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The Applicability Of The Fair Labor Standards Act To Volunteer Workers At Nonprofit Organizations Congress

THE APPLICABILITY OF THE FAIR LABOR STANDARDS ACT TO VOLUNTEER WORKERS AT NONPROFIT ORGANIZATIONS

Congress enacted the Fair Labor Standards Act (FLSA or the Act) to protect employees engaged in commerce or in the production of goods for commerce against oppressive labor conditions.[1] To effectuate the legislative

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1. Fair Labor Standards Act, ch. 676, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. § 201-219 (1982). Congress enacted the Fair Labor Standards Act (FLSA or the Act) pursuant to its power under the Commerce Clause of the United States Constitution. 29 U.S.C. § 202 (1978 & Supp. 1985). The Commerce Clause grants to Congress broad power to regulate commerce among the several states. U.S. CONST. art. I, § 8, cl. 3; *see also* Gibbons v. Ogden, 9 Wheat. 1, 8 (1824). In *United States v. Darby,* the United States Supreme Court upheld the constitutionality of the FLSA as an appropriate means to suppress the movement in interstate commerce of goods produced under substandard labor conditions. *See* United States v. Darby, 312 U.S. 100, 115 (1940).

The FLSA defines commerce as transportation, transmission, or communication among the several states. 29 U.S.C. § 203(b) (1982). Employees engaged in commerce include employees involved in telephone, radio, and transportation industries. *See* Schmidt v. Peoples Tele. Union, 138 F.2d 13, 15 (8th Cir. 1943) (FLSA covers switchboard operators maintaining telephone service across state lines). Employees engaged in commerce also include employees who participate in the distribution of goods that move through interstate commerce. *See* Walling v. Jacksonville Paper Co., 317 U.S. 564, 572 (1943) (Act applicable to paper company employees who delivered goods that had previously moved in interstate commerce). Employees who aid operations of instrumentalities of commerce by providing materials or maintenance and repair are also engaged in commerce for purposes of the FLSA. *See* A.B. Kirschbaum Co. v. Walling, 316 U.S. 517, 524 (1942) (Act applicable to employees engaged in maintenance of building in which tenants engage in production of goods for interstate commerce).

Section 203(j) of the FLSA provides that an employee is engaged in the production of goods for commerce when the employee produces, handles, transports, or in any manner works on goods destined for interstate commerce or any closely related process directly essential to the production of such goods. 29 U.S.C. § 203(j) (1982); *see* Borden Co. v. Borella, 325 U.S. 679, 684 (1945) (Act applicable to maintenance employees of building in which company managed production of goods for interstate commerce); Brennan v. Carrasco, 540 F.2d 454, 456 (9th Cir. 1976) (workers who regularly remove liquid waste from plants that provide goods for interstate commerce perform services essential to production and thus FLSA is applicable); Rural Fire Protection Co. v. Hepp, 366 F.2d 355, 358-59 (9th Cir. 1966) (firemen protecting businesses engaged in production of goods for commerce essential to production and therefore entitled to coverage under FLSA).

Congress has the power under the Commerce Clause to regulate all interstate activity affecting commerce. United States v. Darby, 312 U.S. at 118. Congress rejected proposals to extend the FLSA to activities merely "affecting" commerce as too uncertain and expansive. H. REP. No. 2182, 75th Cong., 3d Sess. 2, 83 CONG. REC. 7749-50 (1938). Congress thus indicated an intention to forego exercising its plenary power and left some regulation of commerce to the states. *See* Mitchell v. Lublin, McGauhy, and Assoc., 358 U.S. 207, 211 (1958) (Act's exclusion of employees whose activities merely "affect" commerce indicated intent not to make Act's scope coextensive with congressional power to regulate commerce).

The FLSA provides that none of the Act's provisions justify noncompliance with a state law or private employment agreement establishing a higher minimum wage or shorter workweek. *See* 29 U.S.C. § 218(a) (1982).

policy of eliminating substandard working conditions, the FLSA prescribes minimum wage and overtime compensation rates for most employees.[2] Enforcement provisions in the FLSA set forth sanctions for employers who violate the Act's requirements.[3] A primary issue arising under the FLSA is the determination of whether a worker is an employee entitled to the Act's coverage.[4]

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2. *See* 29 U.S.C. § 202 (1982). Section 202 of the Act sets forth the elimination of substandard labor conditions. *Id.* The FLSA sought to end the merciless exploitation of unorganized laborers. H. REP. No. 2182, 75th Cong., 3d Sess., 83 CONG. REC. 9260 (1938). The purpose of the FLSA was to prevent sweatshop conditions, starvation wages, and excessive working hours. 83 CONG. REC. at 9260.

Section 206 of the FLSA ensures workers a decent standard of living by providing for extension of minimum wage coverage to those employees not exempted in section 213 of the Act. 29 U.S.C. § 206 (1982). Section 207(a) of the Act establishes a workweek of 40 hours beyond which an employer must pay employees at a rate not less than one and a half times the employees' regular rate. 29 U.S.C. § 207(a) (1982). The purpose of section 207 is to make overtime compensation sufficiently expensive to encourage employers to hire additional employees, decreasing the unemployment rate, and improving the well-being of workers by discouraging excessive working hours. *See* S. REP. No. 884, 75th Cong., 1st Sess. 2 (1938); *see also* Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580 (1942) (establishing amount of overtime compensation rate).

3. *See* 29 U.S.C. § 215-217 (1982). The FLSA provides four means for enforcing the Act's provisions. *See* 29 U.S.C. § 216(a) (1982). (providing criminal sanctions for willful violation of Act); 29 U.S.C. § 216(b) (1982) (allowing individual employees to maintain civil actions for unpaid wages and liquidated damages); 29 U.S.C. § 216(c) (1982). (permitting Secretary of Labor to maintain civil action on behalf of employees); 29 U.S.C. § 217 (1982). (permitting Secretary of Labor to bring injunction proceedings).

4. *See generally* THE NEW WAGE AND HOUR LAW 44-45 (BNA) (1967) (court must establish employer-employee relationship before court may charge employer with liability under FLSA) [hereinafter cited as NEW WAGE AND HOUR LAW]; LAB. L. REP. GUIDEBOOK TO FEDERAL WAGE-HOUR LAWS 33 (CCH) (1974) (primary inquiry into claim involving FLSA seeks to determine existence of employer-employee relationship); Goldberg v. Whitaker House, Coop., 366 U.S. 28, 32 (1960) (court held members of cooperative employees); Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 580 (1942) (employees include employees paid by the week, as well as employees paid by the hour); United States v. Rosenwasser, 323 U.S. 360, 363 (1944) (employees include those compensated on piece rate basis); Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1946) (court held railway trainees were not employees); Wirtz v. Constr. Survey Coop., 235 F. Supp. 621, 624 (D. Conn. 1964) (court adjudged members of cooperative were not employees).

Section 213 of the FLSA enumerates specific exemptions from the requirements of the Act's provisions. *See* 29 U.S.C. § 213 (1982). Among those Congress specifically exempted from the Act's minimum wage and maximum hours requirements are professional, administrative, and executive employees. 29 U.S.C. § 213(a)(1) (1982). The Act's exemptions are very specific, and courts construe the exemptions narrowly against an employer seeking to assert the exceptions. Powell v. United States Cartridge Co., 339 U.S. 497, 517 (1950).

Some exemptions require certification by the Wage-Hour Administrator before an employer can assert the exemptions. *See* L. WEINER, FEDERAL WAGE AND HOUR LAW 112 (1977) (describing criteria for certification); *infra* note 79 and accompanying text (discussing identity and function of Wage-Hour Administrator). For example, the Administrator may provide, upon request of the employer, a reduction in the minimum wage requirement to an employer utilizing the services of handicapped workers. 29 U.S.C. § 214 (1982). The Administrator may provide exemptions to employers of handicapped workers in order to enhance employment opportunities for handicapped persons. 29 U.S.C. § 214(c) (1982).

Congress defined the term employee broadly to render the maximum number of workers eligible for the Act's protection.[5] The Act's broad definition of employee is insufficient for determining employee status without reference to the circumstances of each particular case.[6] Because the Act's definition is too broad to provide meaningful guidance, courts have developed the "economic reality" test to assist in the determination of employee status.[7] Under the "economic reality" test, if a worker is dependent for sustenance upon the business to which the worker renders service, then the worker is an employee of that business.[8] Once a court establishes that a worker is an employee, the court must determine whether the FLSA covers the employee.[9]

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5. *See* Bowie v. Gonzales, 117 F.2d 11, 16 (1st Cir. 1941) (FLSA's definition of employee broad and comprehensive to include all employees not specifically exempted). Section 203(e)(1) of the FLSA defines employee as, "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (1982). The FLSA defines employ with similar breadth in Section 203(g) as, "to suffer or permit to work." 29 U.S.C. § 203(g) (1982). Section 203(d) of the Act defines employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (1982); *see also* 81 CONG. REC. 7656-57 (1937) (remark of Senator Black that definition of employee is broadest ever included in one act); Rutherfood Food Corp. v. McComb, 331 U.S. 722, 729 (1946) (FLSA contains definitions broad enough to require application of coverage to persons whom courts would not have deemed employees prior to the Act); NLRB v. Hearst Publications, 322 U.S. 111, 129 (1944) (common law definitions of employee not applicable in remedial legislation); *see* Walling v. Rutherfood Food Corp., 156 F.2d 513, 516 (10th Cir. 1946) (FLSA concerns itself with remedy of evils unknown at common law and, therefore, may bring back within its ambit those whom courts would not have deemed employees at common law), *aff'd in part, mod. in part,* 331 U.S. 722 (1947).

6. NEW WAGE AND HOUR LAW, *supra* note 4, at 44-45.

7. *See* United States v. Silk, 331 U.S. 704, 713 (1946). In *United States v. Silk,* the United States Supreme Court applied the "economic reality" test to determine whether workers engaged in unloading railroad cars were employees within the meaning of the Social Security Act. *Id.* at 706. The *Silk* Court stressed the importance of accomplishing the purpose of social legislation in determining employee status. *Id.* at 712. The Supreme Court noted that the Social Security Act seeks to remedy the problems accompanying old age and unemployment by providing employees with benefits upon retirement or in the event of unemployment. *Id.* at 710. The Supreme Court in *Silk* held that workers engaged in the unloading of railway cars were employees when testimony indicated that unloaders worked as often as the unloaders had to in order to eat. *Id.* at 706.

In *NLRB v. Hearst Publications,* the United States Supreme Court applied the "economic reality" test to determine the applicability of the National Labor Relations Act (NLRA) to newsboys. NLRB v. Hearst Publications, 322 U.S. 111, 129 (1944). The Supreme Court stated that common law tests are not controlling when determining the applicability of remedial social legislation. *Id.* at 129. In addition, the *Hearst* Court emphasized that a court must determine the applicability of the NLRA on the basis of underlying economic facts rather than rigid, established legal classifications. *Id.* The *Hearst* Court concluded that because the newsboys relied on their earnings to support families the newsboys were employees entitled to coverage under the NLRA. *Id.* at 134.

8. *See* Bartels v. Birmingham, 332 U.S. 126, 130 (1946) (for purposes of social legislation, employees are those who as a matter of "economic reality" are dependent upon business to which they render service); *supra* note 7 (discussing "economic reality" test as applied to social legislation).

9. *See infra* notes 10-15 and accompanying text (discussing bases upon which FLSA covers employees).

Prior to 1961, courts examined the activities of an individual employee to determine whether the employee came within the Act's coverage.[10] If a worker engaged in commerce or in the production of goods or materials for commerce or any closely related process essential to that production, the FLSA protected the worker.[11] While not eliminating individual coverage as a basis for extending the Act's protection, Congress revised the FLSA in 1961 to eliminate inconsistencies inherent in individual coverage.[12] The 1961 revision extended protection to numerous workers previously unprotected by creating a system of enterprise coverage.[13] The FLSA defines an enterprise as related activities performed through unified operation or common control for a common business purpose.[14] When an establishment comes within the statutory definition of enterprise, the FLSA protects all employees within the enterprise regardless of the employee's individual relation to interstate commerce.[15]

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10. *See* Mitchell v. Lublin, McCauhy, and Assoc., 358 U.S. at 213 (legislature intended that activities of individual employees, not employers, be controlling in determining coverage under FLSA); Kirschbaum Co. v. Walling, 316 U.S. at 524 (same).

11. *See* Powell v. United States Cartridge Co., 339 U.S. at 511-12 (applicability of FLSA depends solely on worker being engaged in commerce or in the production of goods for commerce); Kam Koon Wan v. E.E. Black Ltd., 188 F.2d 558, 563 (9th Cir. 1951) (same).

12. H. REP. No. 3935, 87th Cong., 1st Sess. 28 (1961). Extending coverage of the FLSA on an individual basis often led to inequitable results. *See* Player, *Enterprise Coverage Under the Fair Labor Standards Act: An Assessment of the First Generation,* 28 VAND. L. REV. 283, 308 (1975) (describing inconsistent treatment). The FLSA treated individuals performing services side by side for the same employer differently simply because one engaged in commerce or the production of goods therefor, and the other did not. *See* Willis, *The Evolution of the Fair Labor Standards Act,* 26 U. MIAMI L. REV. 607, 625 (1972) (describing inconsistent coverage). The 1961 amendments sought to remedy the inconsistencies of individual coverage. *See* 1961 U.S. CODE CONG. & AD. NEWS 1620, 1650 (purpose of revision is to eliminate fragmentation of coverage).

13. *See* 29 U.S.C. § 201-219 (1982), *as amended by* PUB. L. No. 87-30, 87th Cong., 1st Sess. (1961) (Act to amend FLSA to provide coverage to employees in enterprises engaged in commerce or in the production of goods for commerce). The 1961 amendments to the FLSA extended protection to approximately 4.2 million workers previously unprotected. *See* H. REP. No. 3935, 87th Cong., 2st Sess. 27, *reprinted in* 1961 U.S. CODE CONG. & AD. NEWS 1620, 1645-46.

14. 29 U.S.C. § 203(r) (1982); *see also* 29 C.F.R. § 779.206 (1985); *see* Wirtz v. Savannah Bank and Trust Co., 362 F.2d 857, 860 (5th Cir. 1966) (bank and management offices of bank building constitute related activities for purposes of enterprise coverage). For purposes of the FLSA, unified operations or common control exist where an organized business system with power to make all decisions directed to the accomplishment of a common business purpose exists. 29 C.F.R. § 779.217 (1985); *see* Shultz v. Morris, 315 F. Supp. 558, 564 (M.D. Ala.) (common control may exist despite separate management of individual businesses), *aff'd,* 437 F.2d 896 (5th Cir. 1970). The term common business purpose encompasses activities, performed by one or more persons, aimed at reaching the same business objective. 29 C.F.R. § 779.213. Common ownership of related activities leads to a presumption of a common business purpose. *See* Marshall v. Elks Club of Huntington, Inc., 444 F. Supp. 957, 966 (S.D. W. Va. 1977) (local lodge and private bar/restaurant related activities where bar maintained to provide social atmosphere for lodge members).

15. 29 U.S.C. § 203(r)-(s) (1982). Enterprise coverage renders the FLSA applicable to all employees of an enterprise within which any two employees are involved in interstate commerce. *Id.*

An enterprise must satisfy two prerequisites before the FLSA covers the employees within the enterprise under the enterprise concept.[16] The first test is employee contact.[17] The enterprise must consist of at least two employees engaged in commerce or in the production of goods for commerce, or two employees handling, moving, or selling goods which had previously moved in interstate commerce.[18] The second requirement that an enterprise must satisfy involves the dollar-volume of sales made or business done annually.[19]

Additional amendments to the FLSA in 1966 further revised the coverage and exemption provisions of the Act.[20] The 1966 amendments made hospitals, nursing homes, and certain schools subject to the FLSA minimum wage and overtime compensation requirements for the first time.[21] Congress also specified that eleemosynary, religious, and educational institutions were enterprises and, therefore, subject to FLSA requirements whether or not the institutions operated for a profit.[22] Accordingly, in *Tony and Susan Alamo*

In 1961, the Act covered an enterprise that satisfied the employee contact test and had a gross income of $1,000,000. *See* 29 U.S.C. § 203(s)(1) (1982). Congress provided for periodic reduction of the dollar amount required for enterprise coverage to bring a steadily expanding pool of workers within the Act. *See* 29 U.S.C. § 203(s)(1) (1982). Section 203(s)(1) reduced the dollar amount required for enterprise coverage from $1,000,000 to $500,000 beginning February 1, 1967, and to $250,000 beginning February 1, 1969. *Id.*

Congress emphasized that the adoption of the enterprise concept was for the purposes of extending protection of the Act to employees of large, retail operations which individual coverage inadequately covered. 1961 U.S. CODE CONG. & AD. NEWS 1620, 1647. The 1961 revisions did not intend to bring within the purview of the Act smaller establishments primarily local in nature but located near and making an occasional transaction across state lines. H. REP. No. 3935, 87th Cong., 1st Sess. 23 (1961).

16. Player, *supra* note 12, at 311.

17. *See supra* note 1 and accompanying text (discussing individual coverage requirements).

18. 29 U.S.C. § 203(s) (1982).

19. 29 U.S.C. § 203(s)(1)(2) (1982); *see also* [6 Wages-Hours] LAB. REL. REP. (BNA) 91:18 (1985) (dollar volume test done on quarterly basis, standard of measurement is gross receipt of sales during preceding twelve months).

20. *See* 29 U.S.C. § 203(r)-(s) (1982). Congress amended section 203(r) of the FLSA to indicate more clearly the legislative objective of bringing employees of hospitals and related institutions, schools for the mentally handicapped, and institutions of higher education within the purview of the Act. 1966 U.S. CODE CONG. & AD. NEWS 3002, 3010. Congress redefined section 203(s) of the FLSA to include hospitals, schools for the handicapped, and institutions of higher education, regardless of whether these institutions were operated on a profit or nonprofit basis. *See* 29 U.S.C. § 203(s)(5) (1982). (deeming hospitals and related institutions and certain schools, enterprises engaged in commerce or in the production of goods for commerce for purposes of enterprise coverage). Section 207(j) of the FLSA provides a special basis for computation of overtime compensation for employees at hospitals and related institutions. 29 U.S.C. § 207(j) (1982). The purpose behind the hospital overtime rate is to allow for the special employment needs of institutions engaged in the care of the sick, which often entail long hours for a short number of days and then several days off. *See* S. REP. No. 1487, 89th Cong., 2d Sess., *reprinted in* 1966 U.S. CODE CONG. & AD. NEWS 3002, 3015.

21. 29 U.S.C. § 213(a)(2)(iii) (1938), *amended by* 29 U.S.C. § 213(a)(2)(iii) (1982); *see supra* note 20 (discussion of 1966 FLSA amendments regarding eleemosynary, religious, and educational institutions).

22. *See* 29 U.S.C. § 203(s)(5) (1982). The enterprise concept recognizes that nonprofit enterprises often engage in activities in competition with enterprises organized for a business

Foundation v. Secretary of Labor,[23] the United States Supreme Court held the FLSA applicable to the Alamo Foundation, a nonprofit religious foundation.[24] More specifically, the *Alamo* Court determined that members voluntarily assisting in the Foundation's commercial enterprises were employees within the meaning of the FLSA.[25]

The defendant, the Alamo Foundation, incorporated as a nonprofit religious organization for purposes of rendering assistance to the sick and needy.[26] The Foundation did not solicit contributions from the general public, but derived income from the operation of various commercial businesses.[27] Associates of the Foundation, many of whom were former drug addicts, derelicts, and criminals rehabilitated by the Foundation, staffed the Foundation's commercial businesses.[28] The associates received no cash salaries for work performed in the Foundation's commercial establishments, but the Foundation provided the associates with food, lodging, clothing, and other facilities.[29]

As director of the Wage-Hour Administration, the Secretary of Labor filed suit against the Alamo Foundation in the United States District Court

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purpose. 1966 U.S. CODE CONG. & AD. NEWS 3002, 3010. Coverage of nonprofit enterprises engaged in commercial activities is in accord with FLSA purpose of eliminating unfair methods of competition in interstate commerce, as the competition from a nonprofit enterprise is as rigorous as that from a for-profit business. 1966 U.S. CODE CONG. & AD. NEWS 3010; *see* 29 C.F.R. § 779.214 (1985) (FLSA applicable to eleemosynary, religious, or educational organizations engaging in ordinary commercial activity); Marshall v. Woods Hole Oceanographic Inst., 458 F. Supp. 709, 719 (D. Mass. 1978) (holding nonprofit scientific research corporation engaged in commercial activities within purview of FLSA since corporation contracted under same terms and conditions as other similar commercial organizations).

In *Mitchell v. Pilgrim Holiness Church Corp.,* the United States Court of Appeals for the Seventh Circuit held the FLSA applicable to employees of a church corporation where employees engaged in printing and mailing religious literature. Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879, 882 (7th Cir.), *cert. denied,* 347 U.S. 1013 (1954). The *Mitchell* court stated that the FLSA is a remedial measure seeking to ensure a decent standard of living for workers engaged in commerce or in the production of goods for commerce. *Id.* at 884. The *Mitchell* court reasoned that a minimum standard of living was as necessary to employees of a church's printing operation as it was to employees of a for profit printing business. *Id.* The Seventh Circuit in *Mitchell* concluded that no reason existed for holding that employees engaged in commerce were not entitled to the protection of the FLSA simply because the employees worked for a church. *Id.* at 884.

23. 105 S. Ct. 1953 (1985).

24. *See id.* at 1958.

25. *Id.* at 1956-58.

26. *Id.* at 1957. The *Alamo* Court noted that the Alamo Foundation's Articles of Incorporation stated that the primary purposes of the Foundation included conducting and maintaining an Evangelistic Church, and ministering to the sick, the needy, and the fallen. *Id.*

27. *Id.* at 1957. The Supreme Court in *Alamo* noted that the Foundation's businesses included service stations, clothing and grocery stores, hog farms, construction companies, companies engaged in production and distribution of candy, a recordkeeping company, and a motel. *Id.*

28. *Id.* at 1957.

29. *Id.* at 1957, 1958. The *Alamo* Court noted that the Foundation also provided the associates with transportation and medical benefits. *Id.*

for the Western District of Arkansas.[30] The Secretary of Labor alleged that the associates were employees within the meaning of the FLSA, and, therefore, were entitled to coverage under the Act.[31] The Secretary contended that the Foundation had violated the minimum wage, overtime, and recordkeeping provisions of the FLSA.[32]

Applying the "economic reality" test, the district court held that the associates who worked in the Foundation's commercial enterprises were employees of the Foundation within the meaning of the FLSA.[33] The district court further found that the Foundation was an enterprise engaged in ordinary commercial activity and thus, subject to FLSA regulations governing interstate commerce.[34] Finally, the district court ruled that rendering the FLSA applicable to the Foundation did not violate the associates' constitutional rights under the Free Exercise and Establishment Clauses of the first amendment.[35] The United States Court of Appeals for the Eighth Circuit affirmed the district court's findings, emphasizing that religious organizations that become involved in interstate commerce, are subject to the same regulations as ordinary commercial businesses.[36] The United States Supreme Court granted certiorari and affirmed the decision of the Eighth Circuit.[37]

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30. *Id.* at 1957. The Secretary of Labor filed an action against Tony and Susan Alamo, the Foundation, and the Foundation's vice president. *Id.* Prior to 1950, the FLSA vested all administrative functions under the Act in the Wage-Hour Administrator at the Department of Labor. 29 U.S.C. § 204 note (Transfer of Functions) (1982). In 1950, the President of the United States transferred the administrative functions to the Secretary of Labor who then delegated the functions back to the Administrator, subject to the direction and control of the Secretary. Reorg. Plan No. 6 of 1950, 1, 2, 15 Fed. Reg. 3174 (1950), *noted in* 29 U.S.C. § 204 (1982).

31. 105 S. Ct. at 1957.

32. *Id.; see* 29 U.S.C. § 203(m), 211 (1982) (minimum wage, overtime, and recordkeeping provisions of FLSA). Section 211 of the FLSA requires that enterprises and employers subject to the FLSA make and retain records in accordance with the regulatory provisions of the Act. 29 U.S.C. § 211 (1982). The recordkeeping provision of the FLSA requires employers to record certain data, including employees' occupations, number of hours worked, and wages paid. 29 U.S.C. § 211(c) (1982). The FLSA permits wages to include the reasonable cost of food, lodging, and other facilities furnished to the employee. 29 U.S.C. § 203(m) (1982). Accordingly, an employer must maintain records of food, lodging, and facilities proferred as remuneration to the employee. 29 U.S.C. § 211(c) (1982). Failure to comply with the recordkeeping requirements is a violation of the FLSA rendering the employer criminally and civilly liable. *See* 29 U.S.C. § 215(a)(5) (1982) (making unlawful violation of section 211(c) or (d)).

33. 105 S. Ct. at 1957.

34. *Id.* at 1957. The district court held that, although the Foundation was a nonprofit organization, the Foundation's businesses engaged in competition with other commercial businesses and, therefore, were subject to the requirements of the FLSA. *Id.*

35. *Id.* at 1958; *see* Poulos v. New Hampshire, 345 U.S. 395, 405 (1952). In *Poulos v. New Hampshire,* the United States Supreme Court asserted that reasonable, nondiscriminatory governmental regulation did not violate the religion clauses of the first amendment. 345 U.S. at 405; *see also* Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d at 885 (FLSA is nondiscriminatory legislation protecting interests of laborers and is not violative of religion clauses of first amendment).

36. 105 S. Ct. at 1958.

37. *Id.* at 1958. The United States Supreme Court in *Maneja v. Waialua Agriculture Co.,*

The Supreme Court stated that the Foundation had satisfied two conditions rendering the Foundation subject to FLSA requirements.[38] First, the *Alamo* Court found that the Foundation's commercial businesses constituted an enterprise within the meaning of the FLSA.[39] The *Alamo* Court, therefore, held that any employees within the Foundation's commercial establishments were entitled to coverage under the enterprise concept.[40] The Court, however, cautioned that in some instances an individual may perform services for a covered enterprise and nevertheless not be an employee for purposes of the Act's coverage.[41] The Supreme Court, therefore, determined that the associates working within the Foundation's enterprises were employees for purposes of the Act, thus rendering the FLSA applicable to the associates.[42]

Defendants contended that as a religious foundation not organized for a common business purpose, the Foundation was not an enterprise.[43] To support the assertion that defendants did not organize the Foundation for a common business purpose, defendants pointed out that the Foundation was a tax exempt, charitable organization.[44] The Supreme Court rejected defendants' claim, noting that the Internal Revenue Service had not yet determined whether defendants' commercial businesses were unrelated to defendants' charitable activities and, therefore, subject to taxation.[45]

In finding that the FLSA applied to the Alamo Foundation, the Supreme Court stated that the activities of eleemosynary or religious organizations are not within the specific exemptions enumerated in the FLSA.[46] The

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stated that the Supreme Court grants certiorari when questions arise under the FLSA requiring definitive resolution to ensure proper application of the Act's provisions. Maneja v. Waialua Agriculture Co., 349 U.S. 254, 258-59 (1955).

38. 105 S. Ct. at 1958.

39. *Id.* at 1959-61.

40. *Id.* at 1958; *see infra* notes 41-42 and accompanying text (discussing concept of individual coverage).

41. 105 S. Ct. at 1961; *see infra* notes 55-56 and accompanying text (discussing *Portland Terminal* case).

42. 105 S. Ct. at 1961-62. The *Alamo* Court noted that the FLSA extended coverage to the associates pursuant to section 203(s) by virtue of traditional, individual coverage or enterprise coverage. *Id.* at 1958 n.8.

43. *Id.* at 1959; *see supra* note 14 and accompanying text (discussion of common business purpose).

44. 105 S. Ct. at 1959; see 26 U.S.C. § 501(c)(3) (1967) (exempting from taxes any foundation organized and operated exclusively for religious or charitable purposes). The defendants in *Alamo* also contended that the Foundation's businesses were different than ordinary commercial businesses because the Foundation's businesses performed a religious function. 105 S. Ct. at 1960. *See infra* note 78 and accompanying text (discussing defendant's contentions).

45. 105 S. Ct. at 1959 n.11.

46. *Id.* at 1959; *see* 29 U.S.C. § 213 (1982). (enumerating exemptions); 29 C.F.R. § 779.214 (1985) (FLSA affords eleemosynary, religious, and educational institutions engaging in commercial activities the same treatment as ordinary commercial businesses); *supra* note 22 and accompanying text (discussing inclusion of nonprofit organizations within the Act by virtue of participation in commercial activities).

Supreme Court further noted that Labor Department Regulations specifically define business purpose as inclusive of the commercial activities of eleemosynary and religious organizations.[47] The Supreme Court stressed that congressional intent indicated that ordinary commercial activity should not be exempt from the Act's requirements merely because religious or other nonprofit organizations conducted the activity.[48]

The defendants attempted to persuade the Court that the Foundation's business operations were not ordinary commercial activities, but rather forums in which to spread the Foundation's gospel.[49] The Supreme Court did not seek to determine if the Foundation's businesses were religious forums because the lower courts had determined that even if defendants' businesses promoted a religious purpose, that religious purpose did not negate the commercial nature of the businesses.[50] The Supreme Court noted agreement with the lower court's resolution that religious motivation did not place defendants' commercial activities outside the scope of the FLSA.[51]

After concluding that the defendants' commercial businesses constituted an enterprise, the *Alamo* Court found that the associates were employees to whom the FLSA afforded protection.[52] The Supreme Court applied the "economic reality" test, and found that for long periods of time the associates were dependent upon the Foundation for food, clothing, and shelter.[53] Accordingly, the Supreme Court concluded that as a matter of "economic reality," the associates were dependent upon the Foundation.[54]

In addition to the "economic reality" test, the *Alamo* Court applied the expectation of compensation test set forth in *Walling v. Portland Terminal Co.*[55] In *Portland Terminal,* the United States Supreme Court found that the

47. 105 S. Ct. at 1959-60; *see* 29 C.F.R. § 779.214 (1985) (labor department's regulation defining business purpose as including commercial activities of charitable organizations).

48. 105 S. Ct. at 1960-61; *see supra* note 22 and accompanying text. (discussing reasons for extending coverage to employees at nonprofit institutions).

49. 105 S. Ct. at 1960.

50. *Id.* at 1960-64. The lower courts in *Alamo* determined that the defendants' alleged religious motivations did not change the fact that the Foundation's businesses were in competition with ordinary commercial establishments and, therefore, were subject to FLSA requirements. *Id.; see supra* note 22 and accompanying text (explaining that FLSA covers nonprofit organizations that engage in competition with for-profit businesses).

51. 105 S. Ct. at 1964.

52. *Id.* at 1961.

53. *Id.* at 1961-62.

54. *Id.* at 1962.

55. *Id.* at 1961-62; *see infra* note 56 and accompanying text (discussing *Portland Terminal* case). Courts frequently apply the expectation of compensation test set forth in *Portland Terminal* in cases arising under the FLSA. *See* Isaacson v. Penn Community Serv., Inc., 450 F.2d 1306, 1309 (4th Cir. 1971) (applying expectation of compensation standard); Rogers v. Schenkel, 162 F.2d 596, 598 (2d Cir. 1947) (citing *Portland Terminal* as basis for holding). However, the status of the expectation of compensation test is unclear as some courts choose to ignore the test. *See* Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974) (holding subjective intent is irrelevant under FLSA). Nonetheless, the *Alamo* Court applied the expectation of compensation test as a further indication of the associates' employment status. 105 S. Ct. at 1961.

definition of employee in the FLSA did not include persons who worked on the premises of another, for the individuals' own advantage, with no expectation of remuneration.[56] The Supreme Court in *Alamo* noted that the evidence indicated that the associates expected food and lodging in return for the associates' services.[57] The *Alamo* Court, therefore, concluded that under the expectation of remuneration criterion enunciated in *Portland Terminal,* the associates were employees.[58]

The Court stated that denials of employee status by a worker are irrelevant to the determination of employee status under the FLSA.[59] The *Alamo* Court listed several reasons for not allowing the averrals of workers to be dispositive of employee status for purposes of extending FLSA coverage.[60] First, the *Alamo* Court noted that the superior bargaining position of employers created a coercive atmosphere in which employers could compel employees to waive the Act's protection by forcing employees to avow that they performed services voluntarily.[61] The *Alamo* Court reasoned that since Congress enacted the FLSA to ensure that employers could not compel workers to sell services for less than a decent wage, allowing the protests of workers to be dispositive of employee status undermined the purpose of the FLSA.[62] Secondly, the Supreme Court stated that allowing exceptions to coverage on an individual basis would affect more people than just the

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56. *Portand Terminal*, 330 U.S. at 152. In *Walling v. Portland Terminal Co.*, the United States Supreme Court determined whether individuals being trained as railway brakemen were employees for purposes of FLSA coverage. *Id.* at 150. The *Portland Terminal* Court stated that the trainees were engaged in activities of a kind covered by the Act because the trainees worked directly in interstate commerce. *Id.* Nevertheless, the court in *Portland Terminal* held that the trainees were not employees for purposes of the FLSA. *Id.* at 153. The *Portland Terminal* Court drew an analogy between the railroad trainees and school students and concluded that if the FLSA covered trainees in the instant case, the FLSA should also consider students to be employees. *Id.* at 152. The Supreme Court reasoned that both students and the railroad trainees worked for their own advantage or pleasure on the premises of another without expectation of remuneration. *Id.* at 152. The *Portland Terminal* Court concluded that Congress did not intend that the FLSA apply to persons who worked on the premises of another for self-fulfillment. *Id.* at 153.

57. 105 S. Ct. at 1962 n.22. The *Alamo* court agreed with the suggestion in *Portland Terminal* that an expectation of compensation, whether in the form of cash or other benefits, indicated that a worker was an employee for purposes of the FLSA. *Id.* at 1962; *see supra* note 56 and accompanying text (discussing *Portland Terminal).* Associates of the foundation testifying at the district court level admitted that the associates worked for the benefits they received. 105 S. Ct. at 1962 n.22. Moreover, former associates testified that defendants penalized the associates for poor job performance. *Id.* Associates testified that punishment for poor job performance or absence from work included heavy fines and withholding of food from the cafeteria. *Id.*

58. 105 S. Ct. at 1962 n.22.

59. *Id.* at 1962; *see infra* text accompanying notes 60-64 (reasons for not allowing workers' protests of coverage to be dispositive).

60. 105 S. Ct. at 1961-62; *see infra* text accompanying notes 61-64 (discussing reasons for applying coverage to employees who decline protection).

61. 105 S. Ct. at 1962.

62. *Id.;* 29 U.S.C. § 202 (1982); *see supra* note 2 and accompanying text (discussing congressional purpose behind FLSA).

individual protesting coverage.[63] The Court reasoned that individual exceptions to the Act's coverage would create a downward pressure on wages in competing businesses, thereby affecting workers in other establishments.[64] The Supreme Court in *Alamo* concluded that the Act applied to all covered employees, including employees who declined protection, in order to effectuate the purpose of eliminating oppressive labor conditions.[65]

The defendants asserted that extending coverage to the Foundation's associates would lead to coverage of others who considered themselves volunteers.[66] The Supreme Court rejected the defendant's argument that the *Alamo* decision would affect ordinary volunteers.[67] The Court assured that coverage of the Act would extend no farther than those who perform commercial activities in expectation of remuneration.[68]

Finally, defendants contended that the extension of coverage to associates of the Foundation infringed on constitutional rights granted by the Free Exercise and Establishment Clauses of the first amendment.[69] Defendants claimed that forcing associates to accept wages against the associates' wishes violated the associates' right to freely exercise religion.[70] Defendants further argued that the Act's recordkeeping provisions fostered an excessive governmental entanglement with religion in violation of the Establishment Clause.[71] The *Alamo* Court rejected both of the defendants' first amendments arguments.[72]

The *Alamo* Court noted that the recordkeeping provisions of the FLSA required only the maintenance and preservation of data involving the commercial aspects of the Foundation.[73] The *Alamo* Court, therefore, held that the recordkeeping provisions did not infringe upon defendants' evangelistic activities in violation of the Establishment Clause.[74] The Court stated that

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63. 105 S. Ct. at 1962.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* The *Alamo* Court stated that volunteers who drove the elderly to church or served church suppers would not come under the Act's coverage as a result of the *Alamo* decision. *Id.*

68. *Id.* at 1962. The *Alamo* Court reasoned that since only those who engaged in commercial activities and had an expectation of compensation were covered by the Act, the *Alamo* Court's construction of the FLSA did not threaten ordinary volunteerism. *Id. But cf. infra* text accompanying notes 95-103 (discussion of possible ramifications of *Alamo* decision on Goodwill Industries, Inc.).

69. 105 S. Ct. at 1963; *see infra* text accompanying notes 70-79 (discussing defendant's first amendment claims).

70. 105 S. Ct. at 1963. The *Alamo* Court noted that the Foundation had standing to assert the free exercise claims of the associates because the associates are members of the religious organization and employees under the Act. *Id.* at 1963 n.26.

71. *Id.* at 1963-64.

72. *Id.* at 1963.

73. *Id.* at 1964. The *Alamo* Court indicated that the routine obligations that section 211 of the FLSA imposed on employers did not create the risk of intolerable government regulation. *Id.*

74. *Id.* at 1964. The *Alamo* Court stated that section 211 of the FLSA only applied to

neither of the religion clauses in the first amendment precludes governmental involvement in the secular activities of religious organizations, provided that the involvement is not significantly intrusive.[75]

The *Alamo* Court further asserted that requiring associates to accept wages did not infringe upon the associates' right to freely exercise their religious beliefs.[76] The Court reasoned that the receipt of cash wages by associates would not inhibit the associates' freedom of religious exercise any more than the associates' acceptance of food and shelter.[77] Moreover, the *Alamo* Court added that if the associates were so inclined, the associates could return cash wages to the Foundation as donations.[78] The Court, therefore, concluded that application of the FLSA caused little change in the relationship between the associates and the Foundation and, therefore, did not violate the Free Exercise Clause.[79]

In *Alamo,* the Supreme Court determined that the FLSA may apply to a religious institution engaged in commercial activities despite claims that wages would violate workers' religious beliefs and that the workers rendered

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commercial activities undertaken with a business purpose. *Id.* The Supreme Court, therefore, concluded that the requirements would have no impact on defendants' religious activities. *Id.*

75. *Id.* at 1964. The *Alamo* Court cited *Walz v. Tax Comm'n,* in which the United States Supreme Court determined whether state property tax exemptions, granted to religious organizations, resulted in an excessive entanglement between church and state. Walz v. Tax Comm'n, 397 U.S. 664, 674-76 (1970). The *Walz* Court asserted that separation of church and state cannot mean absence of all contact. *Id.* at 674. The *Walz* Court weighed the degree of entanglement involved in granting tax exempt status to a religious organization against the degree of entanglement absent the tax exemptions. *Id.* The Supreme Court concluded that elimination of the tax exemptions would give rise to a greater degree of involvement between church and state in the form of tax valuations, liens, and foreclosures than granting the tax exemption, which only involved a direct economic benefit. *Id.* The *Walz* Court, therefore, held that granting a tax exemption to a religious organization did not foster an excessive government entanglement with religion. *Id.; see* Meek v. Pittenger, 421 U.S. 349, 368 (1975) (involvement excessive when continuous supervision of personnel supplied by state to parochial schools was necessary to ensure observance of secular limitations); Lemon v. Kurtzman, 403 U.S. 602, 604 (1971) (court must examine all circumstances in relationship between church and state to determine whether government involvement is excessive).

76. 105 S. Ct. at 1963; *cf.* Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 166-67 (1944) (freedom of religious exercise under first amendment not beyond legislative reach when interest of general public violated thereby); Cleveland v. United States, 146 F.2d 730, 734 (10th Cir. 1945) (one cannot perform act forbidden by legislature because act arises out of religious conviction).

77. 105 S. Ct. at 1963.

78. *Id.* Counsel for defendants in *Alamo* urged that the Administrator did not have a compelling interest in applying the Act to the associates, or the Administrator would not allow the associates to simply return the wages to the Foundation. *Id.* at 1963 n.29. The *Alamo* Court, however, responded that by allowing the associates to return money to the Foundation, the Administrator indicated how slight a change the application of the FLSA would have on the relationship between the associates and the Foundation. *Id.* The *Alamo* Court, therefore, concluded that no infringement occurred upon the associates' right to freely exercise religious beliefs. *Id.* at 1963.

79. 105 S. Ct. at 1963.

services voluntarily and gratuitously.[80] While the Supreme Court implied that the decision in *Alamo* will not have an adverse effect upon the operations of religious and other nonprofit institutions, the *Alamo* decision may have just that effect.[81] More specifically, courts may construe the result in *Alamo* to extend coverage to individuals who volunteer services at religious and other nonprofit institutions and receive or contemplate the receipt of wages only incidentally to the services rendered.[82]

Prior to the Supreme Court's holding in *Alamo,* the Wage-Hour Administrator issued an opinion letter stating that, generally, the Administrator considers nonprofit charitable organizations outside of the Act's enterprise coverage.[83] The opinion letter, however, concluded that the FLSA may extend coverage to those employees engaging in commerce or in the production of goods for commerce on the basis of individual functions.[84] The Department of Labor subsequently issued additional opinion letters extending enterprise coverage to institutions primarily engaged in the care of the sick, the aged, or the mentally defective.[85] The Department of Labor considers institutions such as halfway houses, residential centers for drug addicts and alcoholics, homes for the blind, and nursing homes to be covered enterprises under the Act.[86] Noting that no exemption exists in the FLSA for private, nonprofit

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80. *Id.* at 1963. The *Alamo* Court conceded that the associates could continue to receive wages in the form of benefits, but the value of the benefits must not be less than the statutory minimum wage. *Id.*

81. *See* 105 S. Ct. at 1962 (explaining that *Alamo* decision will not extend to services of ordinary volunteers).

82. *See infra* notes 95-103 and accompanying text (discussing possible ramifications of *Alamo* on Goodwill Industries, Inc.). A broad construction of the *Alamo* decision may indicate that FLSA coverage should extend to volunteer workers at legitimate nonprofit organizations. However, speculation exists, not explicitly addressed by the Supreme Court in *Alamo,* that the Alamo Foundation was somewhat less of a religious organization spreading evangelistic gospel and assisting the needy than a money making venture for Tony and Susan Alamo. N.Y. Times, Jan. 21, 1979 at 52, col. 4. The Alamos' daughter testified before a California subcommittee that her parents were using the Foundation as a vehicle for reaping enormous profits while the associates at the Foundation went hungry. N.Y. Times, Jan. 21, 1979 at 52, col. 4.

83. LAB. L. REP. ¶ 30,920 (CCH) (Nov. 1966-Mar. 1969). The responsibility vested in the Wage-Hour Administrator includes interpreting the Act's definitions and issuing guidelines for ensuring compliance with the Act. *See* 29 C.F.R. § 779.1 (1985) (describing scope of FLSA and functions delegated to Department of Labor); Mitchell v. Mitchell Truck Line, Inc., 286 F.2d 721, 727 (5th Cir. 1961) (describing Administrator's authority as comprehensive of advising employers of applicability of Act's provisions). The Administrator issues interpretative bulletins to provide guidance concerning how the Department of Labor perceives administrative responsibility for carrying out the requirements of the Act. 29 C.F.R. § 779.0 (1985). Frequently, the Administrator issues guidelines in response to letters from employers or employees questioning the applicability of the FLSA to their employment relationship. *See generally* [6 Wages-Hours] LAB. REL. REP. (BNA) (compilation of correspondence between Administrator and employers/employees).

84. LAB. L. REP. ¶ 30,920 (CCH) (Nov. 1966-Mar. 1969).

85. [6 Wages-Hours] LAB. REL. REP. (BNA) 91:1177 (1977); *see infra* text accompanying note 86 (listing several nonprofit institutions subject to enterprise coverage under FLSA).

86. [6 Wages-Hours] LAB. REL. REP. (BNA) 91:1177 (1977). *But cf.* Brennan v. Harrison

institutions, another administrative opinion applied coverage to individual employees of the Young Men's Christian Association (YMCA).[87] The Department of Labor, therefore, began to extend coverage to nonprofit institutions even before the Supreme Court's decision in *Alamo*. However, neither the opinions of the Administrator nor the 1966 amendments to the FLSA specifically deal with the status of volunteers under the FLSA. Furthermore, the opinions of the Wage-Hour Administrator do not have the force of law.[88] Decisions of the United States Supreme Court arising under the FLSA, however, have the effect of law.[89] Therefore, *Alamo* is significant as the standard for determining whether a worker is an employee or a volunteer for purposes of the FLSA. In addition to establishing the standard for determining whether a worker is a volunteer or an employee for the purposes of the FLSA, the *Alamo* Court clarified the legislative intent of the FLSA.

The Supreme Court's construction of a statute provides authoritative guidance when the legislative purpose of the statute is ambiguous.[90] The legislative intent regarding the status of volunteers under the FLSA is

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County, 505 F.2d 901, 902 (5th Cir. 1975) (Congress did not intend to extend coverage of FLSA to employees at home for indigents).

In *Brennan v. Harrison County,* the United States Court of Appeals for the Fifth Circuit determined whether Congress intended to include homes for the poor in which the residents are old or ill when Congress extended coverage of the FLSA to hospitals and institutions "primarily engaged in the care of the sick, the aged, or the mentally defective." *Harrison County,* 505 F.2d at 903. The Fifth Circuit stated that the age and infirmities of the home's inmates were incidental factors to the inmates' indigency. 505 F.2d at 904. The Fifth Circuit stated that the home primarily engaged in the care of indigents to whom the language in the FLSA did not speak. *Id.* at 904. The *Harrison County* court concluded that FLSA protection of employees at institutions caring for the aged and the ill did not extend to employees at homes for the poor. *Id.*

87. [6 Wages-Hours] LAB. REL. REP. (BNA) 91:1198-1200 (1976).

88. *See* Skidmore v. Swift, 323 U.S. 134, 140 (1944) (while Administrator's opinions constitute body of experience on which courts may rely for guidance, opinions are not controlling).

89. *See* Acme Lumber Co., Inc. v. Shaw, 243 Ala. 421, 10 So.2d 285, 288 (1942) (authority of United States Supreme Court regarding FLSA becomes law of state court whose only task is to determine applicability in instant case). United States Supreme Court decisions in cases arising under the FLSA are of unequalled significance. *See, e.g.,* McDuffie v. Hayes Freight Lines, Inc., 71 F. Supp. 755, 757-58 (E.D. Ill. 1947) (decisions of federal district courts useful illustrations of application of FLSA, but one must read these decisions with reference to United States Supreme Court decisions regarding same issues); Hitchcock v. Union & New Haven Trust Co., 134 Conn. 246, 56 A.2d 655, 660 (1947) (United States Supreme Court construction of liquidated damages clause in FLSA binding on Supreme Court of Connecticut); Atwater v. Gaylord, 63 Wyo. 492, 184 P.2d 437, 441 (1947) (state courts bound by United States Supreme Court interpretations of FLSA); Pakarinen v. Butler Bros., 218 Minn. 496, 16 N.W.2d 769, 772 (1944) (decision of United States Supreme Court as to whether employee was engaged in commerce binding on state supreme court).

90. *See supra* note 89 and accompanying text (relating to significance of Supreme Court decisions under FLSA). Following a United States Supreme Court resolution of a conflict concerning the interpretation of statutory language, an increased likelihood of judicial uniformity in the application and enforcement of the statute exists. *Cf.* Mitchell v. C.W. Vollmer & Co., Inc., 349 U.S. 427, 428-29 (1955) (United States Supreme Court granted certiorari to resolve

somewhat unclear.[91] While Congress has never manifested an intent to extend the FLSA to volunteer workers at charitable organizations, Congress has rejected two proposals to specifically exempt organizations such as Goodwill Industries, Inc. (Goodwill) from FLSA requirements.[92] Because exemptions under the FLSA are very specific, the absence of an explicit exemption implies that Congress intended coverage to extend to individuals not specifically excluded.[93] The absence of an explicit exemption in the FLSA for nonprofit charitable institutions, coupled with the Supreme Court's decision in *Alamo* holding the FLSA applicable to alleged volunteers at a religious foundation, may lead to unfortunate results.[94]

More specifically, *Alamo* may lead to the inclusion of volunteer workers at institutions, such as Goodwill, within the scope of the FLSA.[95] Goodwill provides skills, training, and job placement for handicapped individuals.[96] Goodwill relies primarily on volunteer workers to provide services and obtain donations to derive income for operations.[97] Recently, Goodwill instituted a pilot project in which volunteer telephone solicitors seek donations of items for sale in Goodwill thrift shops.[98] Volunteer workers are the primary source of thrift shop personnel.[99]

Prior to the Supreme Court's holding in *Alamo,* the Wage-Hour Administrator had decided that an individual manning a thrift store may be within the purview of the FLSA under the enterprise concept of coverage.[100]

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conflict among circuit courts regarding applicability of FLSA provision). Accordingly, after the Supreme Court has interpreted the statute, individuals within the statute's ambit know with greater certainty the rights and duties the statute imposes on them.

91. *See infra* notes 105-109 and accompanying text (discussing legislative history regarding volunteers and social service organizations under FLSA).

92. *See* 106 CONG. REC. 16703-04 (1960) (proposal by Senator Barry Goldwater to amend FLSA to specifically exclude from coverage of FLSA enterprises exempt under section 501(c)(3) of Internal Revenue Code including Goodwill, Salvation Army and YMCA); 107 CONG. REC. 6254-55 (1961) (proposal by Senator Carl T. Curtis to exempt from FLSA religious and charitable organizations exempt under Internal Revenue Code).

93. *See* Powell v. United States Cartridge Co., 339 U.S. 497, 517 (1950) (FLSA exemptions are narrow implying that those not exempted are included); *supra* note 4 (discussing exemptions under FLSA).

94. *See infra* notes 95-103 and accompanying text (discussing potential ramifications of *Alamo* on nonprofit organizations); *infra* note 135 (same).

95. *See infra* notes 96-103 and accompanying text (relating possible effects of *Alamo* on Goodwill Industries, Inc.).

96. *See* INTERNAL REVENUE SERVICE, U.S. DEP'T OF TREASURY, PUB. NO. 526, INCOME TAX DEDUCTIONS FOR CONTRIBUTIONS, *reprinted in* GOODWILL INDUSTRIES OF ATLANTA, INC., VOLUNTEER MANUAL (1981) (describing services provided by Goodwill). Training of handicapped persons includes word processing, computer programming, and electronic sub-assembly. *Id.*

97. *See* J. Mann, Goodwill Industries, Volunteer Job Descriptions (1985) (describing Goodwill volunteer services).

98. *Id.*

99. *Id.* Volunteers catalogue and organize donated books, and establish a system of sales and trade-ins, in addition to running the store. *Id.*

100. *See* LAB. L. REP. ¶ 30,939 (CCH) (Nov., 1966-March, 1969) (enterprise coverage may include thrift stores of a nonprofit organization if thrift store satisfies dollar-volume test). *But*

Furthermore, established precedent holds that the regular and systematic use of channels of communication is a sufficient tie to interstate commerce to entitle a worker to coverage under the FLSA.[101] A telephone solicitor spends a great deal of time utilizing instrumentalities of communication in seeking donations. Telephone solicitors, therefore, are employees engaged in commerce for purposes of the FLSA.[102] While a technical application of the FLSA may have extended coverage to Goodwill volunteers prior to *Alamo,* courts may not have applied the FLSA because of the legitimate charitable function Goodwill serves and the character and motivation of Goodwill volunteers.

In the wake of *Alamo,* however, courts may hold the FLSA applicable to Goodwill volunteers rendering services in commercial capacities, neither receiving nor expecting cash wages, but accepting meals, lodging, or other benefits in exchange for services rendered. Application of the FLSA to Goodwill volunteers would increase the cost of Goodwill's telephone solicitation project, and also lessen the income gained through sales of donated items at Goodwill thrift shops.[103] Requiring Goodwill to pay minimum wage and overtime compensation to volunteers thus would reduce the amount of money that Goodwill could expend providing services to handicapped persons.[104]

Sponsors of proposals to exempt charitable organizations from FLSA requirements warned that application of the FLSA to charitable organizations would decrease revenues needed to assist the sick and needy.[105] Congress rejected the proposed amendments on the grounds that commercial activities

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see id., citing 29 U.S.C. § 213(a)(2) (exemption from enterprise coverage may be available to thrift stores if thrift store does not satisfy dollar-volume test).
may be available to thrift stores if thrift store does not satisfy dollar-volume test).

101. *See* Mabee v. White Plains Pub. Co., 327 U.S. 178, 181 (1946). In *Mabee v. White Plains Pub. Co.,* the United States Supreme Court held that a newspaper publishing company engaged in commerce although only one half of one percent of the newpaper's circulation was out of state. *Mabee,* 327 U.S. at 181. The *Mabee* Court observed that sporadic or occasional shipments of insubstantial amounts of goods did not warrant finding the business making the shipments subject to FLSA requirements. *Id.* The Supreme Court concluded, however, that the FLSA did not exclude businesses making regular shipments out of state from the Act's coverage merely because of the small size of the shipment. *Id.; cf.* Mitchell v. Household Fin. Corp., 208 F.2d 667, 670 (3d Cir. 1953) (mailing three checks out of state each month insufficient participation by employee in interstate commerce for extending employee coverage under FLSA).

102. *See* Shultz v. Circulation Sales, Inc., 301 F. Supp. 937, 942 (E.D. Mo. 1969) (telephone solicitor who procured newspaper subscriptions engaged in commerce under FLSA); *see also* LAB. L. REP. ¶ 30,920 (CCH) (Nov. 1966-Mar. 1969) (individual coverage extends to workers at charitable organizations who regularly use telephone, use mails, or keep records of interstate transactions).

103. *See infra* note 135 and accompanying text (discussing burden minimum wage requirement would impose upon social service organizations).

104. *See infra* note 135 and accompanying text (describing burden application of FLSA would impose on nonprofit organizations).

105. *See infra* notes 106-109 and accompanying text (arguments for proposed amendments exempting charitable organizations from complying with FLSA requirements).

of nonprofit institutions were in competition with similar activities of for-profit businesses and therefore, did not merit special protection.[106] Opponents of the proposals stated that exempting nonprofit organizations engaged in interstate commerce from the requirements of the FLSA provided the nonprofit organizations an unfair advantage over for-profit businesses.[107] Opponents feared that acceptance of the proposed amendments would enable nonprofit organizations that had little or no labor costs to sell the same goods more inexpensively than for-profit businesses, thus putting for profit organizations out of business and depressing the labor market.[108] Proponents argued that the exemptions were justified because the commercial activities of charitable organizations promote the public welfare by providing services to the sick and needy.[109]

The *Alamo* decision does not provide an advantage to nonprofit organizations despite the fact that charitable organizations perform valuable services.[110] Prior to *Alamo,* federal courts did not agree as to whether nonprofit organizations should be exempt from the FLSA because charitable institutions serve the general public.[111] Some courts have held that in certain instances, promotion of the public good outweighs application of the FLSA.[112] In *Isaacson v. Penn Community Services, Inc.,*[113] for example, the United States Court of Appeals for the Fourth Circuit held that a conscientious objector who opted to perform volunteer community service instead of

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106. *See* 106 CONG. REC. 16703-04. Senator Edward Kennedy, an opponent of the proposed amendment, believed that Congress already afforded charitable organizations sufficient protection from the Fair Labor legislation, since the FLSA only subjects such organizations to the provisions of the FLSA when the activities in which the organizations engaged were of a commercial nature. *Id.* at 16703. The proponents of the proposed amendment—first Senator Goldwater and later Senator Curtis—argued that a specific exemption was necessary for purposes of clarity. *Id.* at 16703; *see also* 107 CONG. REC. at 6255.

107. *See* 107 CONG. REC. 6255 (remark of Senator Patrick McNamara against providing exemption to charitable industries engaged in commercial activities); *see infra* text accompanying note 109 (discussing Senator McNamara's reasons for opposing proposed exemptions to nonprofit institutions).

108. *See supra* text accompanying notes 106-108 (discussing opponents' reasoning for rejecting amendment to FLSA).

109. *See* 107 CONG. REC. 6254-55. Senator Curtis argued that in some instances a charitable organization may engage in activity of a commercial nature, not with a business purpose in mind, but in order to provide food and shelter to the needy. *Id.* at 6255. Curtis proposed that in instances in which nonprofit institutions engage in commercial activities without a profit motive, the FLSA should not apply. *Id.* Senator McNamara rejected Curtis' proposed revision of the FLSA, reasoning that the intent of Congress in passing the FLSA was to prohibit the unfair advantage in competition arising from gross disparities in wage levels. *Id.*

110. *But see supra* note 82 (discussing possibility that *Alamo* Court may have considered profit motive of Alamos).

111. *See infra* notes 11-2118 and accompanying text (discussing Fourth and Sixth Circuit decisions in cases arising under FLSA).

112. *See infra* notes 113-115 and accompanying text (discussing case supporting proposition that public good charity serves outweighs application of the FLSA).

113. 450 F.2d 1306 (4th Cir. 1971).

military service was not an employee for purposes of FLSA coverage.[114] The Fourth Circuit in *Isaacson* reasoned that when a worker serves the public interest a court should not consider the worker an exploited laborer for whose protection Congress passed the Act.[115] In *Marshall v. Baptist Hospital, Inc.*,[116] however, the United States Court of Appeals for the Sixth Circuit affirmed that benefits to the public did not justify violating the FLSA, which also promoted the public good.[117] In contrast to the Fourth Circuit's holding in *Isaacson*, the Sixth Circuit implied that the public good served by charitable organizations does not outweigh the public interest served by the FLSA.[118] Following the *Alamo* decision, federal district courts are likely to

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114. 450 F.2d at 1311. In *Isaacson v. Penn Community Serv., Inc.*, the United States Court of Appeals for the Fourth Circuit noted that Penn Community was a nonprofit charitable organization that created positions in which conscientious objectors could perform alternative service by serving the community. *Id.* at 1307. Penn Community provided volunteers subsistence salaries, room, and board. *Id.* Plaintiff, a conscientious objector participating in Penn Community's program, claimed he was an employee entitled to FLSA protection. *Id.* The Fourth Circuit in *Isaacson* indicated that the FLSA is not applicable in every instance in which a worker appears to be an employee within the meaning of the FLSA. *Id.* at 1309. The *Isaacson* Court conceded that plaintiff may have seemed to be an employee within the meaning of the FLSA, but a primary benefit of plaintiff's labor accrued to the public at large. *Id.* The *Isaacson* court stated that since no specific exemption for conscientious objectors from the Act's broad coverage exists, a rigid application of the FLSA would indicate that plaintiff was an employee within the FLSA. *Id.* at 1311. The *Isaacson* court, however, citing *Portland Terminal,* stated that a court cannot interpret the FLSA so broadly as to include every instance in which a person is suffered or permitted to work. *Id.* at 1308, 1309. The Fourth Circuit distinguished an instance in which the primary benefit flowed to the general public from an instance in which the primary benefit flowed to a for-profit enterprise. *Id.* at 1309-10. The Fourth Circuit reasoned that when a worker sells services to a for-profit enterprise, there is a presumption that the worker is of a class whom Congress designed the FLSA to protect. *Isaacson,* 450 F.2d at 1309-10.

115. *See supra* text accompanying notes 112-114 (relating to Fourth Circuit analysis of primary benefit). The Fourth Circuit added that another reason for refusing to extend coverage to the plaintiff in *Isaacson* was that Penn Community displaced no regular employees so that conscientious objectors could perform volunteer services. *Isaacson,* 450 F.2d at 1310. The Fourth Circuit concluded that Isaacson was not a bona fide employee whom Congress intended to protect under the FLSA. *Id.* at 1311.

116. 668 F.2d 234 (6th Cir. 1981). The United States Court of Appeals for the Sixth Circuit in *Marshall,* affirmed the analysis and holding of the district court regarding coverage of the hospital trainees under the FLSA, but reversed the district court decision on other grounds. Marshall v. Baptist Hosp., Inc., 668 F.2d 234, 235-36 (6th Cir. 1981).

117. *Marshall,* 668 F.2d at 236. The Sixth Circuit stated that the training program lacked adequate supervision and that the trainees performed clerical chores of little educational value to the students. *Id.* In *Portland Terminal,* the Supreme Court stated that where the primary benefit of a relationship flows to the employer, some indication exists of an employment relationship for purposes of FLSA coverage. Walling v. Portland Terminal, 330 U.S. 148, 153. The *Marshall* court affirmed that the benefits which accrued to the hospital in turn benefitted the public. *Marshall,* 668 F.2d at 236 (affirming district court opinion). The district court opinion stated that the hospital was the primary beneficiary of the training program. Marshall v. Baptist Hosp., Inc., 473 F. Supp. 465, 476-77 (M.D. Tenn. 1979). The district court asserted that while advantages to the hospital benefitted the public good, the public good promoted by the hospital did not outweigh the public good promoted by the FLSA. 473 F. Supp. at 477.

118. 668 F.2d at 236. *But cf.* Marshall v. Baptist Hosp., Inc., 473 F. Supp. at 496 n.6 (suggesting that language in *Isaacson* implies that a court is more likely to judge a for-profit

resolve questions concerning whether the public good served by the FLSA outweighs the promotion of the public good served by charitable organizations, in favor of the FLSA.[119] Consequently, *Alamo* promotes the public interest which the FLSA serves at the expense of the services that charitable organizations provide.

Prior to *Alamo,* inconsistencies in FLSA coverage arose because no specific provision or exemption for volunteer workers exists within the FLSA.[120] Although the Wage-Hour Administrator has issued various guidelines for determining whether the FLSA should extend to workers in eleemosynary, religious, or educational organizations, the Administrator's guidelines have been set forth in response to specific questions by employers.[121] Because the Administrator's opinions rest on the circumstances of a specific employment relationship, the opinions do not provide universally applicable standards.[122] Moreover, the Administrator's guidelines are not binding on courts seeking to determine the applicability of the FLSA.[123] Administrative opinions, therefore, did not provide the definitive guidance which *Alamo,* as a Supreme Court decision, furnishes the courts in cases

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corporation receiving primary benefit an employer than a nonprofit organization in similar circumstances).

119. *See supra* notes 88-89 and accompanying text (discussing significance of Supreme Court opinions regarding FLSA).

120. *See* Willis, *supra* note 12 at 633, *citing* A.B. Kirschbaum Co. v. Walling, 316 U.S. 517, 523 (1942) (FLSA places responsibility on courts to apply ad hoc general terms of statute in infinite variety of complex situations). In *Rogers v. Schenkel,* the United States Court of Appeals for the Second Circuit applied the expectation of compensation analysis in a case arising under the FLSA. Rogers v. Schenkel, 162 F.2d 596, 597 (2d Cir. 1947). In *Rogers,* the Second Circuit noted that the plaintiff had indicated on several occasions that the plaintiff voluntarily rendered services to the defendant. *Id.* The Second Circuit held that the plaintiff expected no compensation for the services and, therefore, no employment relationship existed between the plaintiff and the defendant. *Id.* at 597, 598. In contrast to the Second Circuit decision, the United States Court of Appeals for the Fifth Circuit in *Brennan v. Partida* applied the "economic reality" test, stating that subjective intent is irrelevant under the FLSA. Brennan v. Partida, 492 F.2d 707, 709 (5th Cir. 1974). The *Partida* court found that as a matter of "economic reality," the workers were dependent for lodging upon the business to which they rendered service. 492 F.2d at 709. The Fifth Circuit, therefore, held that the workers were employees despite the fact that the parties had no intention of creating an employment relationship. 492 F.2d at 709-10.

121. *See* 369 Op. Wage-Hour Adm'r 91:459 (Dec. 3, 1975). The Department of Labor's guidelines include an inquiry into the time commitment involved in the activity, the typicality of such acts being rendered as volunteer services without expectation of remuneration, and the receipt of benefits by those for whom the services are rendered. *Id. See generally* [Wages-Hours] (BNA) (compilation of correspondence between Administrator and employers/employees).

122. *See* 317 Op. Wage-Hour Adm'r 91:1200-1201 (Mar. 28, 1975). In response to a letter from the sponsor of a drug abuse program, the Administrator requested additional information regarding the sponsor's program. *Id.* at 91:1201. The Administrator stated that he only responded to specific fact situations on a case by case basis because of the variety of circumstances generally present in work relationships. *Id.* at 91:1200.

123. *See supra* note 88 and accompanying text (defining significance of Administrator's opinions).

arising under the FLSA.[124] Inconsistencies in the treatment of volunteers under the FLSA may continue, however, even after the Supreme Court's decision in *Alamo* because courts may limit the Supreme Court's treatment of the associates in *Alamo* to the facts of the *Alamo* case rather than extending the decision to all volunteer workers at nonprofit organizations.[125] Judicial interpretations of the status of volunteers under the FLSA will remain varied and inconsistent until Congress legislatively resolves how the Act is to treat volunteers.[126]

While the tests and guidelines fashioned by the courts provide assistance in determining whether a volunteer worker is an employee under the FLSA, these tests are neither definitive nor static.[127] The "economic reality" test and the expectation of compensation standard only examine the particular worker and the particular situation in which the worker is involved.[128] Decisions involving application of the "economic reality" test and expectation of remuneration standard, therefore, furnish little guidance from one case arising under the FLSA to the next.[129] Moreover, in applying tests and guidelines, some courts lose sight of the intent of Congress in passing the FLSA.[130] In passing the FLSA, Congress intended to avoid unfair methods of competition and substandard labor conditions.[131]

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124. *See supra* notes 88-89 and accompanying text (discussing significance of Supreme Court determinations in cases arising under FLSA).

125. *Cf. supra* note 82 (discussing possibility that Supreme Court decided *Alamo* with regard to unique circumstances).

126. *Cf.* Willis, *supra* note 12, at 634. Confusion surrounding FLSA determinations exists in part because of inconsistency in judicial application. *Id.* The method for eliminating confusion and achieving the intent of Congress lies with the legislature. *Id.*

127. *See infra* notes 128-129 and accompanying text (discussing ad hoc nature of determinations in cases arising under FLSA).

128. *See supra* notes 7-8 and accompanying text (explaining "economic reality" test). The judicial interpretations of what constitutes "economic reality" are as varied as the fact patterns under consideration. *See, e.g.*, Goldberg v. Whitaker House Coop., Inc., 366 U.S. 28, 33 (1961) (homeworkers are employees as a matter of economic reality where homeworkers are dependent upon cooperative of which they are members); United States v. Silk, 331 U.S. 704, 716-18 (1947) (unloaders of coal who provided tools but stood neither to gain nor lose profits from work in which they engaged, deemed employees rather than independent contractors for purposes of Social Security legislation); Mednick v. Albert Enter., Inc., 508 F.2d 297, 303 (5th Cir. 1975) (cardroom concessionaire an employee, not independent contractor, where employer owned premises in which concessionaire operated); Sims v. Parke Davis & Co., 334 F. Supp. 774, 787 (E.D. Mich. 1971) (state prisoners assigned to work on penitentiary premises for private corporations not economically dependent on work and, therefore, not employees); Goldberg v. Warren Bros. Rds. Co., 207 F. Supp. 99, 103-04 (D. Me. 1962) (truck owner-operators not dependent as a matter of practical necessity upon those for whom they perform services); Wirtz v. Silbertson, 217 F. Supp. 148. 153 (E.D. Pa. 1963) (newspaper subscription solicitors paid on commission basis at rate set by alleged employer economically dependent upon jobs, and, therefore, employees).

129. *See supra* notes 127-128 and accompanying text describing lack of uniform guidance in cases arising under FLSA).

130. *See* Willis, *supra* note 12, at 634 (nonuniformity of judicial application frustrates congressional intent in framing FLSA).

131. 29 U.S.C. § 202 (1982).

Congress did not intend to hinder the operations of legitimate charitable organizations by forcing them to pay the minimum wage to volunteer workers.[132] Prior to *Alamo,* the United States Supreme Court had not issued a decision in response to a situation in which workers at non-profit organizations protested FLSA coverage.[133] To reverse a potential trend holding volunteers employees for the purposes of the FLSA, Congress should pass a legislative amendment exempting volunteer workers of charitable organizations from FLSA coverage.[134] Congress did not intend to include volunteers at nonprofit institutions within the scope of the FLSA at the expense of the continuation of services of the type which charitable organizations provide.[135] A decision by the United States Supreme Court, broadly read as holding that members of a nonprofit organization who deem themselves volunteers may not claim volunteer status and the freedom from governmental wage controls which volunteer status entails, may have that unintended effect.

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132. *See infra* note 135 and accompanying text (proposing that congressional intent did not include encompassing volunteers at nonprofit organizations within FLSA).

133. 105 S. Ct. at 1962. The *Alamo* opinion noted that the protest of coverage by the associates in the *Alamo* case was unique. *Id.* The Supreme Court in *Alamo* cited several instances in which church members seeking coverage brought claims under the FLSA. *Id.* at 1962 n.24; *see* Van Schaick v. Church of Scientology, 535 F. Supp. 1125, 1140 (D. Mass. 1982) (church member brought claim under FLSA against religious organization); Turner v. Unification Church, 473 F. Supp. 367, 377 (same), *aff'd per curiam,* 602 F.2d 458 (1st Cir. 1979).

134. *See infra* note 135 (asserting need for legislative action with respect to inconsistency in FLSA application).

135. *See generally,* note, *Volunteer Service in the Non-Profit Sector: Meeting the Challenge,* 11 J. LEGIS. 441-42 (1984). A widening gap exists between need and resources in nonprofit organizations. *Id.* at 441. This gap is growing because of the burdensome costs involved in providing services. *Id.* at 441. When providing services, as opposed to manufacturing goods, a labor force consisting of people, not technology, is necessary. *Id.* at 441-42. As a nonprofit organization services more people, that organization needs a larger labor force. *Id.* at 442. Clearly, if Congress requires organizations that are successful in reaching the sick and needy comply with governmental wage laws for an ever-expanding work force, then Congress will force charitable organizations to expend lesser amounts on providing services to the sick and needy.