

Reproduced with permission from Daily Labor Report, 179 DLR I-1, 09/14/2012. Copyright © 2012 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>

**FLSA**

In an economy limping its way back to recovery, the use of volunteers presents employers with a “tantalizing opportunity” to cut costs, Blake Bertagna, an attorney with Paul Hastings LLP, says in this BNA Insights article. He discusses how employers can use volunteers so long as they adhere to the minimum wage and overtime requirements of the Fair Labor Standards Act.

Bertagna provides a detailed analysis of some common factors that distinguish “employees” and “volunteers”—including the length of the volunteer-employer relationship, the volunteer’s expectation of compensation, and whether the volunteer’s duties were integral to the business—to help employers avoid liability for unpaid compensation under the FLSA.

## **For-Profit Volunteers: The Fair Labor Standards Act’s Limits on Volunteering in the Private Sector**

BLAKE R. BERTAGNA

### **A Nation of Volunteers**

**W**hen Alexis de Tocqueville toured the United States in 1831, he was moved by America’s spirit of volunteerism. His observations led him to later remark that an “enlightened regard for themselves prompts [Americans] to assist one another and inclines

them willingly to sacrifice a portion of their time and property to the welfare of the State.”<sup>1</sup>

More recently, President Obama has “encourage[d] every American to stand up and play their part” today by volunteering their time and talents.<sup>2</sup> Americans yearly answer this call to duty. In 2009 alone, more than 63 million Americans volunteered more than 8.1 billion hours of service.<sup>3</sup> Assuming that those 63 million Americans could have earned an hourly wage of around \$10 for each of those 8.1 billion hours volunteered, they could have earned over \$80 billion.

The sheer monetary value of this volunteerism presents employers with a tantalizing opportunity. In an economy still limping its way back to recovery, employers are exploring all cost-cutting measures. And employers are well aware of the leverage they wield in ne-

*Blake Bertagna is an attorney in the Employment Law Department of Paul Hastings LLP. He handles a full range of employment matters, including the defense of wage-and-hour class actions under state and federal law. He can be reached at [blakebertagna@paulhastings.com](mailto:blakebertagna@paulhastings.com).*

<sup>1</sup> Alexis de Tocqueville, *Democracy in America*, Vol. 2, Ch. VIII, 146-47 (1835).

<sup>2</sup> President Obama, Presidential Proclamation—National Volunteer Week, 2012, Apr. 9, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/04/09/presidential-proclamation-national-volunteer-week-2012>.

<sup>3</sup> Laura Arrillaga-Andreessen, *Giving 2.0: Transform Your Giving and Our World* 81-82 (2011).

gotiating terms of employment in an ever-competitive job market. By asking that individuals perform certain tasks in a “volunteer” capacity, employers can save resources by exempting themselves from the minimum wages and overtime pay otherwise owed to “employees” under the Fair Labor Standards Act.

If employers misclassify “employees” as “volunteers,” however, employers’ perceived opportunity to save on money may become a liability. Unfortunately, the law is short on guidance in distinguishing “employees” from “volunteers” for employers in the private sector. Nonetheless, while no singular test controls the analysis, common factors have been identified that can ease employers’ decisions as to the murky analysis applicable to volunteer status under the FLSA.

As the holiday season approaches, there could not be a better time for employers to revisit their practices in this area. No time of the year inspires an outpouring of America’s volunteer spirit like the holidays. If employers examine their practices, informed by certain key factors, they may start the new year with a confidence that comes from knowing they are in line with existing legal requirements as to the use of “volunteers.”

### Circular Definition

The FLSA’s definitions of “employee” and “employer” are hopelessly circular. It defines “employee” as “any individual employed by an employer,” and “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>4</sup>

There are many types of workers who do not qualify as “employees” within the meaning of the FLSA, including independent contractors, trainees, interns, and volunteers. With the lack of any clear definition or helpful legislative guidance on the meaning of the term “employee,” courts and the Department of Labor have turned to crafting their own tests to distinguish the employees from the nonemployees. These tests tend to be fact-intensive, producing results that vary by case.

The most commonly invoked test is that used to distinguish between employees and independent contractors, generally referred to as the “economic reality” test. It ultimately seeks to determine whether, as a matter of economic reality, the workers are dependent upon the business to which they render service. Most courts weigh five or six factors, such as the degree of control the employer exercises over the manner in which the work is done, the worker’s opportunities for profit or loss, and the degree of skill required for the work.<sup>5</sup>

In addition to independent contractors, trainees and student interns are excluded from the minimum wage and overtime obligations of the FLSA. DOL has articulated a six-factor test to distinguish between employees and trainees or interns, which numerous courts have adopted. If *all* of the criteria apply (e.g., the training/internship is similar to that which would be given in a

vocational school and is for the benefit of the trainees/interns), trainees or interns are not “employees.”<sup>6</sup>

Although decisionmakers have the benefit of nicely worded and organized tests for evaluating the status of independent contractors, trainees, and interns, they will find themselves in a much grayer area in evaluating the status of volunteers. No court or government agency has created a similar test for distinguishing employees from volunteers.

### Tony and Susan Alamo Foundation

There exists one key decision controlling the analysis for “volunteers” under the FLSA. In *Tony and Susan Alamo Foundation v. Secretary of Labor*,<sup>7</sup> a nonprofit religious organization operated a number of commercial businesses, which it staffed with “drug addicts, derelicts, or criminals” who had been helped by the foundation. The foundation did not pay them wages; instead, it provided them with food, clothing, shelter, and other benefits.

The secretary of labor filed an action against the foundation for violations of the FLSA. Although the staff members strongly protested being paid wages and insisted that they viewed themselves as volunteers working for religious reasons, the U.S. Supreme Court held that they were “employees” for purposes of the FLSA and ruled against the foundation.

The lack of compensation, or expectation of compensation, proved dispositive in *Alamo Foundation*. Although the staff members did not receive traditional wages in exchange for their labor, the court highlighted the other benefits they received from the foundation, such as lodging and food. This led the court to conclude that they were “entirely dependent upon the foundation for long periods, in some cases several years” and, therefore, qualified as “employees.”

### An ‘Economic Reality’ for Volunteers

In reaching its holding in *Alamo Foundation*, the court attached a label to the legal framework for its analysis: it stated that the test for deciding employment status in this context was one of “economic reality.”

In light of the court’s “economic reality” label, one might expect to find courts applying to volunteers the five- and six-factor tests so commonly invoked for independent contractors. But this is not the case. No court or agency has identified any test for the volunteer context. In fact, the court to have most recently analyzed volunteer status in the private sector observed that it had “not stumbled upon any factored test similar to that of the 6-factor economic realities test used to differentiate independent contractors and employees.”<sup>8</sup>

Other courts have gone a step further and affirmatively eschewed the economic reality test in analyzing volunteer status. Just last year, the U.S. Court of Appeals for the Fourth Circuit—in an opinion joined by

<sup>6</sup> Wage and Hour Division, Fair Labor Standards Act Advisor, available at <http://www.dol.gov/elaws/esa/flsa/docs/trainees.asp>; Wage and Hour Division, Fact Sheet No. 71 (April 2010) available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.

<sup>7</sup> 471 U.S. 290, 27 WH Cases 209 (1985).

<sup>8</sup> *Okoro v. Pyramid 4 Aegis*, No. 2:11-cv-00267, 2012 BL 112276 (E.D. Wis. Apr. 23, 2012).

<sup>4</sup> 29 U.S.C. §§ 203(d), (e)(1).

<sup>5</sup> See, e.g., *Thibault v. Bellsouth Telecommunications Inc.*, 612 F.3d 843, 846, 16 WH Cases2d 720 (5th Cir. 2010) (145 DLR A-7, 7/29/10); *Schultz v. Capital Intern. Sec. Inc.*, 466 F.3d 298, 305-06, 11 WH Cases2d 1742 (4th Cir. 2006) (168 DLR A-1, 8/30/06).

former U.S. Supreme Court Justice Sandra Day O'Connor—agreed with prior district courts that had concluded that the economic reality test does not apply to distinguishing between employees and volunteers.<sup>9</sup> The test, according to the court, presumes an economic exchange between the parties. In the case of volunteers, however, no money changes hands. Because the test seeks to measure the “economic realities” of a relationship, therefore, it cannot serve its purpose in the volunteer context where there is technically no economic relationship.

### Totality of Circumstances

The Supreme Court’s 65-year old observation about evaluating the employment relationship stands true today in the volunteer context: “[T]he determination of the relationship does not depend on . . . isolated factors but rather upon the circumstances of the whole activity.”<sup>10</sup> The following factors have all been identified as relevant to the analysis for distinguishing employees from volunteers.

**Expectation of Compensation.** Compensation goes to the very heart of the FLSA’s purpose. In the absence of compensation, there is typically no employment relationship. Accordingly, the Supreme Court has defined a volunteer as “an individual who, *without promise or expectation of compensation*, but solely for his personal purpose or pleasure, works in activities carried on by other persons.”<sup>11</sup>

While the compensation ordinarily comes in the form of traditional wages, there are a variety of other benefits that can trigger an agreement of compensation between the parties. In *Hallssey v. America Online Inc.*, the plaintiff class consisted of AOL subscribers who had “volunteered” to assist AOL with administering chat rooms and other forums as part of AOL’s “community leader” program.<sup>12</sup> AOL did not pay them wages in return for their time involved with the program. Nonetheless, there was evidence that these community leaders had volunteered in order to eventually secure a full-time, paid position at AOL, which resulted in the court drawing an inference that “AOL [had] used its superior bargaining power to require a certain amount of ‘volunteering’ before an individual would be considered for a paid position” and ruling against AOL.

**Immediate/Primary Benefit.** This next factor weighs the respective rewards to determine which party obtains the primary benefit or immediate advantage. The balance will tip in the employer’s favor so long as the benefit received is insubstantial or indirect.

In *Roman v. Maietta Construction*, the plaintiff worked as a welder at the defendant’s construction company.<sup>13</sup> In addition to his welding duties, the plaintiff, who had a passion for stock car racing and had previously worked as a crew chief for the defendant’s son, continued to work with the son’s stock cars. The defen-

dant’s company received a benefit from the plaintiff’s work because the company’s name was painted on the son’s cars as a sponsor.

But when the First Circuit weighed the benefits accruing to both parties, it held that the primary benefit pointed to *the plaintiff*. It determined that “the link between any potential benefits accruing to the construction firm from [the son’s] performance as a stock car driver and [the plaintiff’s] crew chief activities [was] far too attenuated to trigger the FLSA.” In contrast, the plaintiff volunteered to work on the stock cars for his own “personal enjoyment” and obtained the primary benefit of the work.

Employers hire individuals to add value to their enterprises and make them more profitable. Where objective indicia reveal the individual to be bringing a benefit that is insubstantial or indirect—and particularly where the individual is also receiving some personal enjoyment out of the work being performed—then a common attribute of employment is absent.

**Integral to Business.** A volunteer typically serves an auxiliary role in a business’s operation. In contrast, an employee tends to perform work that is essential to the very operation of the business. Thus, if an individual’s work is integral to the employer’s business, that individual looks more like an employee than a volunteer.

The Department of Labor has often relied upon this factor in analyzing volunteer status. In a 2002 opinion letter, DOL addressed a situation involving a school fundraiser where students “volunteered” at a local supermarket by bagging groceries and carrying the bags to the customers’ cars in return for tips.<sup>14</sup> DOL determined that the bagging activities were “an integral part” of the supermarket’s business, for which the supermarket paid ordinary employees. And because of the students’ involvement in those activities, they had displaced work ordinarily performed by the supermarket’s employees. As a result, DOL decided that the supermarket was required to pay the students for their time.

This concept of employee displacement is important. The FLSA exists “to prevent covered employers from gaining an unfair competitive advantage through payment of substandard wages.” The Supreme Court called out this very problem in *Alamo Foundation*. Even though the foundation was a not-for-profit, it was engaging in competition with ordinary commercial enterprises—but it was not paying any employees for staffing those businesses. This “would undoubtedly give [the foundation] and similar organizations an advantage over their competitors,” which “is exactly [the] kind of ‘unfair method of competition’ that the Act was intended to prevent.”<sup>15</sup>

**Coercion/Pressure.** The presence of coercion will be detrimental to volunteer status. This requirement is inherent in the very definition of “volunteer”: an act cannot be voluntary if it is coerced or compelled. In *Roman*, the First Circuit stressed that the construction company did not require the plaintiff to serve as a crew chief as

<sup>9</sup> *Purdham v. Fairfax Cnty. School Bd.*, 637 F.3d 421, 433-34, 17 WH Cases2d 597 (4th Cir. 2011) (48 DLR AA-1, 3/11/11).

<sup>10</sup> See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730, 6 WH Cases 990 (1947).

<sup>11</sup> *Alamo Foundation*, 471 U.S. at 295 (emphasis added).

<sup>12</sup> 99-CIV-3785 (S.D.N.Y. Mar. 10, 2006) (63 DLR A-1, 4/3/06).

<sup>13</sup> 147 F.3d 71, 4 WH Cases2d 1293 (1st Cir. 1998).

<sup>14</sup> DOL, Opinion Letter, FLSA2002-9 (Oct. 7, 2002).

<sup>15</sup> 471 U.S. at 299, 27 WH Cases 209; see also DOL, Wage & Hour Op. Letter, Wage & Hour Man. (BNA), WHM 99:8186 (Sept. 28, 1998) (deciding that the use of unpaid volunteer ushers during theater performances sponsored by not-for-profit companies would result in the displacement of regular paid ushers and should be considered employees).



part of his welding job. In a more recent decision, a district court ruled that a live-in maintenance worker's fiancée, who had performed maintenance services to assist her fiancé with his duties, had done such work under coercion because she had completed the work to appease management and retain an apartment where she resided with her daughter.<sup>16</sup>

**Time of Activity.** DOL has interpreted the phrase "hours worked" to have an important temporal limit. Under 29 C.F.R. § 785.44, "[t]ime spent in work . . . at the employer's request, or under his direction or control, or while the employee is required to be on premises, is working time."<sup>17</sup>

In contrast, "time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked."<sup>18</sup>

No court or agency has identified any test for volunteer status in the private sector. Nonetheless, it remains a valid and current interpretation by DOL of this important phrase. And DOL has repeated this limitation in deciding volunteer issues. In one decision, the issue was whether employees of a club that helped at-risk youth could volunteer to chaperone cultural and sporting field trips or bingo games.<sup>19</sup>

DOL approved of the employees volunteering for such activities, in part, so long as they occurred outside of the employees' normal working hours.

**Similarity Between Volunteer Activity and Job Duties.** DOL takes the view that if employees volunteer to do the same type of work that they perform as a part of their normal work duties, the volunteer work must be included in the employees' hours worked calculations.<sup>20</sup> This factor is tied to the concern of employers obtaining an unfair competitive advantage by improperly influencing or coercing their employees to provide their otherwise compensable services free of charge.

In its Field Operations Handbook, DOL illustrates this principle with a clerical employee. Its notes that a clerical employee for a hospital may spend time with a sick child while off duty without being compensated. That same employee, however, would have to be compensated for performing clerical work (e.g., handling correspondence) for a charity drive sponsored by the hospital. Similarly, in a DOL opinion letter dealing with a nonprofit university sponsoring annual races, DOL determined that university employees could volunteer their time to the race because their volunteer activities (e.g., staffing a table at the finish line with fruit and water) were not similar to the activities that the university normally paid them to perform.<sup>21</sup>

**Length of Relationship.** A longer relationship can suggest employment. In *Alamo Foundation*, the court stressed the short duration of the training phase that the brakemen underwent in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 6 WH Cases 611 (1947), who were

found not to be employees. In contrast, those who staffed the foundation's commercial enterprises worked for the foundation "for long periods, in some cases several years." Another court recently cited the "substantial length of time" for which the plaintiff worked for the defendant in ruling that he was an employee rather than a volunteer.<sup>22</sup>

**Part Time/Full Time.** The extent of the hours worked for an employer (i.e. part time v. full time) may color a court's decision. The *Alamo Foundation* court mentioned DOL's position as looking to a variety of facts, including "whether the activity is less than full-time," in deciding whether individuals have volunteered their services. DOL continues to associate activities done on a part-time basis with volunteers.<sup>23</sup>

## 'Ordinary Volunteerism'

In *Alamo Foundation*, the Supreme Court assured that its holding would not threaten "ordinary volunteerism," such as driving the elderly to church or helping remodel a home for the needy. It was the staff's participation in the foundation's "ordinary commercial activities" that triggered the court's ruling that they were not volunteers.

In this regard, the court's ruling was far from breaking any new legal ground. Since at least as early as December 1955, the Department of Labor has interpreted the phrase "hours worked" under the FLSA to exclude "[t]ime spent in work for public or charitable purposes" under certain conditions.<sup>24</sup> Within months of the *Alamo Foundation* decision, Congress incorporated this longstanding principle into a statutory exemption for "volunteers" in the public employment context.<sup>25</sup> DOL has since defined "volunteer" in this context to mean an "individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered."<sup>26</sup>

With the status of volunteer work having a charitable purpose at its core, for-profit employers obviously confront a serious obstacle. They are not in the business of charity work; they are in the business of making money. Accordingly, there is no surprise in DOL's staunch position that "[e]mployees may not donate their services to their for-profit employers"<sup>27</sup> and of "limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations."<sup>28</sup>

A 1996 DOL opinion letter illustrates this dichotomy between ordinary volunteerism and for-profit work. There, a nonprofit hospital was using "volunteers" in

<sup>22</sup> *Okoro*, 2012 BL 112276.

<sup>23</sup> See, e.g., DOL, Wage & Hour Op. Letter, FLSA2006-4 (Jan. 27, 2006).

<sup>24</sup> 29 C.F.R. § 785.3(j) (1955), 20 Fed. Reg. 9,964 (now found at 29 C.F.R. § 785.44).

<sup>25</sup> 29 U.S.C. § 203(e)(4)(A).

<sup>26</sup> 29 C.F.R. § 553.101(a) (emphasis added).

<sup>27</sup> Id.; see, e.g., DOL, Wage & Hour Op. Letter, Wage & Hour Man. (BNA), WHM 99:5393 (Aug. 19, 1999); DOL, Wage & Hour Op. Letter, Wage & Hour Man. (BNA), WHM 99:8035 (Sept. 11, 1995); DOL, Wage & Hour Op. Letter, (Sept. 22, 1994); DOL, Wage & Hour Op. Letter, (Sept. 2, 1994).

<sup>28</sup> DOL, Opinion Letter, Wage & Hour Man. (BNA), WHM 99:8035 (Sept. 11, 1995).

<sup>16</sup> *Genarie v. PRD Mgmt. Inc.*, No. 04-2082, 2006 BL 26028 (D.N.J. Feb. 17, 2006).

<sup>17</sup> 29 C.F.R. § 785.44 (emphasis added).

<sup>18</sup> Id. (emphasis added).

<sup>19</sup> DOL, Wage & Hour Op. Letter, FLSA2006-18 (June 1, 2006).

<sup>20</sup> See Field Operations Handbook §§ 10b03(c) and (d).

<sup>21</sup> DOL, Wage & Hour Op. Letter, FLSA2005-33 (Sept. 16, 2005)

various capacities. On one hand, DOL concluded that individuals who had volunteered to “minister directly to the comfort of the patients” (e.g., reading to patients) were legitimate volunteers under the FLSA.<sup>29</sup> On the other hand, it concluded that individuals who had volunteered to work in gift shops maintained by the hospital, where items such as flowers and gifts were sold for profit, were employees.

The courts have not taken such an absolute position on volunteering in the private sector. Just last year, the federal court to have most recently handled this issue observed: “[T]o say that one cannot under any circumstances volunteer for a for-profit entity might be too sweeping a statement.”<sup>30</sup> Nevertheless, DOL and the courts may not be that far apart.

Even in the courts, those circumstances when a private-sector employer may legitimately ask an employee to “volunteer” likely arise when the activity can reasonably be regarded as charitable or civic in character. For example, companies regularly host charitable events such as 5K runs or sponsor programs such as Habitat for Humanity. Under these circumstances, the company should be able to safely invite employees to help or give their time to such an event so long as 1) the activities occur outside of the employees’ normal working hours; 2) there is no obligation to participate or ramifications for choosing not to participate; 3) the employees have no expectation of compensation for their time helping with the event; and 4) the activities performed are different from the normal duties performed by the employees.

If the invitation is extended to a nonemployee, the company may be on safer ground, as the nonemployee helping with the event will less likely be under any coercion from the company and will not be doing any-

thing within the individual’s typical work duties for that company. Nevertheless, the company must still be careful not to make any express or implied representations that give the “volunteer” an expectation of some considerable benefit, such as future employment. If any value or benefit is provided, it should be minimal or nominal in nature.<sup>31</sup> This situation becomes even more problematic if the volunteer activity is closely related to the good or service that drives the employer’s revenue.

In short, whether the “volunteer” opportunity is for employees or nonemployees, companies should make objective and reasonable steps to demonstrate that the activity is truly voluntary in the ordinary sense of that term.

## Conclusion

“From the American Revolution and the Seneca Falls Convention to the everyday acts of compassion and purpose that move millions to make change in their communities, our Nation has always been at its best when individuals have come together to realize a common vision.”<sup>32</sup> The majority of Americans today seek to live up to the collective spirit that moved Alexis de Tocqueville over 150 years ago.

Employers should respect and nurture this desire to give. But they must also respect and adhere to the limits on volunteerism under the FLSA. If they do not, they may assume an unwanted and substantial liability for unpaid compensation. Accordingly, employers will do well to exercise reasonableness in evaluating the circumstances of their relationship with “volunteers.”

<sup>31</sup> See, e.g., DOL, Opinion Letter, FLSA2006-4 (Jan. 27, 2006).

<sup>32</sup> President Obama, Presidential Proclamation—National Volunteer Week, 2012, Apr. 9, 2012, available at <http://www.whitehouse.gov/the-press-office/2012/04/09/presidential-proclamation-national-volunteer-week-2012>.

<sup>29</sup> DOL, Opinion Letter, Wage & Hour Man. (BNA), WHM 99:8054 (June 28, 1996).

<sup>30</sup> *Okoro*, 2012 BL 112276.