A Fair Day's Pay: The Fair Labor Standards Act and Unpaid Internships at Non-Profit Organizations

INTRODUCTION

Congress enacted the Fair Labor Standards Act (FLSA)[1] "'to extend the frontiers of social progress' by 'insuring to all…able-bodied working men and women a fair day's pay for a fair day's work.'"[2] As the Supreme Court has noted, "[t]he statute contains no express or implied exception for commercial activities conducted by…nonprofit organizations."[3] However, building off the Supreme Court's decision in *Tony & Susan Alamo Foundation v. Secretary of Labor*,[4] a number of courts have held that there is an exception to the FLSA for more non-profits than those the Court contemplated, making these organizations exempt from federal minimum wage, overtime, and child labor laws. Additionally, there is a widespread belief, promulgated at least in part by the U.S. Department of Labor (DOL),[5] that non-profit organizations are not subject to the rules on unpaid internships that for-profit companies must meet. Although an increasing number of appellate courts have upheld unpaid internships at for-profit companies, finding that interns are not employees and therefore not protected by the FLSA, these companies are still subject to certain requirements that must be met for their unpaid internships. The DOL claims that these requirements do not extend to non-profit organizations. The courts' and the DOL's interpretations

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[1] 29 U.S.C. §§ 201-219 (2018).
[2] A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (quoting Message of the President to Congress, May 24, 1934).
[3] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 296 (1985).
[4] *Id.*
[5] "Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible." UNITED STATES DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Jan. 2018), https://www.dol.gov/whd/regs/compliance/whdfs71.htm [hereinafter INTERNSHIP FACT SHEET].

of the FLSA raise questions about the status of employees at non-profit organizations, and particularly about the status of unpaid interns at such organizations.

This paper examines the applicability of the FLSA to non-profit organizations, specifically focusing on unpaid internships at such organizations as compared to unpaid internships at for-profit businesses. It concludes that while there may be some circumstances in which non-profit organizations are exempt from the FLSA, there is no support in the text of the Act or related case law for the DOL's contention that unpaid internships at non-profit organizations are generally permissible without further scrutiny. Part I examines *Alamo Foundation*, subsequent decisions, the text of the FLSA, and guidelines issued by the Department of Labor to determine in which circumstances courts believe the FLSA applies to non-profit organizations, and in which circumstances the FLSA *should* apply to such organizations. Part II addresses the legality of unpaid internships and considers how the unpaid internship analysis applies to the non-profit sector. Part III examines the role of state and local law, specifically in New York, in addressing these questions.

I. DOES THE FLSA APPLY TO NON-PROFIT ORGANIZATIONS?

Several District Courts have found that non-profit organizations are not always subject to the FLSA, relying on the Supreme Court decision in *Tony & Susan Alamo Foundation v. Secretary of Labor*.[6] However, the conclusions these courts draw do not derive directly from the holding in *Alamo Foundation*, but from supporting language and embellishments by lower courts. This section will discuss the *Alamo Foundation* case and subsequent District Court cases that draw from it and compare these cases to the text of the Act itself, the Department of Labor guidelines relating to the Act, and the legislative history to show that while there are some circumstances in which

[6] 471 U.S. 290 (1985).

non-profit organizations may not be covered by the FLSA, lower courts are applying these exemptions more broadly than is warranted. Additionally, this section will identify the circumstances in which non-profit organizations are unquestionably covered by the FLSA, casting into doubt the DOL's contention that unpaid internships at non-profit organizations are generally permissible.

A. District Court Cases Use Alamo Foundation *to Support Their Contention That Some Non-Profit Organizations Are Not "Enterprises"*

The Tony and Susan Alamo Foundation was a non-profit organization whose mission was, according to its Articles of Incorporation, to "'establish, conduct and maintain an Evangelistic Church; to conduct religious services, to minister to the sick and needy, to care for the fatherless and to rescue the fallen, and generally to do those things needful for the promotion of Christian faith, virtue, and charity.'"[7] The Foundation's income derived largely from commercial businesses that it operated, including "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy."[8] The businesses were staffed by individuals that the Foundation called "associates," who were largely rehabilitated drug addicts or criminals and to whom the Foundation did not provide any cash payment for their work.[9] The Foundation did, however, provide them with food, clothing, shelter, and other unspecified benefits.[10] The Secretary of Labor sued the Foundation alleging violations of the minimum wage, overtime, and record-keeping provisions of the FLSA with respect to these associates.[11] In considering the case, the

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[7] *Id.* at 292.
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 290.

Supreme Court addressed two questions relating to the FLSA: first, whether the Foundation was an "enterprise engaged in commerce or the production of goods for commerce,"[12] one requirement for coverage under the FLSA; and second whether the associates were "employees" within the meaning of the Act.[13] The first of these questions is relevant for the question of the applicability of the FLSA to non-profit organizations, and will be discussed in this section, while the second question will be discussed *infra* Part II.

The Supreme Court in *Alamo Foundation* affirmed the lower court's holding that the Foundation was subject to the FLSA,[14] as its activities were operated for a "common business purpose," as required by the Act's definition section.[15] Given the nature of the Foundation's business activities, this seems like an easy decision to reach; their activities included retail outlets and other commercial activities that clearly have a business purpose.[16] The only assertions that the Foundation made in order to argue that they were not an enterprise and therefore should not be subject to the FLSA were that they were a tax-exempt organization under 26 U.S.C. § 501(c)(3),[17] and that their businesses were not "ordinary"[18] commercial businesses because they were "infused

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[12] 29 U.S.C. §§ 206, 207 (2018).
[13] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 (1985).
[14] *Id.*
[15] *Id.* The FLSA defines an enterprise as "the related activities performed…by any person or persons for a common business purpose…," but does not define "business purpose." § 203(r)(1).
[16] *Id.* at 292.
[17] *Id.* at 295-96.
[18] This language comes from a statement of interpretation by the Department of Labor that states, "Activities of eleemosynary, religious, or educational organization may be performed for a business purpose. Thus, where such organizations engage in ordinary commercial activities…the business activities will be treated under the Act the same as when they are performed by the ordinary business enterprise." 29 C.F.R. § 779.214 (2018). "Ordinary commercial activities" is not defined. This statement of interpretation will be discussed *infra* Part I.B.

with a religious purpose."[19] In addressing the first of these arguments, the Court held that there is no blanket exemption to the FLSA for tax-exempt non-profit organizations.[20]

In addressing the Foundation's second argument, that their businesses were not "ordinary," the Court pointed out that "[t]he characterization of petitioners' businesses…is a factual question resolved against petitioners by both courts below, and therefore barred from review in this Court 'absent the most exceptional circumstances.'"[21] The Court continued by stating that both lower courts that had considered the case had "found that the Foundation's businesses serve the general public in competition with ordinary commercial enterprises," placing their commercial activities within the FLSA's definition of "enterprise."[22] The Court did not make an independent assessment of what characteristics of the Foundation's activities caused them to fall within this definition, and did not state that competition with ordinary commercial enterprises is a requirement for enterprise coverage.

However, subsequent District Court cases about the applicability of the FLSA to non-profit organizations have relied on this language. Many of these cases state, erroneously, that the Supreme Court held in *Alamo Foundation* that in order for a non-profit organization to qualify as an enterprise under the FLSA, it must engage in competition with ordinary commercial enterprises.[23] Two Appellate Courts have also cited these incorrect lower court holdings or made

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[19] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 298 (1985).
[20] *Id.* at 296-97. To reach this holding, the Court considered the text of the Act, the Department of Labor guidance about the definition of business purpose, and the legislative history of the Act, as discussed *infra* Parts I.B and C. The Court found that there is no express or implied exemption to the Act for non-profit organizations; the Department of Labor's interpretations allow the Act to reach non-profits; and the legislative history of the Act supports reaching non-profits in at least some circumstances. *Id.*
[21] *Id.* at 299 (quoting Branti v. Finkel, 445 U.S. 507, 512 n. 6 (1980)).
[22] *Id.*
[23] *See* Malloy v. Ass'n of State & Territorial Solid Waste Mgmt. Officials, 955 F. Supp. 2d 50, 55 (D.D.C. 2013) (emphasis in original) (internal quotations emitted) ("In determining whether a

similar claims, suggesting that this trend is starting to reach some higher courts.[24] These district and appellate courts ignore the fact that the Supreme Court did not explicitly adopt this as a holding in *Alamo Foundation*, simply stating that it had been the lower courts' reasoning.[25] The Supreme Court has never stated that competition with other commercial enterprises is necessary for a non-profit organization to qualify as an enterprise under the FLSA.[26]

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non-profit entity operates with a business purpose, courts examine whether the non-profit is *primarily* engaging in competition in the public with commercial enterprises."); Kitchings v. Florida United Methodist Children's Home, Inc., 393 F. Supp. 2d 1282, 1294 (M.D. Fla. 2005) (quoting Murray v. R.E.A.C.H. of Jackson County, Inc., 908 F. Supp. 337, 339 (W.D.N.C. 1995)) ("[T]he test is an 'economic reality test,' where the focus is on whether 'the enterprise is primarily engaged in competition in the public with ordinary commercial enterprises.'"); Briggs v. Chesapeake Volunteers In Youth Servs., Inc., 68 F. Supp. 2d 711, 715 (E.D. Va. 1999) ("The focus of the court's inquiry is whether the non-profit agency is primarily engaged in competition in the public with ordinary commercial enterprises."); Joles v. Johnson Cty. Youth Serv. Bureau, Inc., 885 F. Supp. 1169, 1175 (S.D. Ind. 1995) ("Unless it engages in commercial activities in competition with private entrepreneurs…a non-profit charitable organization is not an 'enterprise' under § 203(r) because it is not conducted for a 'business purpose'. [sic] So declares the Supreme Court…."); *Murray*, 908 F. Supp. at 339 (W.D.N.C. 1995) ("[T]he Supreme Court has stated the test is one of economic reality with the focus being whether or not the enterprise is primarily engaged in competition in the public with ordinary commercial enterprises.").

[24] Reagor v. Okmulgee Cty. Family Res. Ctr., 501 Fed. Appx. 805, 809 (10th Cir. 2012) ("[T]he question is whether the non-profit is primarily engaging in competition in the public with commercial enterprises."); Jacobs v. New York Foundling Hosp., 577 F.3d 93, 97 (2d Cir. 2009) (quoting Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 299 (1985)) ("Generally, non-profit organizations that do not 'engage in ordinary commercial activities,' or 'serve the general public in competition with ordinary commercial enterprises,' operate without a 'business purpose' and therefore are not enterprises."). However, neither court adopted this reasoning as a holding.

[25] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 299 (1985).

[26] The District Court that initially considered the Alamo Foundation case relied on two cases that do not explicitly state that competition is a prerequisite for finding enterprise coverage, neither of which is a Supreme Court case. Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 556, 573 (W.D. Ark. 1982), *modified*, No. CIV. 77-2183, 1983 WL 1982 (W.D. Ark. Feb. 7, 1983), *aff'd in part, vacated in part*, 722 F.2d 397 (8th Cir. 1983), *aff'd sub nom.* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985). The two cases were Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 881-82 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954), which held that employees engaged in the operation of a printing press run by a religious organization were covered under the FLSA because they were engaged in commerce, although the court did not explain what made this business "commerce;" and Marshall v. Woods Hole Oceanographic Inst., 458 F. Supp. 709 (D. Mass. 1978), which found that a non-profit scientific research

B. A Textual Analysis of the FLSA and Related DOL Guidance

Additionally, there is no indication in the text of the FLSA that non-profit organizations are exempt from coverage or that they must compete with for-profit businesses in order to be covered. The three major substantive provisions of the FLSA pertain to minimum wage;[27] overtime compensation and maximum hours;[28] and child labor.[29] Each of these provisions applies to 1) "employees…engaged in commerce or in the production of goods for commerce,"[30] or 2) employees who are "employed in an enterprise engaged in commerce or in the production of goods for commerce."[31] This statutory language gives rise to two types of coverage under the FLSA: what courts call "individual" coverage, meaning that the employee herself is engaged in interstate commerce or the production of goods for commerce, and what they call "enterprise" coverage, meaning that the employer for whom the employee works is an enterprise engaged in commerce or in the production of goods for commerce.[32]

Congress added enterprise coverage to the FLSA in 1961.[33] This is the type of coverage analyzed by the Supreme Court in *Alamo Foundation*. Enterprise coverage turns on the definition of "enterprise" in the FLSA, defined as "the related activities performed (either through unified

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organization engaged in ordinary commercial activities because "it contracts with the United States Navy under the same terms and conditions as any other commercial organization in the United States," but did not state that competition with for-profit businesses was required.

[27] 29 U.S.C. § 206(a) (2018). The current federal minimum wage is $7.25 per hour.

[28] § 207.

[29] § 212.

[30] § 206(a). *See also* §§ 207(a), 212(c).

[31] *Id. See also* §§ 207(a), 212(c).

[32] *See* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 n.8 (1985).

[33] Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65. According to the Supreme Court in *Alamo Foundation*, discussed *supra* Part I.A, the addition of enterprise coverage to the FLSA "substantially broadened the scope of the Act to include any employee of an enterprise engaged in interstate commerce, as defined by the Act," whereas "[p]rior to the introduction of enterprise coverage in 1961, the only individuals covered under the Act were those engaged directly in interstate commerce or in the production of goods for interstate commerce." Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 n.8 (1985).

operation or common control) by any person or persons for a common business purpose."[34] The critical term "business purpose" is not defined. The definition section of the FLSA, in the subsection relating to the definition of "enterprise," §203(r), does lay out some types of activities that are "deemed to be activities performed for a business purpose."[35] These activities are those performed:

> (A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or[36]
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> (B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or[37]
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> (C) in connection with the activities of a public agency….[38]

These enumerated types of organizations are covered whether "operated for profit or not for profit."[39] However, since the definition of "enterprise" does not otherwise define "business purpose," it is not clear the extent to which other non-enumerated non-profit organizations are covered by the FLSA.

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[34] § 203(r)(1).
[35] 29 U.S.C. § 203(r)(2) (2018).
[36] This language was added to the FLSA pursuant to the 1966 Amendments. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 831.
[37] This language was added pursuant to the 1961 Amendments, along with enterprise coverage. Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 66. It was modified to the current text in 1966. Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 831.
[38] 29 U.S.C. § 203(r)(2) (2018). This third explicit inclusion to the definition of "enterprise" was added to the FLSA in 1974. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 59.
[39] *Id.*

In 1970, the DOL issued a statement of interpretation relating to the definition of "business purpose" as applied to non-profit organizations. This interpretation says,

> Activities of eleemosynary, religious, or educational organizations may be performed for a business purpose. Thus, 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.[40]

This interpretation simply raises a new question as to the meaning of "ordinary commercial activity;" it therefore does not help to define "business purpose." "Ordinary commercial activity" is the phrase that the Supreme Court addressed but did not define in *Alamo Foundation*,[41] and there is still no precise definition of the term in the case law.

The Department of Labor has also much more recently, in 2016, released a guidance document specifically to help non-profit organizations determine whether their employees are covered under the FLSA.[42] This guidance document expands very slightly on the definition of "ordinary commercial activity" by stating that "[o]rdinary commercial activities are activities such as operating a business, like a gift shop. Activities that are charitable in nature…are not considered ordinary commercial activities…."[43] This document also says that if a non-profit organization that engages in charitable activities also has revenue producing activities that meet the FLSA

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[40] 29 C.F.R. § 779.214 (2018).

[41] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302 (1985).

[42] DEP'T OF LABOR, GUIDANCE FOR NON-PROFIT ORGANIZATIONS ON PAYING OVERTIME UNDER THE FAIR LABOR STANDARDS ACT (May 18, 2016), https://www.dol.gov/whd/overtime/final2016/nonprofit-guidance.pdf [hereinafter OVERTIME GUIDANCE]. This document does not supersede prior guidance but was issued because the DOL became aware of "several issues and misunderstandings about the FLSA's decades-long applicability to non-profits" that the document intends to rectify. *Id.* at 2. The document does not specify what these issues and misunderstandings are.

[43] *Id.* The document also gives examples of charitable activities that are not ordinary commercial activities, naming "providing temporary shelter; providing clothing or food to homeless persons; providing sexual assault, domestic violence, or other hotline counseling services; and providing disaster relief provisions." *Id.*

requirements for "ordinary commercial activity," the employees of such organization are entitled to overtime under the FLSA.[44] This document suggests that the DOL believes that an organization that engages in both commercial[45] and non-commercial activity is an enterprise for purposes of the FLSA, with no line drawn between employees who engage in the commercial activities and those who do not. Neither the text of the Act nor any of the guidance issued by the DOL therefore states or suggests that competition with for-profit businesses is a prerequisite for enterprise coverage, although they fail to provide any other concrete criteria for determining when a non-profit organization is an "enterprise."

For individual coverage, which is based on the status of the employee herself rather than the organization for which she works, the key question is whether the employee is "engaged in commerce or in the production of goods for commerce," as "commerce" is defined by the FLSA.[46] Under this type of statutory coverage, an employee of an organization or business could be covered even if the organization as a whole is not. The definition of "commerce" in the FLSA is broad: it includes "trade, commerce, transportation, transmission, or communication[47] among the several States or between any State and any place outside thereof."[48]

The DOL has issued statements of policy and interpretation pertaining to individual coverage, which, like the text of the Act itself, point toward inclusive coverage of employees through a broad definition of "commerce." An interpretive bulletin issued in 1950 states that "employees whose work involves the continued use of the interstate mails, telegraph, telephone or

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[44] *Id.* at 2-3.
[45] With a requirement of an annual revenue threshold of $500,000 in sales made or business done. *Id.* at 2.
[46] 29 U.S.C. § 206(a) (2018). *See also* §§ 207(a), 212(c).
[47] Most, if not all, large non-profits, and many smaller ones too, regularly engage in interstate communication.
[48] § 203(b).

similar instrumentalities for communication across State lines are covered by the Act."[49] The bulletin additionally defines communication to include "information[,]…written reports or messages,…orders for goods or services, or plans or other documents…."[50]

The DOL's 2016 guidance document for non-profit organizations also expands on the type of activity by non-profit organization employees that qualifies as commerce for purposes of individual coverage. The guidance document states that employees who regularly engage in any interstate communication, including phone calls, emails, ordering or receiving goods for an out-of-state supplier, and handling credit card transactions, are covered under the FLSA.[51] Both the text of the Act and the DOL's interpretation of it, therefore, point to broad individual coverage for employees of non-profit organizations who engage in interstate communication.

The text of the FLSA includes some express exemptions to coverage.[52] These exemptions can be extremely specific, and in general point to Congress's ability to have included an explicit non-profit exemption if they had wanted to do so. For example, there is an exemption to maximum hours coverage for

> any employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children--
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> (A) who are orphans or one of whose natural parents is deceased, or
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> (B) who are enrolled in such institution and reside in residential facilities of the institution,
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> while such children are in residence at such institution, if such employee and his spouse reside in such facilities, receive, without cost, board and lodging from such

[49] 29 C.F.R. § 776.10(b) (2018).
[50] *Id.* In another 1950 interpretive bulletin, the DOL says that employees who are engaged in both covered and non-covered activities under the FLSA are covered employees, and that an employee who regularly engages in activities in commerce or the production of goods for commerce, "even though small in amount," is entitled to the benefits of the Act. § 776.3.
[51] OVERTIME GUIDANCE, *supra* note 42, at 3.
[52] 29 U.S.C. § 213 (2018).

> institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000.[53]

Additionally, some of the exemptions, including the above, expressly mention non-profit status, as with an exemption to both minimum wage and maximum hours coverage for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center" if certain requirements are met.[54]

A DOL statement of interpretation from 1970 specifies that only those exemptions that appear in the text of the FLSA are lawful exemptions,[55] and that these exemptions should be narrowly construed.[56] Thus it is clear that the DOL believes there is no blanket non-profit exemption to the FLSA and has not defined a narrower exemption for certain types of non-profit organizations.

C. The Legislative History of the FLSA

The argument that FLSA coverage extends to at least some non-profits is also supported by the legislative history of the 1961 addition of enterprise coverage. The Senate Committee Report for the amendment to add enterprise coverage to the FLSA stated,

> The purpose of the bill, as amended, is to strengthen and extend the scope and application of the Fair Labor Standards Act of 1938, thus implementing the declared policy of the act to correct and as rapidly as practicable to eliminate, in industries engaged in commerce or in the production of goods for commerce, labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers. The bill seeks to further this purpose by…extending the benefits of the law to…additional workers employed in large retail and service enterprises engaged in commerce or in the production of goods for commerce and by other employers who are so engaged.[57]

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[53] § 213(b)(24).
[54] § 213(a)(3).
[55] "Conditions specified in the language of the Act are 'explicit prerequisites to exemption.'" 29 C.F.R. § 779.101 (2018) (quoting Arnold v. Ben Kanowsky, Inc., 361 U.S. 388, 392 (1960)).
[56] *Id.*
[57] S. REP. NO. 145, at 1-2 (1961).

It is clear that it was in the spirit of expanding the FLSA's coverage in order to protect workers that enterprise coverage was added to the Act. The report went on to discuss the meaning of "common business purpose" in the statute, and stated, "Eleemosynary, religious, or educational and similar activities of organizations which are not operated for profit are not included in the term 'enterprise' as used in this bill. Such activities performed by nonprofit organizations are not activities performed for a common business purpose."[58] This clearly indicates that those activities run by non-profit organizations for profit were intended to be covered by the FLSA.

Additionally, in 1960, the year before enterprise coverage was added to the FLSA, a similar amendment, [59] which also sought to add enterprise coverage, was proposed but ultimately failed "because the conference committee could not agree."[60] As a part of this amendment, Senator Goldwater proposed a floor amendment that would have excluded any employer qualifying for tax exemption under 26 U.S.C. § 501(c)(3) from the definition of "enterprise" under the FLSA.[61] Senator Kennedy, the sponsor of the bill, opposed this amendment because "[i]f an eleemosynary institution owned a profitmaking corporation or company, I think it might be exempt, under the language of the Senator's amendment," which would go beyond Congress's intent in passing the bill.[62] The amendment was rejected on a vote.[63] In 1961, when enterprise coverage was added to the FLSA pursuant to the successful Fair Labor Standards Amendments of 1961,[64] Senator Curtis

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[58] *Id.* at 41.
[59] Fair Labor Standards Amendments of 1960, H.R. 12677, 86th Cong. (1960).
[60] S. REP. NO. 145, at 2.
[61] 106 CONG. REC. 16,703 (1960) (statement of Sen. Goldwater, R-AZ). The examples that the Senator gave of organizations that this would affect included the Salvation Army, the Red Cross, and the YMCA.
[62] 106 CONG. REC. 16,704 (statement of Sen. Kennedy, D-MA).
[63] *Id.*
[64] H.R. 3935, 87th Cong. (1961) (enacted).

introduced the same floor amendment.[65] In arguing against the amendment, Senator McNamara, the sponsor of the bill, stated that non-profit organizations should be and are "exempt except as those industries…engage in…activities which compete with private industry…. Then, when such industry comes into competition in the marketplace with private industry, we say that their work is not charitable organization work.…"[66] The amendment was again rejected on a vote,[67] supporting the idea that Congress did intend to extend enterprise coverage to employees of at least some tax-exempt non-profit organizations. The Court in *Alamo Foundation*, examining this question in 1985, thus found that there was "broad congressional consensus that ordinary commercial businesses should not be exempted from the Act simply because they happened to be owned by religious or other nonprofit organizations."[68]

Given the text of the FLSA and the DOL's related guidance, the Supreme Court's holding in *Alamo Foundation*, and the legislative history of the amendments to add enterprise coverage, there is very little support for the idea of a blanket non-profit exemption to the FLSA. There is some support, however, that can be drawn from the legislative history of the addition of enterprise coverage for hospitals and local railways in the current definition of enterprise under § 203(r)(2). The Senate Report for the 1966 Amendments that added this coverage explained that

> [t]hese enterprises which are not proprietary [sic] that is, not operated for profit, are engaged in activities which are in substantial competition with similar activities carried on by enterprises organized for a business purpose. Failure to cover all activities of these enterprises will result in the failure to implement one of the basic purposes of the act, the elimination of conditions which constitute an unfair method of competition in commerce.[69]

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[65] 107 CONG. REC. 6,254 (1961) (statement of Sen. Curtis, R-NE).
[66] 107 CONG. REC. 6,255 (statement of Sen. McNamara, D-MI).
[67] *Id.*
[68] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 297 (1985).
[69] S. REP. NO. 145, at 1-2 (1961) (internal quotations omitted).

It might be argued that recognizing only this particular type of non-profit activity that competes with for-profit businesses suggests that Congress did not see other types of non-profits as competing with for-profit businesses, and thus, felt they were necessary to cover under the Act. However, it is also possible that Congress simply saw a large, easily rectifiable problem with these types of non-profits, and did not intend to exclude others from coverage by including them. Given the earlier legislative history, the latter seems the more likely explanation.

It does appear to be clear that although there is no blanket non-profit exemption to the FLSA, non-profit organizations are exempt from enterprise coverage to the extent that they are not operated for a "common business purpose." The key issue becomes how to determine whether a non-profit organization falls into this category. The DOL's guidance simply moves the mark by adding an additional ambiguous phrase to define with their "ordinary commercial activities" standard. Some district courts have taken the position that Senator McNamara took in the Senate floor debate[70] that there is a requirement of competition with for-profit enterprises.[71] However, this test is without basis in the law, as described *supra* Part I.A. Additionally, this test should not be adopted by courts seeking to create new law because it will result in under-protection of employees at non-profit organizations, thus flouting the Act's intent. For example, employees at non-profit organizations that have substantial revenue streams but do not compete with for-profit businesses[72] would not be covered under this test.

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[70] 107 CONG. REC. 6,255 (statement of Sen. McNamara, D-MI).
[71] *See supra* Part I.A.
[72] Unions, for example, collect monetary dues from their members, use these dues to hire employees, and could be said to compete with other unions for membership. Large museums, such as the Metropolitan Museum of Art in New York, are another example of non-profit organizations with substantial revenue streams.

Additionally, looking at the text and legislative history of the Act and the DOL guidance, it is clear that there is a tension in the different treatment of individual and enterprise coverage for non-profit organizations under the FLSA. Congress added enterprise coverage to the Act in 1961 for the purpose of "strengthen[ing] and extend[ing] the scope and application" of the Act.[73] The amendment that added enterprise coverage increased coverage under the Act to include employees who did not directly work in commerce themselves, but worked for an enterprise that did, resulting in protection for many more workers. However, because of the way the term "enterprise" has been defined by Congress, by the Department of Labor, and by the courts, this expanded protection has not extended to employees of non-profit organizations in the same way that it has for employees of for-profit companies. It is clear that there are situations in which a non-profit organization may have individual employees who are engaged in commerce and may be engaged in commerce as an organization but will not qualify as an enterprise under the current definition.[74] This leaves unprotected any employees of these organizations who are not themselves engaged in interstate commerce. This is an issue that would likely need to be addressed by Congress, as the contradiction originates in the definition section of the FLSA itself with the definition of "enterprise."[75]

There are therefore two major issues faced by employees of non-profit organizations. First, employees of non-profit organizations that do not compete directly with for-profit businesses may not be covered under the FLSA when in fairness they should be. This is because of the lack of definition of "ordinary commercial activity" that has led to the test created by lower courts requiring competition with for-profit businesses. The DOL clarifying the definition of "ordinary

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[73] S. REP. NO. 1487, at 8 (1966).
[74] There are many large, national non-profits with significant budgets that engage in interstate communication but do not engage in activities that can be termed "business activities."
[75] 29 U.S.C. § 203(r)(2)(A) (2018).

commercial activity" to include activities beyond competition with for-profit businesses would help to alleviate this issue.[76] The second issue is that some employees of non-profit organizations that are engaged in commerce,[77] but not business activities, will not be covered under the FLSA. This will be the case even if some employees that engage in commerce themselves are covered. This seems to be at odds with the purpose of the amendment that added enterprise coverage. These two problems leave a protection gap for employees of non-profit organizations that is not faced by employees of for-profit businesses.

II. What Does This Mean for Unpaid Internships?

Regardless of the fact that at least some non-profit employees are unquestionably covered by the FLSA, there is a widespread belief that all non-profit organizations are exempt from the requirements for unpaid internships that for-profit companies must meet.[78] This assumption is due to language in the Department of Labor's Fact Sheet about internship programs, in which it is stated,

> The FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks. WHD [DOL's Wage and Hour Division] also recognizes an exception 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 for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.[79]

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[76] Perhaps the focus could be on the profit or revenue generated by the organization.
[77] As defined in section 203(b) of the FLSA, "'[c]ommerce' means trade, commerce, transportation, transmission, or *communication* among the several States or between any State and any place outside thereof." § 203(b) (emphasis added).
[78] *See* Jane Pryjmak, *Employee, Volunteer, or Neither? Proposing a Tax-Based Exception to FLSA Wage Requirements for Nonprofit Interns after Glatt v. Fox Searchlight*, 92 WASH. L. REV. 1071, 1073 (2017).
[79] INTERNSHIP FACT SHEET, *supra* Note 5.

However, the fact that non-profit organizations are permitted unpaid volunteers in some circumstances should not be enough to create an assumption that all interns at non-profit organizations are volunteers. The Restatement of Employment Law, recognizing cases involving volunteers at both for-profit and non-profit businesses, states that "[a]n individual is a volunteer and not an employee if the individual renders uncoerced services to a principal without being offered a material inducement."[80] The Restatement directly addresses the non-profit status of the organization that receives the volunteer's services, stating, "Nonprofit enterprises are generally subject to the same employment-law obligations toward employees as are for-profit enterprises. Thus, the distinction between volunteers and employees applies whether the principal operates as a for-profit, nonprofit, or government enterprise."[81] There should therefore be no special internship exemption for non-profit organizations. In fact, given the wealth of court decisions, legislative history, and statutory and regulatory language stating that there is no blanket non-profit exception to the FLSA, discussed *supra* Part I, the DOL's claim borders on nonsensical.

As lawsuits brought by unpaid interns against for-profit companies have come to light, many for-profit companies have started to shut down their unpaid internship programs.[82] However, even as questions of the legality of unpaid internships rise due to high-profile lawsuits,[83] unpaid internships remain a widespread practice across the non-profit industry – a quick search on Idealist,

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[80] Restatement of Employment Law § 1.02 (2017).
[81] *Id.* cmt. a.
[82] Neil Howe, *The Unhappy Rise of the Millennial Intern*, FORBES (Apr. 22, 2014, 10:11 AM), https://www.forbes.com/sites/realspin/2014/04/22/the-unhappy-rise-of-the-millennial-intern/.
[83] *See id.*

a job search site that hosts job postings from many non-profits, yields 84 unpaid internships in the non-profit industry in the New York City area alone on May 21, 2018.[84]

A. The Unpaid Internship Policy Debate

There is an active policy debate as to whether unpaid internships are beneficial for the mostly young people who do them. Proponents point to benefits such as work experience, résumé value, career exploration, networking opportunities, and, perhaps most importantly, the potential for a full-time job offer from the company at which the intern works.[85] These benefits point to the manner in which unpaid internships can lead to full-time, paid employment. Opponents of unpaid internships, on the other hand, argue that such internships "lack educational value, displace paid employees, and are replacing entry-level jobs in more and more fields,"[86] casting doubt on the idea that unpaid internships help those who do them obtain full-time jobs. In support of opponents' arguments, the National Association of Colleges and Employers has conducted surveys of students to see whether completing internships boosts their careers, which have found that students who completed paid internships were much more likely to receive job offers than students who completed unpaid internships. The studies also found that in at least some industries, students with no internship experience at all were more likely to get a job offer than students who had completed

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[84] *Internship Search Results*, IDEALIST, https://www.idealist.org/en/?orgType=NONPROFIT&paid=NO&radius=40000&sort=relevance&type=INTERNSHIP (last visited May 21, 2018).

[85] Erica Wolfe, *Do Unpaid Internships Pay Off In the Long Run? Let's Look at the Pros and Cons*, IGRAD (Dec. 29, 2013), https://www.igrad.com/articles/are-unpaid-internships-worthwhile; Ashley Gearhart, *6 Reasons an Unpaid Internship Is Absolutely Worth Your Time*, ELITE DAILY (June 6, 2015), https://www.elitedaily.com/money/unpaid-internship/1047612.

[86] Sam Bakkila, *Why You Should Never Have Taken That Prestigious Internship*, MIC (June 14, 2013), https://mic.com/articles/48829/why-you-should-never-have-taken-that-prestigious-internship.

unpaid internships.[87] Though interesting, these policy questions are not directly relevant to how the law addresses unpaid internships, with the important question being whether unpaid interns qualify as employees.

B. Non-Profit Organizations Are Permitted Some Non-Employee Volunteers

The legality of unpaid internships stems from an aspect of the FLSA not yet examined in this paper: the definition of "employee" covered by the statute.[88] The FLSA's definition of "employee" is vague and circular: the definition section says only that "the term 'employee' means any individual employed by an employer."[89] Looking at the definition of "employ" does not provide much clarification, as it states that "'[e]mploy' includes to suffer or permit to work."[90] Courts have examined the question of who is an employee in the volunteer context, which is pertinent to the DOL's contention that internships with non-profit organizations are generally permissible because non-profit organizations are permitted volunteers.

The Supreme Court addressed this question in *Alamo Foundation*; in addition to its holding relating to enterprise coverage of employers, the Court considered whether the "associates" who worked for the Foundation were employees within the meaning of the FLSA.[91] In considering this

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[87] Madeline Farber, *Here's Why You May Want to Rethink That Unpaid Internship*, FORTUNE (July 7, 2016), http://fortune.com/2016/07/07/paid-interns-more-job-offers-higher-salaries-than-unpaid-interns/; Jordan Weissman, *Do Unpaid Internships Lead to Jobs? Not for College Students*, THE ATLANTIC (June 19, 2013), https://www.theatlantic.com/business/archive/2013/06/do-unpaid-internships-lead-to-jobs-not-for-college-students/276959/.

[88] The minimum wage provision of the FLSA states that "[e]very employer shall pay to each of his *employees*" a minimum wage. 29 U.S.C. § 206(a) (2018) (emphasis added). The maximum hours provision similarly states that "no employer shall employ any of his *employees*…for a workweek longer than forty hours." § 207(a)(1) (emphasis added).

[89] § 203(e)(1).

[90] § 203(g).

[91] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 299 (1985).

question, the Court, quoting *Walling v. Portland Terminal*,[92] a case involving trainee workers who were not paid during their training period,[93] stated that "[a]n 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,' is outside the sweep of the Act."[94] The Alamo Foundation's position, relying on this language, was that its associates were not employees because none expected to be paid – the Secretary of Labor did not produce any associates who referred to their work as anything other than volunteering.[95] However, the Court found that the employees' own assessment of their working relationship was not dispositive, and that "a compensation agreement may be 'implied' as well as 'express....'"[96] Additionally, the associates did receive "food, clothing, shelter, and other benefits,"[97] and the District Court had found that they must have expected to receive these benefits in exchange for their services, making them "wages in another form."[98] The Supreme Court found that under the circumstances, the District Court's finding "that the associates must have expected to receive in-kind benefits – and expected them in exchange for their services – is certainly not clearly erroneous."[99] The Court also found a public policy reason for finding the associates to be employees, stating, "If 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."[100]

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[92] 330 U.S. 148 (1947).
[93] *See infra* Part II.C.
[94] *Id.* at 295 (1985) (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947)).
[95] *Id.* at 300.
[96] *Id.* at 301.
[97] *Id.* at 292.
[98] *Id.* at 293.
[99] *Id.* at 301.
[100] *Id.* at 302.

The Court in *Alamo Foundation* stressed that finding the Foundation's associates to be employees would not have a chilling effect on "ordinary volunteerism."[101] The Court reasoned that "[t]he Act reaches only the 'ordinary commercial activities'[102] of religious organizations, and only those who engage in those activities in expectation of compensation,"[103] in this case the in-kind benefits received, conditions that will not reach "volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy."[104] The Court thus left open the possibilities both of volunteering at a non-profit organization not engaged in "ordinary commercial activities," and of volunteering more broadly when volunteers do not expect any kind of compensation.[105]

Some subsequent cases involving volunteers have relied directly on language from *Alamo Foundation*.[106] However, the majority of lower court cases dealing with volunteer status under the

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[101] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303 (1985).
[102] *See supra* Part I.
[103] *Alamo Foundation*, 471 U.S. at 302.
[104] *Id.*
[105] In a footnote in Alamo Foundation, the Court also briefly addressed a more specific way to determine whether an individual is a volunteer. The Court cited the Respondent's Brief:

> The Solicitor General states that in determining whether individuals have truly volunteered their services, the Department of Labor considers a variety of facts, including the receipt of any benefits from those for whom the services are performed, whether the activity is a 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. *Alamo Foundation*, 471 U.S. at 303 n.25.

This reasoning was put forward by the Department of Labor in their brief to the Court, but the Court did not address the argument besides this quote in a footnote with no reasoning attached to it. The Court did not specifically adopt this reasoning, and it has not been relied on by other cases, although this is a helpful test that could be adopted more broadly.
[106] *See, e.g.*, Williams v. Strickland, 87 F.3d 1064, 1067 (9th Cir. 1996) (finding an individual to be a volunteer rather than an employee because he had no express or implied agreement for compensation and was working purely for his rehabilitation).

FLSA involve individuals who volunteered for a public agency and use a framework specific to the public agency context that expressly appears in the text of the FLSA and in accompanying guidance from the DOL.[107] Some courts have applied this framework beyond public agency cases, in both the non-profit[108] and for-profit[109] contexts, without acknowledging that the statutory basis for the framework is limited to the public agency context.

The public agency volunteer framework appears in the FLSA as an express exception to the definition of "employee:"

> (A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—
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> (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
>
> (ii) such services are not the same type of services which the individual is employed to perform for such public agency.
>
> (B) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a

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[107] *See, e.g.*, Cleveland v. City of Elmendorf, 388 F.3d 522 (5th Cir. 2004) (finding that unpaid city police officers were volunteers because they performed public service without expectation of compensation); Brown v. N.Y.C. Dep't of Educ., 755 F.3d 154 (2d Cir. 2014) (finding mentor at public high school to be volunteer, not employee because he had no expectation of compensation).

[108] *See, e.g.*, Padilla v. Am. Fed'n of State, Cty., & Mun. Employees—Council 18, No. CV 11-1028 JCH/KBM, 2013 WL 12085976, at *5 (D.N.M. Mar. 28, 2013), *aff'd sub nom.* Padilla v. Am. Fed'n of State, Cty. & Mun. Employees, Council 18, 551 F. App'x 941 (10th Cir. 2014) (finding individual to be a volunteer, rather than an employee, for a non-profit labor union because he did not receive wages and was not dependent on the union financially).

[109] *See, e.g.*, Rhea Lana, Inc. v. U.S. Dep't of Labor, 271 F. Supp. 3d 284 (D.D.C. 2017) (finding individuals who volunteered to work at consignment sales to be employees rather than volunteers because they performed tasks integral to the company's success and expected to receive personal benefits for doing so); Genarie v. PRD Mgmt., Inc., No. CIV.A. 04-2082 (JBS), 2006 WL 436733, at *12 (D.N.J. Feb. 17, 2006) (finding live-in maintenance worker at an apartment complex to be employee rather than volunteer because she expected compensation in the form of an apartment, was not working so as to provide a public service, and did not perform her work in the absence of coercion).

> State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.[110]

Additionally, under the FLSA, "employee" does not include "individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries."[111] These exceptions are extremely narrow and do not add significantly to the judicial exemptions from FLSA coverage for employees. They certainly do not lead to a conclusion that all interns at non-profit organizations are volunteers.

The Department of Labor issued a regulation in 1987 pertaining to public employees that helps to further clarify when an individual is treated as a volunteer for a public agency rather than an employee under § 203(e)(4) of the FLSA. This regulation states that the individual must perform the services "for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered."[112] The regulation also states that "[i]ndividuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer."[113] This regulation is located in a part of the DOL's Wage and Hour Division regulations entitled "Application of the Fair Labor Standards Act to Employees of State and Local Governments," implying that the regulation only applies to those employees. Individuals who are not employees of state or local governments presumably do not fall into this definition of volunteer under the DOL guidelines.

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[110] § 203(e)(4).

[111] § 203(e)(5). Cases involving the food bank exemption from the FLSA are rarer even than those involving non-public-agency non-profits. A District Court case from 2016, faced with the question of whether children who picked almonds fell under the food-bank volunteer exemption, stated that "it appears that no court has applied this exemption until now." Perez v. Paragon Contractors Corp., 222 F. Supp. 3d 1078, 1088 (D. Utah 2016). The court then looked only at the dictionary definition of "volunteer," finding that the children in that case did not fall into that category because they were not working of their own free will. *Id.*

[112] 29 C.F.R. § 553.101(a) (2018).

[113] § 553.101(c). This is consistent with the Restatement of Employment Law provision on volunteers.

The DOL also issued a statement of interpretation in 2011 that restates the FLSA's exclusion of volunteers for non-profit foodbanks from the definition of employee in the FLSA: "Section 3(e)(5) of the Fair Labor Standards Act excludes from the definition of the term 'employee' individuals who volunteer their services solely for humanitarian purposes at private non-profit food banks and who receive groceries from the food banks."[114] These are the only statements issued by the DOL in the Code of Federal Regulations specifically addressing volunteers – there is no mention of the "ordinary volunteerism" mentioned in *Alamo Foundation*, discussed *supra*.

However, the Department of Labor does take the position in an online "advisor" that "[i]ndividuals 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."[115] This position is based on language from *Walling v. Portland Terminal Company*,[116] in which the Supreme Court states that "the FLSA 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.'"[117] This is consistent with the Supreme Court's position in *Alamo Foundation* that other courts have since relied on.

The question of whether there is a legal difference between volunteers and interns has not been addressed by courts. Courts evaluating unpaid internships in the public agency context often

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[114] § 786.350.
[115] *Volunteers*, eLAWS – FAIR LABOR STANDARDS ACT ADVISOR, https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp (last visited Feb. 10, 2018).
[116] 330 U.S. 148 (1947). *See infra* Part II.C.
[117] eLAWS – FAIR LABOR STANDARDS ACT ADVISOR, *supra* note 115 (quoting Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947)).

structure their analyses in such a way that they are trying to determine whether the intern was a volunteer or an employee.[118] Cases involving unpaid internships at for-profit companies tend to categorize interns as either "employees" or "not employees," with no mention of volunteering.[119] The DOL does not define "intern" in its Fact Sheet, nor does it raise the possibility that interns at for-profit businesses may be considered volunteers,[120] even though volunteers at for-profit companies are clearly contemplated by the Restatement of Employment Law and by courts.[121] The word "intern" also does not appear anywhere within the text of the FLSA. At the federal level, therefore, "intern" is not a defined legal category.[122]

The Department of Labor in their Fact Sheet states that unpaid internships at non-profit organizations are generally permissible, presumably because they are akin to volunteering.[123] However, given the reasoning applied in cases involving volunteers and the language from the

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[118] *See, e.g.*, Brown v. N.Y.C. Dep't of Educ., 755 F.3d 154, 171 (2d Cir. 2014) (finding individual who had a "volunteer internship" as a high school mentor to be a volunteer rather than employee because he fit within the statutory definition of a volunteer at a public agency under the FLSA); Hill v. Watson, No. 13 C 6106, 2014 WL 440371, at *2 (N.D. Ill. Feb. 4, 2014) (finding that individual hired as a marketing intern for Chicago State University had not sufficiently alleged that he was an employee rather than a volunteer under the FLSA definition).

[119] *See, e.g.*, Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1148 (9th Cir. 2017) (finding cosmetology student trainees not to be employees for FLSA purposes, but not applying any analysis of whether they may be volunteers); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533 (2d Cir. 2016) (noting that this case "raises the broad question of under what circumstances an unpaid intern must be deemed an 'employee' under the FLSA and therefore compensated for his work" without mentioning volunteers at all).

[120] INTERNSHIP FACT SHEET, *supra* note 5.

[121] Restatement of Employment Law § 1.02, cmt. a (2017). *See also* Rhea Lana, Inc. v. U.S. Dep't of Labor, 271 F. Supp. 3d 284 (D.D.C. 2017), *supra* note 109.

[122] Some states have given more thought to the definition of intern and have recognized that some interns at non-profit organizations may be volunteers, but also recognize that in order for an intern to be a volunteer, specific criteria must be met. *See* NEW YORK STATE DEP'T OF LABOR, DIV. OF LABOR STANDARDS, WAGE REQUIREMENTS FOR INTERNS IN NOT-FOR-PROFIT BUSINESSES, https://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf [hereinafter N.Y. NON-PROFIT INTERN FACT SHEET].

[123] INTERNSHIP FACT SHEET, *supra* note 5.

Restatement of Employment Law, this language does not provide enough of a justification for a full exception to the FLSA for interns at non-profit organizations. Court cases make clear that simply claiming that an individual is a volunteer rather than an employee does not automatically make that individual a volunteer, even if that individual also believes they are a volunteer.[124] There are clear criteria that must be met in order for an individual to qualify as a volunteer, even at non-profit organizations.[125] It is therefore nonsensical to make the claim that simply labeling someone as an intern rather than a volunteer provides a way around meeting these other requirements.

C. Unpaid Internships at For-Profit Companies

Though internships at non-profit organizations have not been examined by the courts, recent cases involving unpaid interns at for-profit companies have led the DOL to promulgate a Fact Sheet that includes a test for the legality of unpaid internships at for-profit companies.[126] It is this test that the DOL claims does not apply to non-profit organizations. The DOL adopted this test very recently after courts rejected its previous test,[127] and it is helpful to understand the history of these two tests to have a full picture of the law around unpaid internships.

An early and important case in considering circumstances in which individuals are not employees[128] is *Walling v. Portland Terminal Company*.[129] This case dealt with a training program

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[124] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 301 (1985) (finding that associates' own testimony that they considered themselves volunteers, "however sincere, cannot be dispositive").
[125] *See Id.* (finding associates to be employees rather than volunteers because they were financially dependent on the Foundation and expected to receive in-kind benefits in exchange for their labor).
[126] INTERNSHIP FACT SHEET, *supra* note 5.
[127] Rebecca Greenfield, *Unpaid internships are back, with the Labor Department's blessing*, L.A. TIMES, (Jan. 13, 2018), http://beta.latimes.com/business/la-fi-unpaid-internships-20180112-story.html.
[128] But also not volunteers
[129] 330 U.S. 148 (1947).

run by a railroad company for prospective yard brakemen, in which the trainees spent seven or eight days being trained without pay, after which they might be given a full-time, paid job as brakemen.[130] The Department of Labor challenged this practice under the FLSA, claiming that the trainees were employees and must therefore be paid the minimum wage.[131] The Court held the trainees not to be employees.[132] In reaching this decision, the Court began by discussing the FLSA's purpose, saying that it applies to individuals whose employment "contemplated compensation," a category into which the trainees did not fall since they knew before beginning the program that they would not be paid.[133] The Court also considered other factors in reaching this conclusion, relying most explicitly on the "unchallenged findings here that the railroads receive no 'immediate advantage' from any work done by the trainees."[134] The Court also noted that the activities of the trainees did not displace any full-time employees,[135] and that the program was essentially educational. The Court compared the program to a school that offers railroading classes and pointed out that since students of such a school could not reasonably be found to be employees of the school, it did not make sense to say that the trainees were employees of the railroad.[136]

Drawing from the factors discussed in *Portland Terminal*, the Department of Labor developed a six-factor test that they claimed would apply to determine when an intern is exempt from protection as an employee under the FLSA.[137] The Department of Labor, in their fact sheet

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[130] *Id.* at 149-50.
[131] *Id.* at 149.
[132] *Id.* at 153.
[133] *Id.* at 152.
[134] *Id.*
[135] *Id.* at 149-50.
[136] *Id.* 152-53.
[137] Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 535 (2d Cir. 2016) (quoting UNITED STATES DEP'T OF LABOR, WAGE AND HOUR DIVISION, FACT SHEET #71: INTERNSHIP PROGRAMS

describing this six-factor test, stated that if all of the following factors were met for an internship at a for-profit company, the FLSA did not apply:[138]

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.[139]

However, many courts refused to give deference to this test,[140] eventually leading the DOL to abandon it.

Perhaps the most high-profile internship case to date is *Glatt v. Fox Searchlight Pictures*,[141] decided by the Second Circuit. This case involved individuals who worked as unpaid interns on the film "Black Swan," distributed by Fox Searchlight, or at the Fox corporate offices in New York.[142] The District Court that first considered the case evaluated the plaintiffs' internships using

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UNDER THE FAIR LABOR STANDARDS ACT (April 2010) [hereinafter 2010 INTERNSHIP FACT SHEET]). This test has since been replaced with a new one based on the Second Circuit's *Glatt v. Fox Searchlight* decision, but was referenced in cases in various appellate courts throughout the United States before replacement.

[138] The *Portland Terminal* court never said that each of the factors discussed in the decision were required for its holding. Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

[139] *Glatt,* 811 F.3d at 535 (2d Cir. 2016) (quoting 2010 INTERNSHIP FACT SHEET).

[140] This paper does not address the types of deference that a court may give to an agency's interpretation, assuming that the Fact Sheet is due *Skidmore* deference, meaning that the weight that the guidance carries depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944). This is recognized by at least some appellate courts. *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015); *Glatt*, 811 F.3d at 536.

[141] 811 F.3d 528 (2d Cir. 2016).

[142] *Id.* at 531.

the six-factor Department of Labor test, although they did not require all six factors to be present, balancing them instead, to conclude that the plaintiffs had been employees who were improperly classified as unpaid interns.[143] However, the Second Circuit declined to adopt the six-factor test, stating that they did not find the Fact Sheet persuasive.[144] Instead, the court held that "the proper question is whether the intern or the employer is the primary beneficiary of the relationship."[145] The court emphasized that this is the correct question because it focuses on the intern's interests, allows the court to examine the economic reality between the intern and the employer, and acknowledges that the intern-employer relationship is different from that of employees because the intern enters into the employment relationship with the expectation of receiving educational benefits not expected by regular employees.[146] The court listed a non-exhaustive list of considerations in determining whether an unpaid intern is an employee, of which none is dispositive:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

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[143] *Id.* at 536.
[144] *Id.*
[145] *Id.*
[146] *Id.*

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[147]

The court then remanded the case to the District Court to apply their primary beneficiary test with the listed factors.[148] The Second Circuit has since applied the primary beneficiary test articulated in *Glatt* to two other unpaid internship programs. In both cases, the court discussed the non-exhaustive factors and found the interns not to be employees under the FLSA or New York Labor Law.[149]

Although the Second Circuit is the only circuit court to specifically address the question of unpaid internships, other circuits have considered the Department of Labor guidelines in the context of student trainees and other unpaid individuals. No circuit court that has considered the issue adopted the DOL's previous six-factor test, and only a few have given it any level of deference.[150]

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[147] *Id.* at 536-37.
[148] *Id.* at 538.
[149] Sandler v. Benden, No. 16-3218, 2017 WL 5256812, at *3-4 (2d Cir. Nov. 13, 2017) (upholding dismissal of intern's New York Labor Law claim under the *Glatt* analysis because six of seven *Glatt* factors weighed in favor of finding her to be an intern; internship was tied to her Master of Social Work degree and the educational benefit she received from the internship made her the primary beneficiary); Wang v. The Hearst Corp., 877 F.3d 69, 73-75 (2d Cir. 2017) (upholding summary judgment in favor of employer for FLSA case involving interns at various print magazines because six of seven *Glatt* factors favored employer's claim; internships were tied to academic calendar and provided academic credit and educational benefit to interns).
[150] Benjamin v. B & H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017) (rejecting the DOL test in favor of the *Glatt* test because cosmetology students received hands-on training while completing unpaid work in salons, making them the primary beneficiaries of their work); Hollins v. Regency Corp., 867 F.3d 830 (7th Cir. 2017) (declining to use any multi-factor test to determine whether cosmetology students working in their school's salon were employees, but finding plaintiff not to be an employee because she was enrolled in an educational program and time in the salon was practical training for that program); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015) (adopting the primary beneficiary test and *Glatt* factors in a case involving student trainees, and remanding to the District Court to apply the test to this case); Petroski v. H & R Block Enterprises, LLC, 750 F.3d 976 (8th Cir. 2014) (finding support in but not relying on the DOL test to find that tax professionals completing rehire training were

Recognizing a widespread rejection of their six-factor test, the Department of Labor issued an updated fact sheet in January 2018.[151] This sheet, purporting to "provide[] general information to help determine whether interns and students working for 'for-profit' employers are entitled to minimum wages and overtime pay under the Fair Labor Standards Act,"[152] states

> Courts have used the "primary beneficiary test" to determine whether an intern or student is, in fact, an employee under the FLSA. In short, this test allows courts to examine the "economic reality" of the intern-employer relationship to determine which party is the "primary beneficiary" of the relationship. Courts have identified the following seven factors as part of the test:
>
> 1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

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not employees of H&R Block; H&R Block received no immediate advantage from the training and professionals were free to use knowledge gained for other jobs); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011) (rejecting DOL test in favor of a primary beneficiary test because DOL test is overly rigid; students received the primary benefit of work they completed in their high school's vocational courses as they learned both practical skills and intangible benefits such as the value of hard work); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993) (finding DOL test helpful but declining to require each factor be met; finding firefighter trainees not to be employees because their training was similar to that to be had in any firefighting academy); McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989) (adopting primary beneficiary test and finding trainee salespeople to be employees because they merely assisted other salespeople during the period of their training, so that the employer received the primary benefit). Only the Fifth Circuit, in a case involving individuals training to become machine attendants in an automobile factory, more analogous to the railroad trainees of *Portland Terminal* than the internship cases, has held that the six-factor Department of Labor test was "entitled to substantial deference." Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983).

[151] Greenfield *supra* note 127.

[152] INTERNSHIP FACT SHEET, *supra* note 5.

> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.
>
> Courts have described the "primary beneficiary test" as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case.[153]

This version of the Fact Sheet clearly draws directly from the *Glatt* decision and describes the test only in terms of what the courts who have considered the issue have found. However, the Fact Sheet, as in the previous version, is careful to state that this test is only for individuals within the "for-profit" sector, with a footnote briefly stating that unpaid internships in the public and non-profit sectors are generally permissible.[154]

Since most circuit courts to consider the issue declined to defer completely to the Department of Labor's 2010 six-part test from the Fact Sheet, there is no reason for courts to defer to the statement about the presumed legality of internships at non-profit organizations that was present in both the former and current Fact Sheet. This is especially true since that statement is inconsistent with the text of the FLSA and the Supreme Court's decision in *Alamo Foundation*, discussed *supra* Part I.A, which states that there is no blanket exception to the FLSA for non-profits, and that those non-profits that are engaged in "ordinary commercial activities" must be subject to the Act. It stands to reason that unpaid internships at non-profit organizations that are subject to the FLSA should be subject to the same test of internship legality as those at for-profit companies. In assessing such internships, courts should apply the internship test of the circuit in which they are located with no regard for the non-profit status of an organization.

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[153] *Id.*
[154] *Id.*

III. The Role of State and Local Labor Law in New York

All states have their own labor laws, and some of these states have higher standards than the FLSA, such as in the form of a higher minimum wage or broader coverage of employees. Employers in those states must meet these higher standards in managing and compensating their employees.[155] This section will discuss New York State as an example of such a state and examine New York's approach to the issues discussed in Parts I and II.

A. New York Labor Laws as Applied to Non-Profits

The question of whether a non-profit organization is subject to the FLSA is a moot one in states with broader coverage for their minimum wage and overtime laws than the FLSA when it comes to non-profits. New York Labor Law, for example, explicitly provides that non-profit institutions are subject to state minimum wage[156] and overtime law.[157] It is thus clear that in New York state, non-profit organizations must follow the same minimum wage and overtime laws as for-profit companies. New York law also has a significantly more restricted definition of non-profit organizations than does federal law, defining "non-profitmaking institution" for the purposes of the Labor Law to include only those organizations that are "operated *exclusively* for religious, charitable or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual."[158] This definition would seem to exclude any organizations that operate like the Tony and Susan Alamo Foundation, with both for-profit and non-profit activities.

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[155] 29 U.S.C. § 218(a) (2018) establishes that compliance with the FLSA will not excuse non-compliance with state or local laws with a higher standard than the FLSA for minimum wage, maximum hours, or child labor.
[156] N.Y. LAB. LAW § 652(3)(a) (McKinney 2018) ("This article shall apply to non-profitmaking institutions.").
[157] 12 NYCCR §§ 142-2.2, 142-3.2.
[158] LAB. § 651(8) (emphasis added).

B. Internship Law for For-Profit Businesses in New York

When it comes to the law around internships, the New York State Department of Labor has released a Fact Sheet with wage requirements for interns in for-profit businesses, with a list of criteria which, if *all* are met, mean that there is no employment relationship and interns do not need to be paid.[159] The Fact Sheet also specifies that non-profit organizations may have unpaid internships if these same criteria are met.[160] The first five criteria on the New York State Fact Sheet are taken almost verbatim from the federal Department of Labor's 2010 six-factor test,[161] but there is a slight modification to the sixth criteria, with a requirement that the intern be notified in writing that they will not receive any wages and are not considered employees for minimum wage purposes – rather than a requirement only that there be an understanding that no wages be received – and there are also an additional five required criteria in the state of New York.[162] These additional criteria are that 1) "[a]ny clinical training is performed under the supervision and direction of people who are knowledgeable and experienced in the activity;" 2) the intern "not receive employee benefits," such as health insurance; 3) the training is general, and "not designed specifically for a job with the employer that offers the program;" 4) "the screening process for the internship program is not the same as for employment;" and 5) "[a]dvertisements, postings, or solicitations for the program clearly discuss education or training."[163] Only if all of these criteria are met will unpaid internships be permissible.

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[159] NEW YORK STATE DEP'T OF LABOR, DIV. OF LABOR STANDARDS, WAGE REQUIREMENTS FOR INTERNS IN FOR-PROFIT BUSINESSES, https://labor.ny.gov/formsdocs/factsheets/pdfs/p725.pdf [hereinafter N.Y. FOR-PROFIT INTERN FACT SHEET].
[160] *Id.*
[161] *See supra* PART II.C.
[162] *Id.*
[163] *Id.*

C. Internship Law at Non-Profit Organizations in New York

In addition to its internship Fact Sheet, the New York Department of Labor has also released a Fact Sheet that specifically addresses wage requirements for interns at non-profit organizations.[164] This Fact Sheet points out that there is no exemption within the New York Labor Law for interns at non-profit organizations, but that these interns may fall into three categories of exemptions to the law: volunteers, students, or trainees.[165] It states that only those organizations that are set up and operated *strictly* for charitable, educational, or religious purposes may have interns that qualify for any of these exemptions, and there are additional requirements for each type of exemption.[166] For example, among other restrictions, an organization may not require a volunteer to work specific hours or perform duties involuntarily.[167] The student exemption has strict requirements as to who qualifies as a student, stating that though the work experience "need not fulfill a curriculum requirement or even relate to the student's field of study," the student must be enrolled in an "institution of learning with courses leading to a degree, certificate, or diploma," or, if they have graduated recently, be planning to start a new program within six months of their graduation.[168] For the trainee exception, the trainee must be in a bona fide training program that meets certain requirements, including a length of not more than ten weeks, unless "the Commissioner of Labor finds after investigation that the occupation requires more than 10 weeks of training for proficiency."[169] These additional required criteria serve to make the nature of any internship programs very clear, and the fact that all of the criteria are required serve to protect

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[164] N.Y. NON-PROFIT INTERN FACT SHEET, *supra* note 159.
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*

interns who may be treated as employees despite having applied for and obtained an unpaid internship.

CONCLUSION

In light of the lack of a blanket exception to the FLSA for non-profit organizations, the Department of Labor's contention that internships at non-profit organizations are generally permissible is clearly erroneous. Instead of continuing to adhere to this contention, the Department of Labor should hold the internship programs of non-profit organizations that are subject to the FLSA to the same standards as those of for-profit internships. The question of whether an intern at a non-profit organization is a volunteer or an employee is a tricky one, but the Department of Labor could take guidance from the footnote in *Alamo Foundation*, and consider the type of work being performed and the amount of work required of the volunteers.[170] The Department of Labor could also draw inspiration from the New York State guidelines on internships at non-profit organizations. Recognizing that there is no blanket exemption from the FLSA for unpaid internships at non-profit organizations will help to achieve the original purpose of the FLSA, "'insuring to all…able-bodied working men and women a fair day's pay for a fair day's work,'"[171] even if they work for non-profit organizations, and even if they are interns.

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[170] *See supra* note 105.

[171] A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945) (quoting Message of the President to Congress, May 24, 1934).