . thus . . . reduc[ing] the amount of money that Goodwill could expend providing services to handicapped persons."¹⁸⁷ This effect would then spread to other charitable organizations, which would consequently have decreased revenues to assist the sick and needy.¹⁸⁸ Milani concludes that, while Congress intended to prevent unfair competition and improve labor conditions, it did not intend to force nonprofit organizations to pay minimum wages to all of their workers.¹⁸⁹ She proposes that Congress amend the FLSA to exempt all volunteer workers at charitable organizations.¹⁹⁰

¹⁸³ See *supra* note 132 and accompanying text.

¹⁸⁴ Lisa M. Milani, *The Applicability of the Fair Labor Standards Act to Volunteer Workers at Nonprofit Organizations*, 43 WASH. & LEE L. REV. 223 (1986).

¹⁸⁵ *Id.* at 235 (footnote omitted).

¹⁸⁶ *Id.* at 237.

¹⁸⁷ *Id.* at 238 (footnote omitted). Goodwill donates a portion of its resources to job training and placement of individuals with handicaps. *Id.* at 234.

¹⁸⁸ *Id.* at 238.

¹⁸⁹ *Id.* at 242-43.

¹⁹⁰ *Id.*

Although Milani recognizes the need to address the potential problems resulting from an extension of *Tony & Susan Alamo* to volunteers at nonprofit organizations, her solution, while supporting certain aspects of Congress' original intent, clearly ignores others. In enacting the legislation, Congress did not intend to abridge most workers' rights to contract for their own employment terms, and wanted instead "to increase opportunities for gainful employment."¹⁹¹ Milani's proposed amendment would surely enable prospective volunteers to negotiate with their employers over the terms of their employment contracts, and would also allow individuals, such as the volunteers at Goodwill, to increase their opportunities for future gainful employment. Congress, however, articulated another purpose in enacting the FLSA: to eliminate employer coercion by assisting "the helpless victims of their own bargaining weakness . . . obtain a minimum wage."¹⁹² The potential for employer coercion is present even at nonprofit organizations, where poverty-stricken individuals might seek employment at subminimum wages. If Congress were to adopt such a blanket exemption, an important aspect of Congress's original intent would be frustrated. Furthermore, Milani's solution is underinclusive; the DOL should allow for-profit organizations to hire volunteers as well. For-profit corporations can provide valuable training experience that individuals could not receive at non-profit organizations. There is, indeed, a way to protect volunteer workers against employer abuses at both nonprofit and for-profit organizations without violating the FLSA's original intent.

B. The Solution

Looking solely at the legislative intent behind the passage of the FLSA, one can conclude that Congress did not intend the Act to cover individuals voluntarily performing productive work. The Senate and House committee reports indicate that Congress did not want the FLSA, in ordinary circumstances, to invade individuals' rights to contract for their own employment terms.¹⁹³ According to the Supreme Court's interpretation of the FLSA in *Walling* and in *Tony & Susan Alamo*, Congress sought to prevent employers from using their bargaining power to force employees to work for less than the minimum wage, and intended to apply the FLSA only to those working in contemplation of compensation.¹⁹⁴ The Court further stated that Congress never intended to prevent employers from pro-

¹⁹¹ See *supra* note 132 and accompanying text.

¹⁹² See S. REP. NO. 884, *supra* note 71, at 5.

¹⁹³ See *supra* notes 71-74 and accompanying text.

¹⁹⁴ See *supra* notes 157-67 and accompanying text.

viding free services and training.¹⁹⁵ Rather than developing a test to determine the presence of employer coercion, the Court decided to guard against such coercion by simply banning all individuals from working for subminimum wages, unless the individuals work "solely for their own pleasure or profit."¹⁹⁶

Allowing organizations to accept volunteers who work in business capacities will enable organizations to increase their productivity. Moreover, volunteers will gain experience that will bolster their skills and make them more marketable. Nevertheless, Congress must impose restraints on such volunteerism. Indeed, one must not lose sight of one of Congress' original purposes behind passing this anti-poverty device: to prevent employer coercion.¹⁹⁷ But, where employer coercion is clearly lacking and individuals are not dependent on the employment for their livelihood, Congress should amend the FLSA to allow individuals to volunteer their services. Such an amendment will both increase productivity and decrease the skills deficits of many individuals.

In formulating a solution that takes into account the original Congressional goals, one must distinguish between for-profit and nonprofit corporations. As the Fourth Circuit Court of Appeals stated in *Isaacson*, the nonprofit organization's corporate purpose, unlike that of the for-profit corporation, is to benefit the public at large.¹⁹⁸ Because nonprofit organizations need less expensive ways to maintain their labor-intensive social services, volunteer activity at such organizations should not only be permitted, but encouraged. Hence, the individual volunteer gains a benefit pursuant to her own humanitarian objectives or career aspirations, while the public at large receives greater beneficial services.¹⁹⁹

Conversely, at for-profit corporations the public receives no direct benefit from work performed by the volunteer, while employers reap great benefits in the form of increased revenues. If the DOL allows for-profit employers to seek volunteers, such employers might coerce individuals into providing free services by suggesting that volunteer service will enhance the prospect of obtaining a paid position at the corporation at some later date. Corporations could feign such a purpose and yet hire the volunteers purely to maximize profits, with no intention of ever hiring the workers for paid positions. The public would receive no direct benefit from the corporation's efforts to maximize its profits. Nevertheless, if the DOL

195 See *supra* note 135 and accompanying text.

196 See *supra* notes 136-38 and accompanying text.

197 See *supra* notes 69-75, 132 and accompanying text.

198 See *supra* notes 146-50 and accompanying text.

199 See *supra* notes 13-46 and accompanying text.

continues to prohibit all individuals from volunteering in business capacities at for-profit corporations, individuals will lose valuable training and experience that they could not otherwise receive.²⁰⁰

The DOL, however, could prevent this type of employer coercion through restraints on advertising. Because non-profit organizations need volunteers to maintain their labor-intensive services to benefit the public as a whole, the DOL should allow them to advertise for volunteers to maintain adequate levels of service. Because for-profit corporations do not have a similar public-good motive, the DOL should prohibit them from advertising for volunteer positions. This prohibition would ensure that the individual's wish to volunteer springs from her desire to gain experience and not from the employer's desire to maximize profits. Such restraints on advertising would presumably be easy to monitor since advertising is a public medium of communication.

Restraints on advertising, however, are insufficient to guard against all employer coercion; the potential for employer coercion will nonetheless exist at both for-profit and nonprofit corporations. Therefore, additional safeguards are necessary. To determine whether an organization is coercing an individual to volunteer her services, one must assess whether the volunteer is deriving a benefit from her work. As the Supreme Court noted in *Tony & Susan Alamo*, payment under the FLSA need not be in the form of wages.²⁰¹ If the DOL and the federal courts recognize experience as a form of payment, neither corporate form will receive purely gratuitous services from its volunteers. One may argue that such intangible payments are too difficult to quantify. However, the DOL and the federal courts have already demonstrated a way to measure intangible benefits in their exception for trainees.²⁰²

The current test used to determine whether an individual is an employee or a trainee who is exempt from the FLSA's provisions is as follows:

- (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) the training is for the benefit of the trainees . . . ;
- (3) the trainees . . . do not displace regular employees, but work under their close observation;
- (4) the employer that provides the training derives no immediate advantage from the activities of the trainees . . . ; and on occasion his operation may actually be impeded;

200 See *supra* notes 27-46 and accompanying text.

201 See *supra* note 160 and accompanying text.

202 See *supra* notes 98-100 and accompanying text.

- (5) the trainees . . . are not necessarily entitled to a job at the conclusion of the training period; and
- (6) the employer and the trainees . . . understand that the trainees . . . are not entitled to wages for the time spent in training.²⁰³

The DOL carved out this exception for trainees in order to "prevent curtailment of opportunities in employment."²⁰⁴ Similarly, by allowing individuals to volunteer to perform work in productive capacities, the DOL will further the Act by promoting opportunities in employment through training and experience. By slightly altering the current rules applicable to the hiring of trainees, the DOL can, indeed, insure that the volunteer receives compensation to the same extent as a qualifying trainee. The proposed test should take the following form:

- (1) the volunteer work is for the benefit of the volunteer;
- (2) the volunteer does not displace regular employees, but works under their close observation;
- (3) the volunteer derives a substantial advantage from the work performed;
- (4) the volunteer is not necessarily entitled to a job at the completion of his or her volunteer work; and
- (5) the employer and the volunteer understand that the volunteers are not entitled to wages for the time spent volunteering.

This proposed test keeps the second and third prongs of the trainee test in place. The work must benefit the volunteer, and the volunteer must not displace a regular employee, but rather work under her close observation.²⁰⁵ The former requirement will ensure that the individual is deriving a benefit, albeit a nonmonetary one, from the work performed. The latter requirement will ensure that the organization is not accepting the volunteer's work to avoid paying the salary of a regular, paid employee. In order to meet this latter prong, the organization should publish an employee handbook detailing precise job descriptions for its regular, paid employees and stating the number of employees who fill these positions. The corporation should include a copy of this handbook, along with a list of all paid employees and their positions in the organization, in the records that it must keep pursuant to DOL requirements.²⁰⁶ The prospective volunteer must not assume the responsibilities of a position described on the list. This requirement will protect current employees from having volunteers usurp their roles.

²⁰³ EMPLOYMENT RELATIONS SUPPLEMENT, *supra* note 2, at 4-5.

²⁰⁴ *Minimum Wages and Overtime Pay*, *supra* note 86, at 16.

²⁰⁵ See *supra* note 100 and accompanying text.

²⁰⁶ See *supra* note 118 and accompanying text.

The fifth and sixth prongs of the trainee test also remain unchanged. A volunteer cannot expect the right to paid employment upon completion of her training period, and both the volunteer and the employer should be aware that no monetary compensation is owed for the time spent volunteering.²⁰⁷ If an employer promises a volunteer that she might be entitled to a permanent position upon completion of the volunteering period, the promise may induce the individual to volunteer in the hopes of later obtaining paid employment. Therefore, it is necessary that both parties understand that a volunteer position does not guarantee, or even make more likely, a future paid position. Consequently, it would be highly unlikely for an impoverished individual to be unduly influenced to work for free if she does not expect a paid position upon completion of the volunteer work.

Despite the similarities, this proposed test differs from the trainee test in two major ways. First, Congress should delete the vocational school requirement of the trainee test because some volunteer work constitutes office procedure that is not part of vocational instruction. Second, Congress should change the fourth prong. This portion of the trainee test states that the employer providing the training must derive no immediate advantage from the work performed and "on occasion his operations may actually be impeded."²⁰⁸ This prong contains the "exclusive benefits" test of *Walling* and *Tony & Susan Alamo*.²⁰⁹ By performing productive work, volunteers will necessarily provide the employer with a benefit and thus fail the "exclusive benefits" test. Indeed, it is impossible to perform actual, hands-on training in business activities without the employer deriving at least some benefit from the work. Therefore, at the very least, the DOL should modify the "exclusive benefits" test articulated in *Walling* and *Tony & Susan Alamo Foundation* in favor of the "principal benefits" test articulated in *Isaacson* and *McLaughlin*.²¹⁰

However, given the difficulties in determining whether the employer or the volunteer derives the principal benefit from the work performed, an even better modification would be the DOL's adoption of a "substantial benefits" test. Not only is the subjective "principal benefits" test difficult to implement, but it can also achieve contrary results in cases with identical facts. For example, if an individual with a disability volunteers at a nonprofit organization and performs office tasks, both the employer and the volunteer receive a

207 See *supra* note 203 and accompanying text.

208 EMPLOYMENT RELATIONS SUPPLEMENT, *supra* note 2, at 5.

209 See *supra* notes 130-38, 152-67 and accompanying text.

210 See *supra* notes 142-51, 168-74 and accompanying text.

benefit. The organization receives the benefit of increased office productivity, and the volunteer receives the benefit of training and experience that might lead to future, gainful employment. One court might deem the employer to be the principal beneficiary of the work performed, while a second court, sensitive to the plight of workers with disabilities, might view the volunteer as the principal beneficiary.

If the DOL were to adopt a "substantial benefits test," the focus of the analysis would shift to the individual wishing to volunteer. As long as the prospective volunteer will derive a "substantial" benefit in the form of training and experience, the DOL should permit her to volunteer, regardless of the degree of advantage that the employer may gain from the work. In order to meet the "substantial benefits" test, the volunteer must show how the experience will prove relevant to her career aspirations and thus constitute "compensation." The volunteer must also show, through a financial disclosure, that she does not need compensation for her livelihood. As long as the volunteer receives a substantial benefit from the work that she freely performs, the DOL should permit the individual to volunteer.

The DOL, after an investigation, should certify corporations meeting the five criteria as eligible to utilize volunteer services. These qualifying corporations should be allowed to utilize such services only until the individuals receive their compensation, or "substantial benefits," in the form of training and experience. The DOL already performs similar investigations when determining whether to allow organizations to employ trainees, student learners, and individuals with disabilities at subminimum wages. Accordingly, investigation costs and efforts should not present major administrative impediments to the adoption of this test.²¹¹ This test should impose little or no additional burdens on the employer who currently must maintain records regarding its employees and other workers exempt from the Act.²¹²

Most importantly, the imposition of this test will not frustrate, but rather will further, the legislative intent behind the passage of the FLSA. In passing the FLSA, Congress wished to ameliorate the poor economic conditions that plagued the Depression era and to prevent employers from wielding superior bargaining power over weak, unaware employees. By forcing the FLSA on individuals wishing to volunteer in business activities, Congress furthers neither objective. The current state of the law prevents many individuals, such as workers with disabilities and recent college graduates, from gain-

²¹¹ See *supra* notes 93-104 and accompanying text.

²¹² See *supra* note 118 and accompanying text.

ing valuable training experience. This, in turn, causes such individuals to have decreased earning potential because of skills deficits. This situation, however, is unnecessary. The DOL can, indeed, guard against employer coercion through this proposed test and thereby increase, not decrease, opportunities for gainful employment.

CONCLUSION

An examination of the Fair Labor Standards Act, Department of Labor publications, and federal court decisions interpreting the FLSA reveals a dramatic limitation on acceptable volunteer activities. Driven by a fear of employer coercion, federal courts and the DOL refuse to allow individuals to volunteer to perform business activities that benefit the employer, unless these services fall within a very narrow category of exceptions. Rather than provide a way to guard against employer coercion, the courts and the DOL have decided simply to ban all such volunteer activity. Since employer coercion can be controlled, Congress should amend the FLSA to allow individuals to volunteer their services whenever no clear evidence of employer coercion exists. Not only will such an amendment comport with the legislative intent behind the passage of the FLSA, but it will also encourage individuals to pursue humanitarian objectives and enhance the public good. Furthermore, the amendment will enable certain individuals to receive valuable training that may lead to gainful employment.

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