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

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I. Introduction

A few weeks after I graduated from college, I started my first full-time job. I had gone through three rounds of interviews and was thrilled to be hired to contribute to the work of a non-profit organization whose mission I cared about deeply. The only catch: I was hired as an intern, paid a “stipend” that broke down against my 40+ hour workweek to, at best, $3.25 per hour. As the weeks passed and it became clear that I was doing work that had been handled by full-time, paid employees in the past, I began to feel that I was being taken advantage of. I started researching the legality of unpaid internships and came across a fact sheet promulgated by the U.S. Department of Labor (DOL).1 This fact sheet laid out a test that employers had to pass to classify someone as an unpaid intern, a test I was fairly confident my internship failed.2 However, the fact sheet also said, in a footnote qualifying its statement, that the test applied to “for-profit” employers and that “[u]npaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.”3 So, assuming my employer to be exempt from the requirements surrounding unpaid internships by virtue of its non-profit status, I gave up my research, finished the internship, and moved on without ever seeking legal advice. However, the experience

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2. This test will be discussed in detail infra Part III.B.

3. Glatt, 811 F.3d at 535 (quoting 2010 Internship Fact Sheet, supra note 1).
stuck with me, and, when I got to law school, I decided to do more research on the issue.

Congress enacted the Fair Labor Standards Act (FLSA)\(^4\) “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.’\(^5\) As the Supreme Court has noted, “The statute contains no express or implied exception for commercial activities conducted by . . . nonprofit organizations.”\(^6\) However, there is a widespread belief, promulgated at least in part by the DOL,\(^7\) 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 the legality of unpaid internships at for-profit companies,\(^8\) these companies are still subject to certain requirements that must be met for their unpaid interns not to be covered under the FLSA.\(^9\) But the DOL claims that these requirements do not extend to non-profit organizations.\(^10\) Further complicating the matter, some courts have held that certain non-profits are exempt from the FLSA,\(^11\) which would make these organizations exempt from federal minimum wage, overtime, and child labor laws. The courts’ and the DOL’s interpretations 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. Following this Part I introduction, Part II examines the text of the FLSA, guidelines issued by the DOL, and the relevant case law to


\(^7\) See Internship Fact Sheet, supra note 1.

\(^8\) See, e.g., Wang v. The Hearst Corp., 877 F.3d 69, 73–76 (2d Cir. 2017); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1150–51 (9th Cir. 2017).

\(^9\) For a critique of the rationale behind the decisions upholding unpaid internships at for-profit companies, see David C. Yamada, The Legal and Social Movement Against Unpaid Internships, 8 NE. U.L.J. 357, 372–73 (2016).

\(^10\) Internship Fact Sheet, supra note 1 (“Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.”).

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 III addresses the legality of unpaid internships and considers how the unpaid internship analysis applies to the non-profit sector. Part IV examines the role of state and local law, specifically in New York, where the state has enacted more protections for interns at non-profit organizations than the FLSA, in addressing these questions.

II. Does the FLSA Apply to Non-Profit Organizations?

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

The three major substantive provisions of the FLSA pertain to minimum wage;12 overtime compensation and maximum hours;13 and child labor.14 Each of these provisions applies to (1) “employees . . . engaged in commerce or in the production of goods for commerce,”15 or (2) employees who are “employed in an enterprise engaged in commerce or in the production of goods for commerce.”16 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.17

1. Individual Coverage

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.18 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 communication19 among the several States or between any State and any place outside thereof.”20

13. Id. § 207.
14. Id. § 212.
15. Id. § 206(a); see also id. §§ 207(a), 212(c).
16. Id. § 206(a); see also id. §§ 207(a), 212(c).
18. 29 U.S.C. § 206(a); see also id. §§ 207(a), 212(c).
19. Most, if not all, large non-profits, and many smaller ones too, regularly engage in interstate communication.
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 similar instrumentalities for communication across State lines are covered by the Act.”21 The bulletin additionally defines communication to include “information[,] . . . written reports or messages, . . . orders for goods or services, or plans or other documents.”22 Although not every employee that engages in interstate communication will be covered, those who engage in it “as a regular and recurrent part of [their] duties” will be.23

The DOL 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.24 This document expands on the type of activity that qualifies as commerce for purposes of individual coverage of non-profit organization employees. 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.25 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.

2. Enterprise Coverage

Congress added enterprise coverage to the FLSA in 1961.26 According to the Supreme Court, 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

22. 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. Id. § 776.3.
23. Id. § 776.10(b).
24. U.S. Dep’t of Labor, Wage & Hour Div., Guidance for Non-Profit Organizations on Paying Overtime Under the Fair Labor Standards Act (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.
25. Id. However, employees “who on isolated occasions spend[] an insubstantial amount of time performing such work” are not covered. Id.
engaged directly in interstate commerce or in the production of goods for interstate commerce.”27 Enterprise coverage, in addition to requiring that an entity engage in “commerce” in order to be covered, turns on the definition of “enterprise” in the FLSA, defined as “the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose.”28 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.”29 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), or30

(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), or31

(C) in connection with the activities of a public agency . . . .32

These enumerated types of organizations are covered whether “operated for profit or not for profit.”33 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.

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

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29. Id. § 203(r)(2).
30. 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.
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.\(^{34}\)

This interpretation simply raises a new question as to the meaning of “ordinary commercial activities”; it therefore does not help to define “business purpose.” The Supreme Court has addressed the phrase “ordinary commercial activities” in one case, but did not define it,\(^{35}\) and there is still no precise definition of the term in the case law.

The DOL’s 2016 guidance document for non-profit organizations expands very slightly on the definition of “ordinary commercial activities” 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.”\(^{36}\) This document says that if a non-profit organization that engages in charitable activities also has revenue-producing activities that meet the FLSA requirements for “ordinary commercial activities,” the employees of such organization are entitled to overtime under the FLSA.\(^{37}\) The document thus suggests that the DOL believes an organization that engages in both commercial\(^{38}\) 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. The text of the Act and the guidance issued by the DOL therefore make it clear that non-profit organizations can be considered “enterprises” under the FLSA.

The text of the FLSA includes some express exemptions to coverage.\(^{39}\) These exemptions can be extremely specific and in general point to Congress’s ability to have included an explicit non-profit exemption if it 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—

(A) who are orphans or one of whose natural parents is deceased, or

(B) who are enrolled in such institution and reside in residential facilities of the institution,

\(^{34}\) 29 C.F.R. § 779.214 (2018).

\(^{35}\) Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 302 (1985). This case will be discussed infra Part II.B.

\(^{36}\) OVERTIME GUIDANCE, supra note 24, at 2. 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.

\(^{37}\) Id. at 2–3.

\(^{38}\) With a requirement of an annual revenue threshold of $500,000 in sales made or business done. Id. at 2.

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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 institution, and are together compensated, on a cash basis, at an annual rate of not less than $10,000.\footnote{Id. § 213(b)(24).}

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.\footnote{Id. § 213(a)(3).}

A DOL statement of interpretation from 1970 specifies that only those exemptions that appear in the text of the FLSA are lawful exemptions,\footnote{“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)).} noting that these exemptions should be narrowly construed.\footnote{Id.} 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. While the plain language of the statute and the DOL interpretations make clear that non-profit organizations that are not “enterprises” are not covered by the FLSA, the lack of definition of “business purpose” and “ordinary commercial activities” makes it difficult in some circumstances to determine whether a particular organization is subject to coverage.

B. The Supreme Court’s Approach and the Erroneous Approach Lower Courts Have Created from It

The Supreme Court addressed the question of whether non-profit organizations are exempt from the FLSA in \textit{Tony & Susan Alamo Foundation v. Secretary of Labor},\footnote{471 U.S. 290 (1985).} specifically discussing enterprise coverage, the meaning of “business purpose” under the Act, and the DOL’s “ordinary commercial activities” test.\footnote{Id. at 297.} 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.”\footnote{Id. at 292.} 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.”

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. The Foundation did, however, provide them with food, clothing, shelter, and other unspecified benefits.

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. In considering the case, the 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;” and second whether the associates were “employees” within the meaning of the Act. 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 in Part III.

The Supreme Court in Tony & Susan Alamo Foundation affirmed the lower court’s holding that the Foundation was subject to the FLSA, as its activities were operated for a “common business purpose,” as required for enterprise coverage. Given the nature of the Foundation’s business activities, this seems like an easy decision to reach; its activities included retail outlets and other commercial activities that clearly have a business purpose. The only assertions that the Foundation made in arguing that it was not an enterprise and therefore should not be subject to the FLSA were that it was a tax-exempt organization under 26 U.S.C. § 501(c)(3), and that its businesses were not “ordinary” commercial businesses under the DOL’s test because they were “infused with a religious purpose.” In addressing the first of these arguments, the Court held that there is no blanket exemption to the FLSA for non-profit organizations, as is clear from the plain language of the statute and the DOL statements of interpretation, discussed supra in Part II.A.

47. Id.
48. Id.
49. Id.
50. Id. at 290.
51. Id. at 295 (quoting 29 U.S.C. § 203(s)(1) (2012)).
52. Id.
53. Id.
54. Id. at 292.
55. Id. at 295–96.
56. Id. at 298.
57. Id. at 296–97. To reach this holding, the Court considered the text of the Act, the DOL guidance about the definition of business purpose, and the legislative history of the Act, as discussed supra Part II.A and infra Part II.C. The Court found that there is no express or implied exemption to the Act for non-profit organizations; the DOL’s
In addressing the Foundation’s second argument, that its 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.’”58 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 its commercial activities within the FLSA’s definition of “enterprise.”59 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, merely upholding the lower courts’ holding that in these circumstances that competition was dispositive. The decision therefore did not provide a definition of “business purpose” or “ordinary commercial activities” that can be universally applied to other non-profits.

However, subsequent district court cases about the applicability of the FLSA to non-profit organizations have relied on the Court’s discussion of competition with for-profit businesses. Many of these cases state, erroneously, that the Supreme Court held in Tony & Susan 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.60 Two appellate courts have also cited these incorrect lower court holdings or made similar claims, interpretations allow the Act to reach non-profits; and the legislative history of the Act supports reaching non-profits in at least some circumstances. Tony & Susan Alamo Found., 471 U.S. at 296–97.


59. Id.

suggesting that this trend is starting to reach some higher courts. These district and appellate courts ignore the fact that the Supreme Court did not explicitly adopt this as a holding in *Tony & Susan Alamo Foundation*, simply stating that it had been the lower courts’ reasoning. 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, although it is sufficient.

C. The Purposes and Legislative History of the FLSA

The FLSA’s section on congressional finding and declaration of policy states:

> The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.64

This section clearly indicates that Congress considered that allowing some entities to avoid the requirements of the FLSA would result in unfair competition. The Supreme Court’s approval of the application

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61. Reagor v. Okmulgee Cty. Family Res. Ctr., 501 F. App’x 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. N.Y. Foundling Hosp., 577 F.3d 93, 97 (2d Cir. 2009) (quoting *Tony & Susan Alamo Found.*, 471 U.S. at 299) (“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.


63. The district court that initially considered the *Tony & Susan 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.*, 471 U.S. 290. The two cases were *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 881–82 (7th Cir. 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 Institute*, 458 F. Supp. 709, 718 (D. Mass. 1978), which found that a non-profit scientific research 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.

of the FLSA to non-profit organizations that engage in competition with for-profit businesses is therefore logical and supports one of the purposes of the Act. However, avoiding unfair competition is not the only justification of the FLSA, so limiting its application to only those non-profits that engage in direct competition with for-profit businesses would undercut Congress’s intent. The statement of congressional finding makes clear that Congress intended the Act to provide sufficient support for workers to live in a state of general well-being. As the Supreme Court has pointed out, “[T]he primary purpose of Congress was not to regulate interstate commerce as such. It was to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation. It sought to raise living standards without substantially curtailing employment or earning power.” Courts that require non-profits to engage in competition with for-profit entities in order to be subject to the FLSA ignore this congressional purpose when they refuse to subject some non-profits to the Act.

Additionally, enterprise coverage, as discussed supra Part II.A, was added to the FLSA to expand its coverage to protect more workers. 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.

In the spirit of expanding FLSA coverage, it is also apparent that Congress intended at least some non-profits to be covered, although the question of which non-profits would be covered is far less clear. The Senate Committee Report went on to discuss the meaning of “common business purpose” in the statute, focusing on the character of the activities that a non-profit organization performs: “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.” This implies

68. *Id.* at 41 (emphasis added).
that business activities performed by non-profit organizations would be covered. This is consistent with the DOL’s interpretation of the Act, discussed supra Part II.A. However, it is still not clear from the Senate Report what is required for an activity to have a “common business purpose.”

There are some clues as to which non-profits would be covered in the floor debates surrounding the addition of enterprise coverage. In 1960, the year before enterprise coverage was added to the FLSA, a similar amendment, which also sought to add enterprise coverage, was proposed but ultimately failed “because the conference committee could not agree.” 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. 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. The amendment was rejected on a vote. In 1961, when enterprise coverage was added to the FLSA pursuant to the successful Fair Labor Standards Amendments of 1961, Senator Curtis introduced the same floor amendment. 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.” The amendment was again rejected on a vote.

Senator Curtis’s statement about competition is consistent with the view of courts that see competition as a prerequisite to FLSA coverage for non-profit organizations and with the congressional intent to prevent unfair competition through the FLSA. However, Senator Curtis’s statement is not as broad as that of Senator Kennedy from the previous year, which is more consistent with the other stated purposes of the FLSA and would prevent non-profit organizations engaged in

71. 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.
73. Id.
76. 107 Cong. Rec. 6,255 (statement of Sen. McNamara, D-MI).
77. Id.
profitmaking activities from avoiding the requirements of the FLSA, whether or not they engaged in competition with for-profit businesses. It thus appears that there was never a congressional consensus as to the meaning of “business purpose” as it relates to non-profit organizations. Although Congress was clear that some non-profits are covered by the Act, it is still unclear where to draw the line.

There is some support for the idea that Congress intended only to cover businesses that competed with for-profit businesses 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

> these 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.78

It might be argued that recognizing only this particular type of non-profit activity suggests that Congress did not see other types of non-profits as necessary to cover under the Act because they did not compete with for-profit businesses. 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 stated purposes of the Act, the latter seems the more likely explanation.

Based on the text of the Act, the DOL regulations, the case law, and the legislative history, non-profit organizations can be grouped into four categories when it comes to possible FLSA coverage. First, there are those that all agree are covered because they engage in commerce in competition with for-profit businesses, thus meeting both the “commerce” requirement and the “enterprise” requirement for coverage. Second, there are those that engage in commerce and in what most people would consider commercial activities, but that do not necessarily compete with for-profit businesses.79 Under the text of the Act and the DOL guidelines, employees of these organizations should arguably be covered, but the district court cases discussed supra Part II.B would deny coverage to these employees. This is a problem that can be fixed at the judicial level or by the DOL issuing a new definition of

79. 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, have substantial revenue streams that come from visitors paying for a service.
“business purpose” that provides more guidance than its current statement of interpretation. 80 Third, there are non-profit organizations that engage in commerce, as broadly defined in the FLSA, but do not engage in commercial activities. 81 As discussed supra Part II.A, “commerce” under the FLSA includes interstate communication. Employees at these non-profit organizations should be covered in order to effectuate the purpose of the Act, but for the Act to reach them, Congress would likely need to change the definition of “enterprise” or clarify what “business purpose” means in that definition. Fourth and finally, there are those non-profits that unquestionably are not covered by the Act, because they do not engage in commerce, even as it is broadly defined.

If a court refuses to apply the FLSA to the second and third categories discussed above, it would result in under-protection of employees at non-profit organizations, thus flouting the Act’s intent. This is clear from the tension in the different treatment of individual and enterprise coverage for non-profit organizations under the FLSA that becomes apparent when one looks at the text and legislative history of the Act and the DOL guidance. 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. 82 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 DOL, 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. This leaves unprotected any employees of these organizations who are not themselves engaged in interstate commerce.

III. 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. 83 This assumption is due to language in the DOL’s Fact Sheet about internship programs, which states:

80. 29 C.F.R. § 779.214 (2018). Perhaps the test could focus on revenue streams.
81. Many large, national non-profits with significant budgets engage in interstate communication but do not engage in activities that can be described as for a “business purpose,” including Planned Parenthood and the American Red Cross.
83. 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).
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.\footnote{Internship Fact Sheet, supra note 1.}

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.”\footnote{Restatement (Third) of Emp’l Law § 1.02 (Am. Law Inst. 2015).} The Restatement directly addresses the non-profit status of the organization that receives the volunteer’s services, stating that “[n]onprofit 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.”\footnote{Id. cmt. a.}

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 II, the DOL’s fact sheet lacks a factual basis.

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.\footnote{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.} However, even as questions of the legality of unpaid internships rise due to high-profile lawsuits,\footnote{See id.} unpaid internships remain a widespread practice across the non-profit industry—a quick search on Idealist, a job search site that hosts job postings from many non-profits, yields ninety-five unpaid internships in the non-profit industry in the New York City area alone on May 23, 2019.\footnote{Internships, IDEALIST, https://www.idealist.org/en/?searchType=MAIN_SEARCH&type=INTERNSHIP (last visited May 23, 2019) (under “Org Type” select “Nonprofit” and under “Location” type, “New York, NY”).}

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. It is this test that the DOL claims does not apply to non-profit organizations. The DOL adopted this test recently after courts rejected its previous test, and it is helpful to understand the history of these two tests to have a full picture of the law around unpaid internships.

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. On the one hand, 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. 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,” casting doubt on the idea that unpaid internships help those who do them obtain full-time jobs. Opponents also point out that unpaid internships are generally available only to individuals who have the means to work for a period of time without income, so that a reliance on them within an industry disadvantages individuals from less affluent backgrounds.

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 unpaid internships. However, courts do

90. Internship Fact Sheet, supra note 1.
not seem to have taken these policy considerations into account in considering unpaid internships, with the main question considered being whether unpaid interns qualify as employees.

B. Unpaid Internships at For-Profit Companies

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.96 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.”97 Looking at the definition of “employ” does not provide much clarification, as it states that “[e]mploy includes to suffer or permit to work.”98 Determining whether someone is an employee therefore requires an examination of the case law.

An early and important case in considering circumstances in which individuals are not employees99 is Walling v. Portland Terminal Co.100 This case dealt with a training program 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.101 The DOL challenged this practice under the FLSA, claiming that the trainees were employees and must therefore be paid the minimum wage.102 The Supreme Court held the trainees not to be employees.103 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.104 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.”105 The Court also

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96. 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) (2012) (emphasis added). The maximum hours provision similarly states that “no employer shall employ any of his employees . . . for a workweek longer than forty hours.” Id. § 207(a)(1) (emphasis added).


98. 29 U.S.C. § 203(g).

99. But also not volunteers

100. 330 U.S. 148 (1947).

101. Id. at 149–50.

102. Id. at 149.

103. Id. at 153.

104. Id. at 152.

105. Id. at 153.
noted that the activities of the trainees did not displace any full-time employees\textsuperscript{106} 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.\textsuperscript{107}

Drawing from the factors discussed in \textit{Portland Terminal}, the DOL developed a six-factor test that it claimed would apply to determine when an intern is exempt from protection as an employee under the FLSA.\textsuperscript{108} The DOL, in its fact sheet 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:\textsuperscript{109}

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.\textsuperscript{110}

However, many courts refused to give deference to this test,\textsuperscript{111} eventually leading the DOL to abandon it.

\textsuperscript{106} Id. at 149–50.

\textsuperscript{107} Id. at 152–53.

\textsuperscript{108} Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534–35 (2d Cir. 2016) (quoting 2010 \textit{Internship Fact Sheet}, supra note 1). This test has since been replaced with a new one based on the Second Circuit’s \textit{Glatt v. Fox Searchlight} decision, see \textit{Internship Fact Sheet}, supra note 1, but was referenced in cases in various appellate courts throughout the United States before replacement. E.g., Benjamin v. B & H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017); Hollins v. Regency Corp., 867 F.3d 830 (7th Cir. 2017); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015).

\textsuperscript{109} Glatt, 811 F.3d at 534 (quoting 2010 \textit{Internship Fact Sheet}, supra note 1). The \textit{Portland Terminal} court never said that each of the factors discussed in the decision was required for its holding. See generally 330 U.S. 148.

\textsuperscript{110} Glatt, 811 F.3d at 534–35 (quoting 2010 \textit{Internship Fact Sheet}, supra note 1).

\textsuperscript{111} 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 \textit{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.” \textit{Skidmore v. Swift & Co.}, 323 U.S. 134, 140 (1944). This is recognized by at least some appellate courts. See Glatt, 811 F.3d at 536; Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015).
Perhaps the most high-profile internship case to date is *Glatt v. Fox Searchlight Pictures*, 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. The district court that first considered the case evaluated the plaintiffs’ internships using the six-factor DOL test, although it 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. However, the Second Circuit declined to adopt the six-factor test, stating that it did not find the Fact Sheet persuasive. Instead, the court held that “the proper question is whether the intern or the employer is the primary beneficiary of the relationship.” 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. 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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112. 811 F.3d 528.
113. *Id.* at 531.
114. *Id.* at 535.
115. *Id.* at 536.
116. *Id.*
117. *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.\textsuperscript{118}

The court then remanded the case to the district court to apply its primary beneficiary test with the listed factors.\textsuperscript{119} The Second Circuit has since applied the primary beneficiary test articulated in \textit{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.\textsuperscript{120}

Although the Second Circuit is the only circuit court to specifically address the question of unpaid internships, other circuits have considered the DOL guidelines in the context of student trainees and other unpaid individuals.\textsuperscript{121} 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.\textsuperscript{122} Recognizing a widespread rejection

\textsuperscript{118}. \textit{Id.} at 536–37.

\textsuperscript{119}. \textit{Id.} at 538. For a critique of the \textit{Glatt} decision and “primary beneficiary” test, see Yamada, \textit{supra} note 9, at 372–73. Professor Yamada proposes a test based on whether the intern performs work for the employer, which he says should be used instead of the “primary beneficiary” test. \textit{Id.} at 374.

\textsuperscript{120}. Wang v. 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 \textit{Glatt} factors favored employer’s claim; internships were tied to academic calendar and provided academic credit and educational benefit to interns); Sandler v. Benden, 715 F. App’x 40, 44–45 (2d Cir. 2017) (upholding dismissal of intern’s New York Labor Law claim under the \textit{Glatt} analysis because six of seven \textit{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).

\textsuperscript{121}. \textit{See, e.g.}, Benjamin v. B & H Educ., Inc., 877 F.3d 1139 (9th Cir. 2017); Hollins v. Regency Corp., 867 F.3d 830 (7th Cir. 2017); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015).

\textsuperscript{122}. \textit{Benjamin}, 877 F.3d at 1147–48 (rejecting the DOL test in favor of the \textit{Glatt} test because cosmetology students received hands-on training while completing unpaid work in salons, making them the primary beneficiaries of their work); \textit{Hollins}, 867 F.3d at 836 (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); \textit{Schumann}, 803 F.3d at 1203 (adopting the primary beneficiary test and \textit{Glatt} factors in a case involving student trainees, and remanding to the district court to apply the test to this case); Peterski v. H & R Block Enterprises, LLC, 750 F.3d 976, 980–81 (8th Cir. 2014) (finding support in factors found in but not relying on the DOL test to find that tax professionals completing rehire training were 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, 528 (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, 1026–27 (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, 1209–10 (4th Cir. 1989)
of its six-factor test, the DOL issued an updated fact sheet in January 2018. This sheet purports 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.” It adopts the Glatt reasoning and factors verbatim. As in the previous version, the Fact Sheet is careful to state that this test is only for individuals within the “for-profit” sector, with the same footnote stating that unpaid internships in the public and non-profit sectors are generally permissible.

Since most circuit courts to consider the issue declined to defer completely to the DOL’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 *Tony & Susan Alamo Foundation*, discussed supra Part II.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 without regard for the non-profit status of an organization.

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

In addition to considering internships at for-profit companies, 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

(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 DOL test was “entitled to substantial deference.” *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983).

124. *Internship Fact Sheet, supra* note 1.
125. *Id.*
126. *Id.*
128. *Id.* at 298–99.
129. For a full discussion of various tests courts have applied to determine whether a volunteer is an employee under a wide range of employment law statutes, see Rubinstein, *supra* note 97.
Court addressed this question in *Tony & Susan 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.\(^{130}\) In considering this question, the Court, quoting *Walling v. Portland Terminal*,\(^{131}\) 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.”\(^{132}\) 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.\(^{133}\) 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.’”\(^{134}\) Additionally, the associates did receive “food, clothing, shelter, and other benefits,”\(^{135}\) 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.”\(^{136}\) 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.”\(^{137}\) 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.”\(^{138}\)

The Court in *Tony & Susan Alamo Foundation* stressed that finding the Foundation’s associates to be employees would not have a chilling effect on “ordinary volunteerism.”\(^{139}\) The Court reasoned that “[t]he Act reaches only the ‘ordinary commercial activities’ of religious organizations, and only those who engage in those activities in expectation of compensation,”\(^{140}\) in this case the in-kind benefits received, conditions that will not reach “volunteers who drive the elderly to church,

\(^{131}\) 330 U.S. 148 (1947); see supra Part III.B.
\(^{132}\) *Tony & Susan Alamo Found.*, 471 U.S. at 295 (quoting *Walling*, 330 U.S. at 293).
\(^{133}\) Id. at 300.
\(^{134}\) Id. at 301.
\(^{135}\) Id. at 292.
\(^{136}\) Id. at 293.
\(^{137}\) Id. at 301.
\(^{138}\) Id. at 302.
\(^{139}\) Id. at 303.
\(^{140}\) *See supra* Part II.
\(^{141}\) *Tony & Susan Alamo Found.*, 471 U.S. at 302.
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.143

Some subsequent cases involving volunteers have relied directly on language from Tony & Susan Alamo Foundation.144 However, the majority of lower court cases dealing with volunteer status under the 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.145 Some courts have applied this framework beyond public agency cases, in both the non-profit146 and for-profit147 contexts, without

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142. Id.
143. In a footnote in Tony & Susan 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.

Id. at 303 n.25. This reasoning was put forward by the DOL in its 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.

144. 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).
145. See, e.g., Brown v. N.Y.C. Dep’t of Educ., 755 F.3d 154, 170–71 (2d Cir. 2014) (finding mentor at public high school to be volunteer, not employee, because he had no expectation of compensation); Cleveland v. City of Elmendorf, 388 F.3d 522, 527 (5th Cir. 2004) (finding that unpaid city police officers were volunteers because they performed public service without expectation of compensation).
146. 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, 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).
147. See, e.g., Rhea Lana, Inc. v. U.S. Dep’t of Labor, 271 F. Supp. 3d 284, 290–91, 293–94 (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. CIVA. 04-2082 (JBS), 2006 WL 436733, at *11 (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).
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—

(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 State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.148

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.”149 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 DOL 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.150 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.”151 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.”152

149. Id. § 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.
151. Id.
152. Id. § 553.101(c). This is consistent with the Restatement of Employment Law provision on volunteers. Restatement (Third) of Emp’t Law § 1.02 (Am. Law Inst. 2015).
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,” signifying 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.

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.”153 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 Tony & Susan Alamo Foundation, discussed supra.

However, the DOL 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.”154 This position is based on language from Walling v. Portland Terminal Co.,155 in which the Supreme Court stated 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.’”156 This is consistent with the Supreme Court’s position in Tony & Susan Alamo Foundation on which other courts have since relied.

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 structure their analyses in such a way that they are trying to determine whether the intern was a volunteer or an employee.157 Cases involving unpaid

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153. 29 C.F.R. § 786.350.
155. 330 U.S. 148 (1947); see infra Part III.C.
156. eLAWs—FAIR LABOR STANDARDS ACT ADVISOR, supra note 154 (quoting Walling, 330 U.S. at 152).
157. 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).
internships at for-profit companies tend to categorize interns as either “employees” or “not employees,” with no mention of volunteering. 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, even though volunteers at for-profit companies are clearly contemplated by the Restatement of Employment Law and by courts. The word “intern” also does not appear anywhere within the text of the FLSA. At the federal level, then, “intern” is not a defined legal category.

The DOL in its Fact Sheet states that unpaid internships at non-profit organizations are generally permissible, presumably because they are akin to volunteering. However, given the reasoning applied in cases involving volunteers and the language from the 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. There are clear criteria that must be met for an individual to qualify as a volunteer, even at non-profit organizations. 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. Non-profits that are subject to the FLSA should be permitted unpaid internships only where they meet the for-profit

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158. *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).

159. *Internship Fact Sheet*, supra note 1.


161. 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 N.Y. State Dep’t of Labor, Div. of Labor Standards, Wage Requirements for Interns in Not-For-Profit Businesses* (2016), https://labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf [hereinafter N.Y. NON-PROFIT INTERN FACT SHEET].

162. *Internship Fact Sheet*, supra note 1.

163. 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”).

164. *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).
internship test or where the intern fits comfortably into the framework of volunteering.  

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

All states have their own labor and employment 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. This section will discuss New York State as an example of a state that provides additional guidelines for unpaid internships at non-profit organizations and will examine New York’s approach to the issues discussed in Parts II and III.

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

States may establish broader coverage of non-profit organizations for their minimum wage and overtime laws than that under the FLSA. New York Labor Law, for example, explicitly provides that non-profit institutions are subject to state minimum wage and overtime law. 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.” This definition would seem to exclude any organizations that operate like the Tony and Susan Alamo Foundation did, with both for-profit and non-profit activities.

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,  

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165. As Professor David Yamada has pointed out, “there are alternative approaches to providing compensation for internships with tax-exempt non-profit organizations and public agencies that are not available for the private sector, such as independently funded fellowships and stipends and the federal work-study program.” Yamada, supra note 9, at 377. It would make sense for courts to take these alternative compensation sources into consideration in considering unpaid internships at non-profit organizations under the FLSA, but a discussion of how is beyond the scope of this paper.

166. The FLSA, 29 U.S.C. § 218(a) (2012), 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.

167. N.Y. LAB. LAW § 652(3)(a) (McKinney 2018) (“This article shall apply to non-profitmaking institutions.”).

168. 12 NYCCR §§ 142-2.2, 142-3.2.

169. N.Y. LAB. LAW § 651(8) (emphasis added).
if all are met, mean that there is no employment relationship and that interns do not need to be paid. The Fact Sheet also specifies that non-profit organizations may have unpaid internships if these same criteria are met. The first five criteria on the New York State Fact Sheet are taken almost verbatim from the federal DOL’s 2010 six-factor test, 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. 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.” Only if all of these criteria are met will unpaid internships be permissible.

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. 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. 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. For example, among other restrictions, an organization may not require a volunteer to work specific hours or perform duties involuntarily. The student exemption has strict requirements as to who qualifies as a student, stating that though the work experience “need not fulfill a curriculum

171. Id.
172. See supra Part III.C.
173. Id.
174. Id.
175. N.Y. Non-Profit Intern Fact Sheet, supra note 161.
176. Id.
177. Id.
178. Id.
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 gradu-
ation.179 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.”180 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 serves to protect interns who may
be treated as employees despite having applied for and obtained an
unpaid internship.

V. Conclusion

In light of the lack of a blanket exception to the FLSA for non-
profit organizations, the DOL’s contention that unpaid internships at
non-profit organizations are generally permissible is not supported by
the law. Instead of continuing to adhere to this contention, the DOL
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 organi-
zation is a volunteer or an employee is a tricky one, but the DOL could
take guidance from the footnote in Tony & Susan Alamo Foundation,
and consider the type of work being performed and the amount of work
required of the volunteers.181 The DOL could also draw inspiration from
the New York State guidelines on internships at non-profit organiza-
tions. 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 work-
ing men and women a fair day’s pay for a fair day’s work,”182 even if
they work for non-profit organizations, and even if they are interns.

179. Id.
180. Id.
181. See supra note 143.
President to Congress, May 24, 1934).