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MCLE Self-Study:

Experience Pays, but Interns May Have To Be Paid for Their Experience: When Interns Are Covered by Wage and Hour Laws

By Aaron D. Kaufmann & Elizabeth C. Morris

Unpaid internships continue to draw considerable attention, as paying entry-level jobs remain scarce. In addition to spawning high-profile litigation, the unpaid intern phenomenon has been the subject of recent books,[1] news articles,[2] Stephen Colbert's biting satire, the HBO series "Girls," and now an entire magazine covering the "intern lifestyle." Whether companies should compensate these interns for their work has become an important legal and societal question.

Neither California's wage and hour laws nor the federal Fair Labor Standards Act (FLSA) directly addresses whether unpaid "internships" are lawful. This article examines how the answer may differ based on the benefits the intern receives, the benefits the organization receives, and the type of organization offering the internship, i.e., for-profit vs. nonprofit. Ultimately, nonprofits and entities that provide substantial training to their interns will likely be found in compliance with wage and hour laws, while businesses that simply benefit from the free labor will not.

When Are Interns Covered by the FLSA?

The FLSA provides overtime and minimum wage protections for "employees."[3] Thus, whether interns must be paid for their work depends on whether they are "employees" under the FLSA. While the FLSA's definition of "employee" is extremely broad,[4] the Supreme Court's decisions in *Walling v. Portland Terminal Co.*[5] and *Tony and Susan Alamo Foundation v. Secretary of Labor*[6] have served to create narrow exceptions for certain trainees and volunteers.

The "Trainee" Exception to FLSA Coverage

In 1947, the Supreme Court in *Walling v. Portland Terminal Co.* carved out an exception to FLSA coverage when it found that unpaid "trainees" in a one-week railroad brakeman course were *not* employees under the FLSA. The training course was a prerequisite for employment with the railroad, the trainees did not

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displace any paid workers, and the trainees received a $4 per day stipend.[7] The Court observed that the FLSA's definition of employment: (1) was "not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another"; and (2) does not make a person "whose work serves only his own interest an employee of another person who gives him aid and instruction."[8] The Court found that the trainees' activities were to their own benefit and that the railroad received no "immediate advantage" from those activities, thus supporting the conclusion that the trainees fell outside of the FLSA's coverage.[9]

The U.S. Department of Labor's (DOL) Wage and Hour Division derived from *Portland Terminal* a six-factor test to determine when "trainees" fall outside of FLSA coverage.[10] The DOL recently adopted a similar six-factor test to determine whether "interns" are employees under the FLSA:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[11]

The DOL takes the position that all six of the factors must be satisfied for the internship to fall outside of FLSA coverage.[12]

Internship programs that offer vocational-type training, teaching fungible skills useful in different workplaces, are more likely to be outside FLSA coverage.

Courts are split on whether and how to apply the DOL's six-factor test in assessing the lawfulness of engaging unpaid staff.[13] Some courts have chosen not to apply the factors rigidly in an "all or nothing approach," but more as a prism to assess the totality of the circumstances under which the interns are engaged.[14] Other courts have declined to rely on the DOL test, and instead have interpreted *Portland Terminal* to focus the inquiry on which party is the "primary beneficiary" of the trainee's labor.[15] However, even where a court applies the "primary beneficiary" test, the DOL factors may be influential.[16]

Regardless of which test a court applies, analyzing when novice workers enjoy the protections of the FLSA is often fact intensive. (As a result, some court decisions can seem idiosyncratic and provide uncertain guidance.) Generally, when the intern program has unique educational value and is confined to non-productive activities—that is, tasks that are not directly linked to creating the goods or providing the services for which the enterprise exists in the marketplace—it is unlikely that employment status will be found.[17] On the other hand, when interns perform productive work that is of immediate advantage to the company, and they are not engaged in an educational program that teaches skills *beyond* those normally acquired through a paying job, employment status under the FLSA is virtually certain.[18]

The latter situation is exemplified by *Wirtz v. Wardlaw*,[19] where two high school students providing clerical help to an insurance salesperson were found to be employees. The insurance salesperson sought to justify not paying statutory minimum wage by claiming he was teaching the young workers about the insurance business so they could determine if they were interested in pursuing insurance-related careers after graduating from high school. The Fourth Circuit rejected the argument, and in distinguishing the case from *Portland Terminal*, emphasized that the insurance salesperson "benefited from [the students'] labors," which were an "essential part" of his promotional activities.[20] Conversely, courts finding that the enterprise enjoys no

immediate benefit from the intern's work typically find no coverage.[21]

Internship programs that offer vocational-type training, which teach fungible skills useful in different workplaces, are more likely to be outside FLSA coverage. For instance, students who worked at a nursing home connected to their Seventh-Day Adventist Church school were not covered employees, in part because the "students [were] provided with hands-on training comparable to training provided in public school vocational courses, allowing them to be competitive in various vocations upon graduation."[22] Similarly, students studying medical billing and coding were not employees of the billing service where they completed unpaid externships, in part because the "training provided was similar to that which would be given in school and was related to Plaintiffs' course of study."[23] Flight attendant trainees who received training from American Airlines similar to training offered by preparatory schools and junior colleges were not employees of the airline.[24] However, courts may scrutinize whether such vocational training provides adequate educational value and supervision before excusing compliance with the FLSA.[25]

Most unpaid interns do derive some educational or professional benefit from their work; that is why they agree to do it. However, when the benefit they receive is no different than the benefit employees typically derive from performing work for pay, courts typically find the benefit to the intern to be outweighed by the immediate advantage to the company. For example, in *Glatt v. Fox Searchlight Pictures*,[26] unpaid interns who assisted on film production crews were found to be employees as a matter of law. The court concluded that the interns

> worked as paid employees work, providing an immediate advantage to their employer and performing low-level tasks not requiring specialized training. The benefits they may have received—such as knowledge of how a production or accounting office functions or references for future jobs—are the results of simply having worked as any other employee works, not of internships designed to be uniquely educational to the interns and of little utility to the employer.[27]

Similarly, in *Okoro v. Pyramid 4 Aegis*[28] the court concluded that a long-term "volunteer" at a for-profit residential care facility was covered by the FLSA, finding that the direct and immediate benefit she conferred on the company outweighed her desire to learn about the business.[29]

On-the-job training will also likely be seen as benefiting the employer and thus trigger FLSA coverage. In such instances, trainees frequently perform tasks that benefit the enterprise as they supplement or replace the efforts of regular employees.[30] Also, as one court observed, on-the-job training advantaged the employer as it "obtained employees able to perform at a higher level when they began to receive pay" and "a free opportunity to review job performance."[31]

In sum, the more an intern's training is akin to a vocational school experience, the more likely that intern can be treated as a non-employee. But when the intern performs the routine tasks of an employee, and accordingly displaces regular employees and economically benefits the organization, the intern is likely an employee under the FLSA.

The Volunteer Exception to FLSA Coverage

The FLSA allows individuals to "volunteer" for a state or local government entity if the individual receives no compensation and the services provided "are not the same type of services which the individual is employed to perform for such public agency."[32] This public sector volunteerism provision, added to the FLSA in 1986, is meant to prevent abuse and manipulation of volunteers, not "to discourage or impede volunteer activities undertaken for humanitarian purposes."[33]

The FLSA provides no explicit coverage exception for volunteers in the private sector.[34] The Supreme Court and DOL have acknowledged that individuals may volunteer to perform charitable work in the private sector, but they have provided only limited guidance on the parameters of such lawful volunteerism[35] The determination generally depends on the relative benefits to the worker and to the enterprise, as well as whether compensation is expected. Courts are much more likely to find no employment status when the work is performed for a nonprofit and for a non-business purpose, than when the work is performed for a business purpose or at a for-profit organization.[36]

In *Tony and Susan Alamo Foundation v. Secretary of Labor*,[37] the Supreme Court considered whether the FLSA required a nonprofit religious organization to provide minimum wage and overtime compensation to its "associates" who staffed the organization's commercial businesses, including gas stations, retail clothing and grocery outlets, farms, and construction companies.[38] The organization operated these businesses for the purpose of funding its religious and evangelical programs.[39] The associates did not receive cash wages for their work, but the Foundation provided food, clothing, shelter, and other benefits.[40] The Secretary of Labor brought claims against the Foundation for unpaid wages under the FLSA, although each of the associates vigorously protested the

payment of wages, asserting they considered themselves volunteers who worked for religious and evangelical reasons.[41]

The Court first noted that, because the religious organization's business activities served the public and competed with ordinary commercial enterprises, the FLSA applied to the organization notwithstanding its non-profit status.[42] Next, the Court applied the teachings of *Portland Terminal* to conclude the associates were employees under the FLSA.[43] In reaching its conclusion, the Court warned against carving out an exception for employees willing to testify that they performed work "voluntarily," noting the FLSA's unwaivable nature and the public purpose of the legislation.[44] The Court explicitly acknowledged that its interpretation did not threaten "ordinary volunteerism"—such as driving the elderly to church, serving church supper, or helping remodel homes for the needy—because the FLSA reaches only an organization's "ordinary commercial activities" and only workers "who engage in those activities in expectation of compensation."[45] The Court found that although the associates did not expect cash compensation, they expected "wages in another form," by relying on the food, shelter, and other benefits provided by the organization.[46] Further, the Court noted that exempting the associates from 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."[47]

Where work is not done for a business purpose, however, courts are more likely to find no coverage. For example, in *Isaacson v. Penn Community Services, Inc.*,[48] the court found that a conscientious objector to military service who volunteered to perform civilian work for a nonprofit organization that provided adult education programs, in lieu of induction into the armed forces, was not an "employee." In determining employment status, the court considered the respective benefits to the organization and to the worker, finding that the principal benefit was to the worker, for whom the organization created a position so he could satisfy his statutory obligation to render civilian service. The court found that because the nonprofit organization's purpose is the public good in the community, any benefit to the organization is a benefit to the public at large—a benefit of a different nature than that of a for-profit enterprise.[49]

The fact that work is "voluntarily" performed for one's own advantage at a nonprofit does not automatically negate FLSA coverage. This is particularly true where the activities have a business purpose, as demonstrated by the Supreme Court's holding in *Alamo*, and by then-district court Judge Sonia Sotomayor's analysis in *Archie v. Grand Central Partnership, Inc.*[50]

In *Archie*, the defendants were nonprofit organizations that provided services to homeless individuals with the goals of helping them, and attracting customers to businesses in certain neighborhoods by improving the local business environment.[51] To achieve these goals, defendants provided various work opportunities to homeless individuals in return for an amount less than minimum wage.[52] In ruling that the workers were employees covered by the FLSA, the court acknowledged that the participants "benefited enormously" from the program.[53] The court noted that the participants would have "great difficulty" obtaining jobs in the private sector and needed instruction on the most basic of job skills.[54] The court concluded, however, that "the defendants gained an immediate and greater advantage from the [work] program: the ability to offer security and other services at below market rates."[55]

Similarly, the DOL emphasized in a 2002 opinion letter the unfair competitive advantage a for-profit company could realize by using free labor.[56] The DOL found employment status for students who bagged groceries at a for-profit grocery store in exchange for donations to charities, noting that free or cheap bagging services gave the store an advantage over other stores.[57] The DOL's reasoning, in line with the Court's observations in *Alamo* on the effect unpaid work has on the market, suggests that for-profit employers receiving an immediate benefit from unpaid work will have great difficulty establishing they are in compliance with the FLSA.[58]

The Law Is Underdeveloped as to When Interns Fall Under California's Wage and Hour Laws

Similar to federal law, there is no state statute or regulation that exempts interns, trainees, or volunteers from California's wage and hour laws. There is little or no guidance found in published case law either. While California's Division of Labor Standards Enforcement (DLSE) has issued several opinion letters on the topic, the tests applied in those letters have varied.

The DLSE historically applied an 11-factor test to determine whether certain trainees are employees entitled to California minimum wage and overtime compensation.[59] That test was comprised of the DOL's six factors, plus five other factors that were designed to ensure that trainees are engaged in genuine educational programs.[60] However, in 2010 the DLSE rejected use of the additional five factors and found it appropriate to rely solely on the DOL's six-factor test.[61] In another instance, the DLSE applied the federal six-factor "economic reality" test to determine

whether students participating in an externship program as part of their formal culinary school education were employees.[62] The DLSE has also determined that volunteers pursuing humanitarian, religious, or public service objectives are not employees when they have no expectation of pay and do not perform services of a commercial nature.[63]

In sum, DLSE has largely followed federal precedent in issuing guidance on whether California's wage and hour protections apply to those serving as unpaid interns and volunteers. But whether courts may properly rely on such federal authority to determine the definition of "employee" under California law raises an important legal question that has not yet been answered in this context.[64]

Conclusion

The typical modern unpaid internship—where recent graduates perform routine, productive work with minimal training at for-profit companies—will likely be found to violate the FLSA under either the six factor test or an "economic realities" test. The result would likely be the same under California law.

ENDNOTES

1. Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso 2012).
2. Teddy Wayne, *The No-Limits Job*, N.Y. Times, Mar. 3, 2013, available at http://www.nytimes.com/2013/03/03/fashion/for-20-somethings-ambition-at-a-cost.html?pagewanted=all.
3. 29 U.S.C. §§ 203, 206(a)(1).
4. *U.S. v. Rosenwasser*, 323 U.S. 360, 362 (1945) (remarking on FLSA's definition of "employee:" "A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.").
5. 330 U.S. 148 (1947).
6. 471 U.S. 290 (1985).
7. 330 U.S. at 150.
8. *Id.* at 152.
9. *Id.* at 153.
10. DOL Opinion Letters, Jan. 6, 1969, May 7, 2004 (FLSA2004-5NA), and April 6, 2006 (FLSA2006-12), applying the six factors to address whether "interns" and "externs" fall under the trainee exception. DOL, *Field Operations Handbook* § 10b11 (1993).
11. *Id. See also* DOL Opinion Letters, Sept 12, 2013 (available at http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_reFLSA_091213.pdf), applying the six factors to address whether law students may work for private law firms on pro bono matters without pay.
12. Several courts have approved of and applied the six-factor test to determine whether certain individuals were "employees" or exempt "trainees" under the FLSA. *See, e.g., Atkins v. General Motors Corp.*, 701 F.2d 1124, 1127–29 (5th Cir. 1983); *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 273, n.7 (5th Cir. 1982); *Archie v. Grand Cent. P'ship, Inc.*, 997 F. Supp. 504, 531–35 (S.D.N.Y. 1998); *Harris v. Vector Mktg. Corp.*, 753 F. Supp.2d 996, 1105–09 (N.D. Cal. 2010); *Wang v. Hearst Corp.*, No. 12 CV 793 (HB), 2013 U.S. Dist. LEXIS 65869, 2013 WL 1903787, at *5 (S.D.N.Y. May 8, 2013); *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784 (WHP), 2013 U.S. Dist. LEXIS 82079, 2013 WL 2495140 (S.D.N.Y. June 11, 2013). Some courts have explicitly found that the DOL's test is entitled to deference. *Atkins*, 701 F.2d at 1128; *Archie*, 997 F. Supp. at 532; *Wang* 2013 WL 1903787, at *5; *Glatt*, 2013 WL 2495140, at *12.
13. *See Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993); *Archie*, 997 F. Supp. at 532; *Harris*, 753 F. Supp.2d at 1006; *Wang* 2013 WL 1903787, at *5; *Glatt*, 2013 WL 2495140, at *12.
14. *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 (4th Cir. 1989); *Solis v. Laurelbrook Sanitarium and Sch.*, 642 F.3d 518, 528 (6th Cir. 2011). *See also Marshall v. Baptist Hosp., Inc.*, 668 F.2d 234, 236 (6th Cir. 1981) (finding of employment status was supported by the fact that the hospital was the "primary beneficiary" of the relationship with X-ray students); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (holding that the educational benefit of chores performed by a boarding school student serving a juvenile sentence outweighed the labor savings enjoyed by the school).
15. *See, e.g., Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d at 529.
16. *See Harris*, 753 F. Supp.2d at 1006–07 (suggesting that where trainees are learning skills that are fungible, the training may be more akin to the vocational school setting that, under *Portland Terminal*, falls outside of FLSA coverage). *Cf. Ensley*, 877 F.2d at 1210 (in finding trainee route drivers to be employees, the court observed that "the skills learned were either so specific to the job or so general to be of practically no transferable usefulness").
17. *See, e.g., Glatt v. Fox Searchlight Pictures Inc.*, 2013 U.S. Dist. LEXIS 82079, 2013 WL 24910. But see *Wang v. Hearst Corp.*, 2013 U.S. Dist. LEXIS 65869, 2013 WL 1903787 (finding a triable issue of fact regarding employment status, even though interns performed menial tasks that benefited the company because, in part, the interns received school credit and attended some classroom training).
18. 339 F.2d 785 (4th Cir. 1964).
19. *Id.* at 787–88. *See also Marshall*, 668 F.2d at 236 (finding X-ray students enrolled in a two-year college program of classroom

study and hospital clinical training were employees of the hospital where the hospital received a "direct and substantial benefit" from their "work that would otherwise have been done by regular employees and work for which the hospital charged patients at full rates"); *Bailey v. Pilots' Ass'n for the Bay and River Delaware*, 406 F. Supp. 1302, 1304–05 (E.D. Pa. 1976) (finding a boat pilot apprentice to be an employee of the Association when he performed duties as a pilot boat crew member that were of "immediate and substantial benefit" to the Association); DOL Opinion Letter, May 17, 2004 (FLSA2004-5NA) (DOL declined to opine "marketing interns" fall outside of FLSA coverage, where the interns analyzed trends on their college campus and developed marketing information in a number of areas that may be of benefit to the putative employer).

20. *See, e.g., Kaplan v. Code Blue Billings & Coding, Inc.*, 504 Fed. Appx. 831, 834 (11th Cir. 2013) (finding medical billing and coding students were not employees when "Defendants received little if any economic benefit from Plaintiffs' work"); *Atkins*, 701 F.2d at 1129 (finding participants in training classes set up by the state to provide a trained labor pool for a headlight plant were not employees when they "performed no work which derived to G.M.'s immediate advantage").
21. *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d at 531.
22. *Kaplan*, 504 Fed. Appx. at 833–34.
23. *Donovan v. American Airlines*, 686 F.2d at 271–72.
24. *See Marshall*, 668 F.3d at 236 (finding the clinical education portion of an X-ray technician academic program was not a bona fide educational activity because students were not adequately supervised and quickly became regular working members of the hospital's X-ray department); *Archie*, 997 F. Supp. at 533 (lack of meaningful supervision supported a finding of employment status for formerly homeless and jobless employment program participants).
25. No. 11 Civ. 6784 (WHP), 2013 U.S. Dist. LEXIS 82079, 2013 WL 2495140 (S.D.N.Y., June 11, 2013).
26. *Id*. at *14.
27. No. 11-C-267, 2012 U.S. Dist. LEXIS 56277, 2012 WL 1410025 (E.D. Wis., Apr. 23, 2012).
28. *See also Donovan v. New Floridian Hotel*, 676 F.2d 468 (11th Cir. 1982) (finding that former psychiatric patients who staffed a for-profit company's retirement homes were employees under the FLSA because they did work that provided economic benefit to the company).
29. *See, e.g., Ensley*, 877 F.2d at 1210 (holding route driver trainees were employees when they helped regular drivers distribute the employer's snack foods); *Archie*, 997 F. Supp. at 514, 533, 535 (holding that formerly homeless and jobless participants in a nonprofit entity's employment programs were employees when they performed the same work as paid staff members); *Bailey*, 406 F. Supp. at 1307 (finding that a boat pilot apprentice was an employee when he served as a deckman and mate and "substituted for hired men at times their number was counted toward the full legal complement"). *But cf. Williams v. Strickland*, 87 F.3d 1064 (9th Cir. 1996) (finding a participant in a "work therapy" program at a rehabilitation center was not an employee even though he restored furniture for re-sale and sorted food and clothing donations).
30. *Ensley*, 877 F.2d at 1210.
31. 29 U.S.C. § 203(e)(4)(A).
32. *Mendel v. City of Gibraltar*, 842 F. Supp. 2d 1035, 1039–40 (E.D. Mich. 2012), quoting S. Rep. No. 99-159 (1985), 1985 U.S.C.C.A.N. 651, 662.
33. The only exemption from coverage for volunteers in the private sector is for "individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries." 29 U.S.C. § 203(e)(5). Because the law is more developed regarding public sector volunteerism than it is regarding private sector volunteerism, courts may look to the public sector jurisprudence and regulations in developing the law governing nonprofit, private sector organizations. *See Livingston v. Gaviolo*, No. 04-1303, 2006 U.S. Dist. LEXIS 948, 2006 WL 37029 (W.D. La., Jan. 5, 2006) (citing the public-sector volunteer regulations and finding a triable issue as to whether a private-sector worker is an employee or a volunteer). See also DOL Opinion Letter, Dec. 18, 2008 (FLSA2008-14) (Wage and Hour Division applies public sector volunteerism policy to private, nonprofit employers).
34. The DOL "recognizes an exception [to FLSA coverage] for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for [nonprofit] charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." DOL Fact Sheet #71 (*supra* note 11).
35. *See Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 469, n.6 (M.D. Tenn. 1979), *overruled on other grounds by Marshall v.*

Baptist Hosp., 668 F.2d 234 (6th Cir. 1981) (for-profit corporation receiving substantial, but less than primary, benefit from workers' services is more likely to be found an employer than is a nonprofit organization in like circumstances).

36. 471 U.S. 290 (1985).
37. *Id*. at 291–92.
38. *Id*. at 292–99.
39. *Id*. at 292.
40. *Id*. at 293.
41. *Id*. at 299.
42. *Id*. at 299–303.
43. *Id*. at 302. That the protections of the FLSA are not ordinarily waivable was also highlighted in *Reab v. Electronic Arts, Inc.*, 214 F.R.D. 623, 629 (D. Colo. 2002), where the court considered FLSA claims against a for-profit online gaming company that engaged "volunteers" to provide customer service counseling to the company's online users. In conditionally certifying an FLSA collective action of volunteer counselors, the court found that the counselors' "subjective belief" as to their own volunteer status was irrelevant, citing the *Alamo* Court's observation that "the purpose of the [FLSA] requires that it be applied even to those who would decline its protections." *Reab*, 214 F.R.D. at 629, *quoting Alamo*, 471 U.S. at 302.
44. *Alamo*, 471 U.S. at 302–03.
45. *Id*. at 301.
46. *Id*. at 302. In a 2001 opinion letter, DOL provided factors to consider in determining whether a particular activity constitutes "ordinary volunteerism," such as "the nature of the entity receiving the services, the receipt by the worker (or expectation thereof) of any benefits from those for whom the services are performed, whether the activity is less than a full-time occupation, whether regular employees are displaced, whether the services are offered freely without pressure or coercion, and whether the services are of the kind typically associated with volunteer work." DOL Opinion Letter, July 31, 2001 (FLSA2001-18).
47. 450 F.2d 1306 (4th Cir. 1971).
48. *Id*. at 1309–10.
49. 997 F. Supp. 504 (S.D. N.Y. 1998).
50. *Archie*, 997 F. Supp. at 507–28.
51. *Id*.
52. *Id*. at 533.
53. *Id*.
54. *Id*.
55. DOL Opinion Letter (FLSA2002-9). The DOL draws a distinction between the services volunteers provide to nonprofit organizations and the services volunteers provide to for-profit organizations: "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 employees of the religious, charitable or similar non-profit organizations that receive their service." DOL, elaws Advisors, Fair Labor Standards Act Advisor, http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp. "Under the FLSA, employees may not volunteer services to for-profit private sector employers." *Id*.
56. *Id*.
57. *But see McQueen v. Licata's Seafood Rest.*, No. 91-1461, Section "N", 1992 U.S. Dist. LEXIS 4554, 1992 WL 73322 (E.D. La., Mar. 30, 1992) (finding a worker who voluntarily helped her fiancé complete his job duties was not an employee as a matter of law because "[a] reasonable jury could certainly find that plaintiff worked at [the for-profit restaurant] 'without promise or expectation of compensation' and with the 'personal purpose' of helping her fiancé . . . finish work earlier"); *Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 75–76 (1st Cir. 1998) (plaintiff who "volunteered" to perform as a race car "crew chief" for his for-profit employer's son was exempt from FLSA coverage because the work was performed for plaintiff's own personal enjoyment and the benefit to the employer was tenuous).
58. *See* DLSE Opinion Letters 1998.11.12 re: Intern Program Exemption (advising that unpaid interns at a weekly newspaper that fact-checked articles, researched, and performed office chores were employees). *See also* 1998.11.12 re: Training Program Exemption; 1996.12.30; 1993.09.07; 1993.10.21; 1993.1.7.
59. *See* DLSE Opinion Letters 1998.11.12 re: Intern Program Exemption; 1998.11.12 re: Training Program Exemption.
60. DLSE Opinion Letter 2010.04.07 (Educational Internship Program).
61. DLSE Opinion Letter 2000.05.17 (Employment Status of Culinary Externs).
62. DLSE Opinion Letter 1988.10.27.
63. *Cf. Martinez v. Combs*, 49 Cal.4th 35, 52, 68, n.43 (2010) (finding in the joint employment context that courts may not properly rely on federal authority interpreting the FLSA definition of employment for purposes of interpreting the definition of employment under California's IWC wage orders).