OUR NATION’S FORGOTTEN WORKERS: THE UNPROTECTED VOLUNTEERS

Mitchell H. Rubinstein*

“What an employee is may be unclear, but courts have devised their own approaches for determining what an employee is not. According to established case law, partners are not employees and independent contractors are not employees. Given those holdings, neither are volunteers.” U.S. District Judge Robert Patterson, Jr.¹

I. INTRODUCTION

We see them everywhere. They work in our nation’s hospitals, schools, police forces, civic and political organizations, social and community service organizations, eleemosynary and non-profit agencies.² They are our nation’s volunteers.

---

* Adjunct Professor of Law, St. John’s Law School; New York Law School; Senior Counsel, New York State United Teachers, affiliated with American Federation of Teachers, National Education Association, AFL-CIO. B.S., School of Industrial and Labor Relations at Cornell University; J.D. with distinction, Hofstra University School of Law. The author has published several articles on labor and employment law. Professor Rubinstein welcomes comments and may be reached at New York State United Teachers, 52 Broadway, 9th Floor, New York, NY 10004, 212-533-6300, mrubinst@nysutmail.org. The views expressed in this article are entirely the author’s and may not necessarily represent the views of any organization that he works for or is affiliated with.

1. Tadros v. Coleman, 717 F. Supp. 996, 1003 (S.D.N.Y. 1989), aff’d, 898 F.2d. 10 (2d Cir. 1990) (noting that a volunteer doctor who received a title, access to a university library, and helped plan a symposium, but who did not teach or receive wages was not an employee under Title VII).

2. Volunteers perform a whole host of activities which include, but are not limited to, fund-raising; collecting, preparing and distributing food; supplying transportation; mentoring, tutoring, teaching, and providing professional assistance; collecting and distributing clothing and goods; ushering, greeting or ministering; providing office services; engaging in music, performance, and other artistic activities; coaching and refereeing sports teams; counseling; and protecting through services like firefighting and emergency medical services. Stephanie Boraas White, Volunteering in the United States, 2005, 129 MONTHLY LAB. REV. 65, 70 (2006) (analyzing voluntarism in the United States).
The public policy of the United States strongly encourages voluntarism. Indeed, voluntarism is critically important to the welfare of this country, particularly in these days of ever-increasing budget cuts. Much of the country's population participates in volunteering. In each of


In modern times, in 1974, President Nixon signed an executive order establishing National Volunteer Week as a celebration of volunteering. Since then every U.S. President has signed a proclamation promoting National Volunteer Week. Additionally, governors, mayors, and other elected officials often make public statements and sign proclamations promoting voluntarism. National Volunteer Week, http://www.pointsoflight.org/programs/seasons/nvw/ (last visited Oct. 18, 2006).


In recognition of the need to promote voluntarism, many states as well as the federal government have enacted statutes to limit tort liability of volunteers, particularly with respect to sporting events. See, Kenneth W. Biedzynski, *The Federal Volunteer Protection Act: Does Congress Want to Play Ball?*, 23 SETON HALL L. LEGIS. J. 319, 325-45 (1999) (analyzing Federal Volunteer Protection Act and similar statutory enactments in the several states); Rebecca Mowrey & Adam Epstein, *The Little Act That Could: The Volunteer Protection Act of 1997*, 13 J. LEGAL ASPECTS SPORT 289, 291 (2003) (stating that the Volunteer Protection Act was designed to extend Charitable Immunity, Sovereign Immunity and Good Samaritan laws to federal law in order to encourage voluntarism).

4. See, Biedzynski, supra note 3, at 319 (stating that without volunteers many non-profit and charitable organizations could not function); Leda E. Dunn, Note, "Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism?, 61 FORDHAM L. REV. 451, 452 (1992) (stating that whether volunteers are covered by employment laws could have "far-reaching effects on both the economy and the viability of charitable organizations"); Kelley Jordan, Comment, *FLSA Restrictions on Volunteerism: The Institutional and Individual Costs in a Changing Economy*, 78 CORNELL L. REV. 302, 304 (1993) (discussing scarcity of resources and the effect budget cuts can have on non-profit organizations).
the three years ending September 2005, nearly three out of every ten Americans volunteered.5

Additionally, more and more students are seeking unpaid internships after graduating from school. In some industries, an internship has become a "virtual requirement in the scramble to get a foot in the door."6 The opportunity to volunteer can, and often does, provide students and others with opportunities for growth and training while at the same time providing individuals with a way to "give something back" to the community.7

However, the volunteer experience may not always work out. This article addresses what happens when something goes awry. Should a volunteer who is sexually harassed, for example, be able to sue for sex discrimination under Title VII? What is a volunteer and where is the line between "volunteer" and "employee"? Does it matter if the putative volunteer receives a stipend or just gets his or her expenses reimbursed? Or, for that matter, is a volunteer simply someone who does not receive any remuneration? Moreover, who exactly is an employee? These are some of the questions this article examines. In a very real sense, this article addresses a clash between the public policy which seeks to promote voluntarism while at the same time promoting the purposes of our nation's employment laws—such as outlawing employment discrimination.8

---

5. White, supra note 2, at 65.


The Bureau of Labor Statistics publishes detailed statistics on volunteerism. These statistics establish that women tend to volunteer more than men, whites are the highest racial group to volunteer, individuals with school-age children are the highest percentage of volunteers, and volunteerism increases with education. Id.; White, supra note 2, at 65-68.


Large numbers of newly minted college graduates are often willing to work for free to gain valuable experience. There are also a host of displaced and unemployed white collar individuals willing to work for free in hopes of obtaining a position with a certain employer. David L. Gregory, The Problematic Employment Dynamics of Student Internships, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 228 (1998) (discussing the dynamics of and economic issues involved with student internships and the increasing number of people willing to work as interns).

7. Voluntarism often provides individuals with increased standing in the community, an expectation of reciprocal acts of kindness from their recipients, or a form of "'psychic income'... generated by the act of doing good [deeds]." McAdoo v. Diaz, 884 P.2d 1385, 1390 n.5 (Alaska 1994) (citing, Jeffrey L. Harrison, Egoism, Altruism, and Market Illusions: The Limits of Law and Economics, 33 UCLA L. REV. 1309, 1316-1319 (1986) (discussing the self-motivations for volunteer work)). Other times, individuals volunteer their time as a simple act of kindness. Id. (citing, JOHN RAWLS, A THEORY OF JUSTICE (1971)).

8. Throughout this article, references to employment law are utilized to refer
Although volunteerism is vitally important to this country, little scholarly attention has been paid to it, especially in relation to employment law. This article attempts to fill this gap. I will first explain why it is important to distinguish between volunteers and employees. I will then describe the two types of volunteers: the ordinary or pure volunteer and the "volunteer plus." This article will then discuss the various tests of employee status and the application of those tests to volunteers. I ultimately conclude that a two-step test that focuses on whether the putative employee was hired and whether the putative employer controls the work in question is the most appropriate test to determine whether volunteers are employees. Finally, this article also addresses the problem of remedy with respect to volunteers who may have been discharged in violation of our nation's employment laws. As the title of this article indicates, volunteers are our nation's forgotten workers. They are left with virtually no protection under our labor and employment laws.

II. WHY IS IT IMPORTANT TO DISTINGUISH BETWEEN VOLUNTEERS AND EMPLOYEES?

Determining who is and who is not a volunteer is important for several reasons. It is obviously important to the purported volunteer since his or her statutory rights may depend upon whether he or she is classified as an employee or a volunteer. This is because our employment laws generally apply to employees only. Similarly, it is important for our nation's employers to know whether they are subject to the various employment laws. An employer's exposure to labor and employment legal liability is largely dependent upon whether volunteers are classified as employees.

It is also important to understand the legal rights of volunteers since there is potential for abuse. Specifically, some volunteers may be exploited generically to most of our federal employment statutes since courts often construe them similarly. This is sometimes referred to as "cross-fertilization." Darren M. Creasy, A Union of Formalism and Flexibility: Allowing Employers to Set Their Own Liability Under Federal Employment Discrimination Laws, 44 WM & MARY L. REV. 1453, 1453 n.4 (2003). See also Daniel S. Kleinberger, "Magnificent Circularity" and the Churkendoose: LLC Members and Federal Employment Law, 22 OKLA. CITY U. L. REV. 477, 502-503 n.118 (1997) (noting cross-fertilization and discussing various cases).

However, it should be noted that volunteers at public agencies are treated differently under the FLSA as a result of detailed regulations which were issued. See infra notes 40-44 and accompanying text.

9. See Gregory H. Perry, Volunteers Enter the Schoolhouse Gate, 79 NEB. L. REV. 998 (2000) (discussing use of volunteers in Nebraska public schools); Desautels, supra note 3 (discussing whether volunteers are protected under Connecticut's Public Accommodation statute and contrasting that statute with employment laws); Dunn, supra note 4 (surveying coverage of volunteers under various federal employment laws); Jordan, supra note 4 (discussing voluntarism under the Fair Labor Standards Act).
by employers looking for a source of inexpensive—or worse, free—labor. Given that this nation wants to, and needs to, encourage volunteerism, it must curb the exploitation of volunteers.

It is also important to properly define what a volunteer is because there is a need for consistency in the law. Logic would dictate that a volunteer have the same employment status, or lack thereof, for tax, unemployment, discrimination, minimum wage, and collective bargaining purposes. Unfortunately, this is not the case. Employee status is governed by a host of statutes that may not be consistently interpreted by the courts. This can present obvious problems for both employees and employers who do not know what law governs the relationship between them.

A. Numerosity Requirements in Employment Law

More fundamentally, whether or not a person or a certain category of service provider is a volunteer may be important because many of our employment laws have numerosity requirements and thus will only apply to employers who have a certain number of employees. As a result, certain small employers may not meet the minimum statutory threshold if the putative volunteers are not counted as employees.

10. Professor David L. Gregory notes that many unpaid college interns are desperate to obtain jobs and that this can lead to exploitation by certain employers. For example, Gregory states that some employers regard unpaid interns as a means to reduce, if not eliminate, labor costs while others place interns in meaningless "grunt"-type positions where they merely fetch coffee and make photocopies, rather than positions that would provide the intern with valuable experience. Gregory, supra note 6, at 241-43. Of course, as Gregory also notes, an unpaid internship can provide students with meaningful learning experiences, future employment, and networking opportunities. Id. As most law school and graduate school professors know, there is also a potential that law students or other professional interns can be exploited by volunteering. There is also the potential, however, that volunteering may open up doors that might otherwise be closed.

11. Of course, volunteers are not the only exemptions from our nation's employment laws. For example, the NLRA expressly excludes supervisors and independent contractors from the definition of employee. 29 U.S.C. § 152(3) (2000); see Friendly Cab Co., 341 N.L.R.B. 722, 724-25 (2004) (discussing the independent contractor exemption under the NLRA); NLRB v. Ky. River Cmty. Care, Inc., 532 U.S. 706, 717-21 (2001) (discussing the history of the supervisory exemption under the NLRA); VIP Health Servs., Inc. v. NLRB, 164 F.3d 644, 650 (D.C. Cir. 1999) (holding that field nurses are not supervisors within the meaning of the NLRA); NLRB v. United Ins. Co. of America, 390 U.S. 254, 255-60 (1968) (discussing the independent contractor exemption under the NLRA).

12. This is not just a law school professor's hypothetical. In 2002, a divided D.C. Circuit held that a certain individual was an employee under the NLRA even though he was not paid the minimum wage and did not receive a W-2 tax form. Seattle Opera v. NLRB, 292 F.3d 757 (D.C. Cir. 2002).

13. Strictly speaking, statutory numerosity requirements are not jurisdictional, at least under Title VII. Rather, it is considered to be a threshold requirement, which is an element of any plaintiff's claim for relief. Therefore, numerosity requirements can be waived.
For example, to spare small businesses from Title VII\textsuperscript{14} liability, Congress defined the term employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . ."\textsuperscript{15} Similarly, the Americans with Disabilities Act (ADA)\textsuperscript{16} only applies to employers with fifteen or more employees.\textsuperscript{17} The Age Discrimination in Employment Act of 1967 (ADEA)\textsuperscript{18} applies to employers who have twenty or more employees.\textsuperscript{19} The overtime provisions of the Fair Labor Standards Act of 1938 (FLSA)\textsuperscript{20} do not apply to employees who work in law enforcement and fire protection if the public agency employs less than five employees in those respective activities.\textsuperscript{21} Additionally, state workers’ compensation statutes may impose numerosity requirements.\textsuperscript{22}

If volunteers are not counted as employees, certain small employers may not be subjected to these and other employment laws. Therefore, it is not surprising that volunteer status has been litigated in connection with whether an employer employs a sufficient number of employees under Title VII,\textsuperscript{23} ADA,\textsuperscript{24} ADEA,\textsuperscript{25} FLSA,\textsuperscript{26} and state Workers’ Compensation


\textsuperscript{16} Arbaugh, 126 S.Ct. at 1239 (2006) (quoting 42 U.S.C. § 2000e(b) (2000)). As originally enacted, Title VII only applied to employers with twenty-five or more employees. Congress reduced that number to fifteen employees as a result of the 1972 amendments to Title VII. Id. at 3 n.2 (citing Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103, 103 (1972)).


\textsuperscript{18} Id. § 12111(5)(a).


\textsuperscript{20} 29 U.S.C. § 630(b) (2000).


\textsuperscript{22} See, e.g., Alabama Workers’ Compensation Act, ALA. CODE § 25-5-50(a) (2000) (stating that employers who employ less than five employees are exempt from the statute); Ex parte A-O Machine Co., 749 So. 2d 1268, 1270 (Ala. 1999) (discussing numerosity requirements under Alabama law).

\textsuperscript{23} See e.g., Scott v. City of Minco, 393 F. Supp. 2d 1180, 1190-91 (W.D. Okla. 2005) (finding that since volunteer firefighters are not employees, Title VII case is dismissed for failing to meet numerosity requirements). Accord, Keller v. Niskayuna Consol. Fire Dist. 1, 51 F. Supp. 2d 223 (N.D.N.Y. 1999); Hall v. Del. Council on Crime & Justice, 780 F. Supp. 241 (D. Del. 1992). But see, Pietras v. Bd. of Fire Comm’rs of the Farmingville Fire Dist., 180 F.3d 468, 473 n.7 (2d Cir. 1999) (holding that since volunteer firefighters were employees, and since the Department had more than 15 volunteer firefighters, it is subject to Title VII).

\textsuperscript{24} See e.g., Tawes v. Frankford Volunteer Fire Co., No. 03-842-KAJ, 2005 U.S. Dist.
III. WHO IS A VOLUNTEER?

There are two types of volunteers. The ordinary or pure volunteer is someone who receives nothing in return from the organization he or she is serving. The other type of volunteer is what I will term a “volunteer plus.” A volunteer plus may have his or her expenses reimbursed and may receive some types of minor benefits such as death or disability insurance or even a small stipend. The legal status of the volunteer very much depends upon the category into which the volunteer falls.

In 1947, the U.S. Supreme Court recognized that a person who performs services “without promise or expectation of compensation, but solely for his [or her] personal purpose or pleasure” is not an employee. However, in that case, the Court was addressing the issue of whether or not trainees are employees under the FLSA, it did not examine whether volunteers are covered under the statute.

The Court expressly addressed the employment status of volunteers one time in *Tony and Susan Alamo Foundation v. Secretary of Labor*. In this 1985 decision, the Court stated that the minimum wage and overtime provisions of the FLSA would not reach “[o]rdinary volunteerism,” which the Court described as “volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy.” In a footnote, the Court quoted, with approval, a Department of Labor brief that delineated factors to examine when ordinary volunteerism is involved;
factors listed include: "the receipt of any benefits from those for whom the services are performed, whether the activity is a less than full-time occupation, and whether the services are of the kind typically associated with volunteer work." In that same footnote, the Court went on to give examples of "recognized" volunteer services: "The Department has recognized as volunteer services those of individuals who help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth."

Thus, the Court has recognized that ordinary or pure volunteers are not subject to the FLSA and presumably our nation's other labor and employment laws. However, not all volunteerism is so pure. In fact after *Tony and Susan Alamo Foundation* was decided, the Department of Labor issued regulations broadening the definition of volunteers at public agencies that are exempt from the FLSA's minimum wage and overtime requirements.

The easy volunteer cases involve the ordinary or pure volunteer. When volunteers receive absolutely nothing in return, courts do not seem to have much difficulty in concluding that they are volunteers under the various employment statutes. Illustrative of this principle is *Mendoza v. Town of Ross*, where a disabled community service officer who worked regular hours and received an unpaid two-week vacation was held not to be an employee under California wrongful discharge and California disability discrimination law because he did not receive any remuneration from the municipality where he worked.

After *Tony and Susan Alamo Foundation* was decided, Congress amended the FLSA to state that the term employee does not include certain

34. Id. at 303 n.25.
35. Id.
36. See infra notes 40-43 and accompanying text.
37. See, e.g., Jacob-Mua v. Veneman, 289 F.3d 517, 521 (8th Cir. 2002) (holding that a college graduate research student who received no funds from the putative employer is a volunteer under Title VII); Pettyjohn v. Principi, Case No. CIV-03-230-C, 2005 U.S. Dist. LEXIS 30441, at *4 (W.D. Okla. 2005) (noting that plaintiff, a service officer at a hospital, did not receive any funds from his putative employer, in holding that the plaintiff is a volunteer under Title VII); Keller v. Niskayuna Consol. Fire Dist. 1, 51 F. Supp. 2d 223, 231-32 (N.D.N.Y. 1999) (holding that firefighters who received no remuneration are volunteers under Title VII); Benshoff v. City of Virginia Beach, 9 F. Supp. 2d 610, 623 (E.D. Va. 1998) (holding that volunteer rescue squad individuals are volunteers under FLSA in part because they receive no compensation); Schoenbaum v. Orange County Ctr. for the Performing Arts, Inc., 677 F. Supp. 1036, 1039 (C.D. Cal. 1987) (holding that individuals who received no remuneration from a performing arts center are volunteers under the ADEA).
38. 27 Cal. Rptr. 3d 452 (Cal. Ct. App. 2005).
39. Id. at 454. See also Pinchas v. U.S.A. Deaf Sports Fed'n, Inc., No. Civ. 05-4024, 2006 WL 2927651, at *3 (D.S.D. Oct. 12, 2006) (holding that chair of Deaf Olympic Games organizing committee who received no pay or benefits is not an employee under Title VII).
volunteers providing services at a public agency who are reimbursed expenses or paid a nominal fee if such services are not the same type of services that the individual is employed to perform for that particular public agency. The text of the amended FLSA is set forth in a footnote below.

Additionally, with respect to public agencies, the Department of Labor issued regulations which further liberalize who a volunteer may be. The regulations provide that volunteers may be paid reasonable benefits (for example, tuition, transportation or meal costs, and health insurance or pension costs under certain scenarios) or a nominal fee, which is not tied to productivity, for their service without losing their volunteer status. The


41. (4)(A) The term “employee” does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.

42. These regulations provide in relevant part:

(a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

(b) A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing . . . Such individuals would not lose their volunteer status because they are reimbursed for the approximate out-of-pocket


These regulations provide in relevant part:

(a) Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.

(b) A school guard does not become an employee because he or she receives a uniform allowance, or reimbursement for reasonable cleaning expenses or for wear and tear on personal clothing . . . Such individuals would not lose their volunteer status because they are reimbursed for the approximate out-of-pocket
FLSA regulations however, only apply to public agencies as defined in those regulations.43

One of the benefits that the regulations expressly allow is health insurance. Today, as health insurance becomes increasingly expensive, some employees work simply because of this fringe benefit. However, under the amended FLSA, a volunteer who performs services for a public agency may receive substantial benefits, like health insurance, in return for services and still be classified as a volunteer.

The U.S. Bureau of Labor Statistics (BLS) defines volunteers as “persons who worked without being paid (except for expenses) through or for an organization at least once during the past year.”44 The BLS definition is not limited to volunteers who perform services for public agencies. This type of volunteer is an example of what I termed earlier in this article as a “volunteer plus.”45

Determining where to draw the line between an employee and a nonemployee with respect to a “volunteer plus” is difficult. In Cleveland v. City of Elmendorf,46 non-paid regular auxiliary police officers received a type of benefit known as a commission, which under Texas law, was necessary to maintain their licenses to be peace officers. Such a benefit was not sufficient compensation to transform these volunteers into employees. However, this was an FLSA case and the court was

---

expenses incurred incidental to providing volunteer services, for example, payment for the costs of meals and transportation expenses.

(c) Individuals do not lose their status as volunteers because they are reimbursed for tuition, transportation and meal costs involved in their attending classes intended to teach them to perform efficiently the services they provide or will provide as volunteers.

(d) Individuals do not lose their volunteer status if they are provided reasonable benefits by a public agency for whom they perform volunteer services. Benefits would be considered reasonable, for example, when they involve inclusion of individual volunteers in group insurance plans (such as liability, health, life, disability, workers' compensation) or pension plans or “length of service” awards, commonly or traditionally provided to volunteers . . . .

(e) Individuals do not lose their volunteer status if they receive a nominal fee from a public agency. A nominal fee is not a substitute for compensation and must not be tied to productivity . . . .


43. See Hallissey v. America Online, Inc., No. 99-CIV-3785, 2006 U.S. Dist. Lexis 12964, at *13 n.5 (S.D.N.Y. 2006) (stating that 1985 FLSA exemption for volunteers only applies to public agencies, and therefore, a private corporation such as America Online cannot rely on this exclusion from the definition of employee).

44. White, supra note 2, at 65.

45. A volunteer plus receives some remuneration whether it be expense reimbursement or a nominal stipend. See supra notes 28-29 and accompanying text.

46. 388 F.3d 522 (5th Cir. 2004).
interpreting the liberal regulations applicable to public agencies under the FLSA.

Similarly, an auxiliary deputy sheriff, who only received "accoutrements of the trade," such as equipment, training, uniforms, and reimbursement for expenses incurred while on duty, was not an employee under the ADEA or Title VII. A search-and-rescue pilot, who was eligible for death benefits, free military rides, income tax deductions, free jet simulator time, and free air time and training, was not an employee under Title VII because such benefits did not constitute compensation.

On the other hand, a volunteer fire fighter who received a state mandated pension, life insurance, death benefits, disability insurance, and some medical benefits was found to be an employee under Title VII, notwithstanding the fact that he was not outwardly paid any compensation. Similarly, a youth volunteer who received a small stipend, expense reimbursement, meals, and a uniform, and who was eligible for a $2500 bonus after one year, was an employee for unemployment insurance purposes.

While it is the intent of this author to provide assistance in determining where to draw the line with respect to a "volunteer plus," it is important to recognize that this is not an easy task because the label placed on a putative employee/volunteer is not controlling and each case is fact specific.

49. Pietras v. Board of Fire Comm'r's, 180 F.3d 468 (2d Cir. 1999). But see Scott v. City of Minco, 393 F. Supp. 2d 1180 (W.D. Okla. 2005) (finding that a volunteer firefighter was not an employee under Title VII); Tawes v. Frankford Volunteer Fire Co., No. 03-842-KAJ, 2005 U.S. Dist. LEXIS 786 (D. Del. Jan. 13, 2005) (finding that a volunteer firefighter was not an employee under the ADA); Haavistola v. Community Fire Co., 6 F. 3d 211, 221-22 (4th Cir. 1993) (holding that a factual question exists whether volunteer firefighter was an employee in that firefighters were entitled to state funded disability pension, scholarships for dependents upon disability or death, group life insurance, tuition reimbursement for courses on medical and fire service techniques, travel expenses, special commemorative license plate and access to a method of obtaining certification as a paramedic).
51. See Vojvodich v. City of Elmendorf, Texas, 388 F. 3d 522, 529 (5th Cir. 2004) (looking to "the totality of the circumstances" to determine employee status under the FLSA); EEOC v. Sidley, Austin, Brown & Wood, 315 F. 3d 696, n.2 (7th Cir. 2002) (stating that an employer cannot escape Title VII by labeling employee a partner); Hallissey v. America Online, No. 99-CIV-3785, 2006 U.S. Dist. Lexis 12964, at *13-40 (S.D.N.Y. 2006) (conducting a factual investigation into the plaintiffs' expectations of compensation, the significance of their role at America Online, and the benefits to the parties in ruling that the plaintiffs were volunteers); Rodriguez v. Township of Holiday Lakes, 866 F. Supp.
IV. WHO IS AN EMPLOYEE?

It has long been recognized that work is important to us. It provides us with the means to provide for our families. Additionally, in some cases it defines who we are and what we are interested in. According to William Blackstone, work is one of the three great relations in private life. Unfortunately, two and a half centuries later, there is no clear understanding of how the law should distinguish between employees and non-employees. Therefore, it is not surprising that courts have to struggle with determining when a "volunteer plus" is, in reality, an employee.

This is due, at least in part, to the fact that many modern work

1012, 1020 (S.D. Texas 1994) ("Courts routinely look beyond the labels employers use and apply the [fact specific] "economic reality test" in FLSA cases to determine the employment status of an individual."); Schoenbaum v. The Orange County Center For the Performing Arts, 677 F. Supp. 1036, 1038 (C.D. Ca. 1987) (conducting a factual investigation into the activities of the plaintiffs as directors and trustees of defendant organization to determine that they were not employees under the ADEA). See also Kelley, 563 N.Y.S.2d at 171 (stating that fact that parties signed a letter of understanding which indicated that an individual is a volunteer is not binding on the court).

52. See Kenneth L. Karst, The Coming Crisis of Work in Constitutional Perspective, 82 CORNELL L. REV. 523, 533 (1997) (arguing that we often become like our jobs and the work we do affects how others think of us). See also MARION G. CRAIN ET AL., WORKLAW: CASES AND MATERIALS 5-6 (2005) ("The significance of work in the lives of most Americans resonates with themes of Protestantism, particularly self-sufficiency and industriousness. While some past civilizations viewed work as a 'degrading pursuit to be carried out by those at the bottom of their cultural hierarchy,' modern Western culture sees hard work and diligence as positive virtues, marks of good character."); David L. Gregory, Catholic Labor Theory and the Transformation of Work, 45 WASH. & LEE L. REV. 119, 130 (1988) (stating that work "helps us become more fully human").

53. WILLIAM BLACKSTONE, 1 COMMENTARIES *410 ("The three great relations in private life are, 1. That of master and servant; which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labour will not be sufficient to answer the cares incumbent upon him. 2. That of husband and wife . . . [and] 3. That of parent and child . . . ")

Sigmund Freud also recognized the importance of work to society. When asked to name the most important things in life, Freud's answer was "Love and work." MARK A. ROTHSTEIN & LANCE LIEBMAN, EMPLOYMENT LAW: CASES AND MATERIALS 2 (5th ed. 2003).

It should be noted that the nature of work is changing. Long term job security between a worker and an employer is becoming a thing of the past. Today, many individuals expect to change jobs, and employers often overhaul their work force as production and skill demands change. As Professor Stone has stated: "Indeed, the very concept of the workplace as a place, and the concept of employment as involving an employer, are becoming out-dated." Katherine V.W. Stone, Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers, 27 BERKELEY J. EMP. & LAB. L. (forthcoming 2006) available at http://ssrn.com/abstract=894930 (referring to increased use of temporary workers, homeworkers, and independent contractors).
relationships are ambiguous and highly fact specific. Additionally, there is not one uniform test to determine who is an employee. Unfortunately, the statutory language utilized in most employment statutes is utterly useless. For example, the National Labor Relations Act (NLRA) defines an employee in the following manner: “the term employee shall include any employee . . . .” The FLSA defines employee as “any individual employed by an employer.” The Employee Retirement Income Security Act (ERISA) of 1974, the Family and Medical Leave Act (FMLA) of 1993, Civil Rights Act of 1964, Title VII, ADEA, and ADA all define employees in the same manner. Additionally, various state statutes concerning workers compensation, wage and hour laws, and anti-discrimination statutes utilize similar definitions. One scholarly commentator has described these statutory definitions as “baffling.” Numerous courts, including the Supreme Court, have recognized that these

54. CRAIN ET AL., supra note 52, at 883. Even where it is clear which test of employee status should be utilized, courts have found that it is not easy to apply the definitions contained in those tests to specific facts. E.g., Matter of O’Brien v. Spitzer, 851 N.E.2d 1195 (N.Y. 2006).

55. Most cases concerning whether or not someone is an employee concern claims that the employee is an independent contractor and therefore, not subject to the employment law at issue.


57. 29 U.S.C. § 203(e)(1). Note that the FLSA further defines the verb “employ” expansively to mean “suffer or permit work.” Id. § 203(g). The other employment statutes discussed herein do not contain any similar language. See Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 326 (1991) (noting that the FLSA’s definition of “employ” results in its definition of “employee” being more expansive than under ERISA).


59. Id. § 2611(3).


61. Id. § 630(f).

62. Id. § 12111(4) (2000).


Some courts have noted the similarity in language and consequently have held that analysis under the various employment statutes should be interchangeable. See, e.g., Haavistola v. Cmty. Fire Co., 6 F.3d 211, 219 n.2 (4th Cir. 1993) (“Although we were construing the definitions of ‘employee’ and ‘employer’ under the Age Discrimination in Employment Act (‘ADEA’), the operative language in ADEA is identical to the operative language in Title VII, so the analysis utilized under either act is interchangeable”). Accord Garrett v. Phillip Mills, Inc., 721 F.2d 979, 981, n.4 (4th Cir. 1983).

64. Carlson, supra note 63, at 296. See also MICHAEL J. ZIMMER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION 465 (6th ed. 2003) (comparing and contrasting the various tests for employee status under Title VII, the ADEA and the FLSA); Craig J. Ortner, Note, Adapting Title VII To Modern Employment Realities: The Case For The Unpaid Intern, 66 FORDHAM L. REV. 2613, 2614 (1998) (describing Title VII jurisprudence as “murky” with regard to the definition of an employee).
definitions are circular and useless.\textsuperscript{65}

The Supreme Court, having long wrestled with defining "employee," has recognized that there is not one "simple, uniform and easily applicable test which . . . determine[s] whether persons doing work for others" are employees under the statute in question.\textsuperscript{66} The Supreme Court explains that "[f]ew problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent, entrepreneurial dealing."\textsuperscript{67}

From a public policy perspective, this lack of clarity is somewhat shocking. The consequences to an employer for misclassifying an employee can be enormous. If an employee has been mischaracterized as an independent contractor, for example, the employer may owe its employees large sums of monies because employees are generally entitled to fringe benefits, which can be substantial.\textsuperscript{68}


However, this non-definition of the term “employee” has also been interpreted by the Supreme Court as being very broad. See, e.g., NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 87 (1995) (finding that “salts,” paid union organizers who obtain a position with an employer to help organize a union, qualify as employees under the NLRA); Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 295 (1985) (stating that the definition of employee under the FLSA “is exceedingly broad”); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984) (holding that the definition of employee under NLRA covers undocumented aliens).

\textsuperscript{66} NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 120 (1944) (holding that independent contractors were not excluded from the definition of the term employee under the NLRA). However, in 1947, \textit{Hearst} was legislatively overruled by the Taft-Hartley Amendments to the NLRA. \textit{See generally} NLRB v. United Ins. Co. of America, 390 U.S. 254, 256 (1968) (discussing legislative history of the 1947 amendment to the definition of employee under the NLRA).

\textsuperscript{67} \textit{Hearst Publ’ns}, 322 U.S. at 121.

\textsuperscript{68} Stone, \textit{supra} note 53 (citing Vizcaino v. Microsoft Corp., 120 F.3d 1006 (9th Cir. 1997)).
Courts have developed four different tests to determine whether an individual is an employee: the common law agency test, the primary purpose test, the economic reality test, and a test which combines the common law standard with the economic reality test known as the hybrid test. 69

A. Common Law Agency Test for Employee Status

The starting point for determining employee status is the common law standard, which has been adopted by the Restatement (Second) of Agency § 220. 70 The Supreme Court has described the common law test as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. 71

The Court went on to state that, “[s]ince the common law test contains no short hand formula or magic phrases that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” 72

The Supreme Court applied this common law test in Community for

69. One appellate court has arguably recognized another test for employment status known as the “entrepreneurial opportunity” test where the court examines whether or not the putative employee has an opportunity for significant gain or loss. Corporate Express Delivery Sys. v. NLRB, 292 F.3d 777, 780 (D.C. Cir. 2002). Cf. SAMUEL ESTREICHER & MICHAEL C. HARPER, CASES AND MATERIALS ON EMPLOYMENT LAW 20 (2004) (questioning whether entrepreneurial opportunity is an additional test to determine employee status).

In any event, this test seems to be applicable to the issue whether a putative employee is an independent contractor. It does not seem to have any application to volunteers. This test, which is also not widely followed by other courts, is probably an offshoot of the common law agency test applicable in NLRB proceedings.

70. Gregory, supra note 6, at 233.


Creative Non-Violence v. Reid\(^\text{73}\) to determine whether an artist was an employee for purposes of the Copyright Act of 1976.\(^\text{74}\) In so doing, the Court also recognized that employees are not limited to individuals who receive a formal salary.\(^\text{75}\)

The Court also applied this test to determine whether an insurance broker was an employee under ERISA,\(^\text{76}\) rejecting the claim that the statute was to be construed "in the light of the mischief to be corrected and the end to be attained."\(^\text{77}\) Thus, the Court rejected the "primary purpose test"\(^\text{78}\) as the appropriate test to determine employee status under ERISA.\(^\text{79}\)

The common law test has also been applied in employment cases by some courts with respect to cases arising under the ADA,\(^\text{80}\) Title VII,\(^\text{81}\) and ERISA.\(^\text{82}\)

Many courts that apply the common law standard do so because Congress did not provide any useful definition of the term employee in the various employment laws. Those courts reason that Congress, therefore, intended that the traditional common law standards be applied.\(^\text{83}\) However, a serious problem with the common law standard is that it results in courts

73. 490 U.S. at 751-52.
74. 17 U.S.C. § 101 et seq. (2006). See id. Under the Copyright Act of 1976, work prepared by an employee within the scope of his or her employment is part of work made for hire. Id. § 101. Therefore, the copyright belongs with the employer. Cmty. for Creative Non-Violence, 490 U.S. at 737. Hence, it was important for the Court to determine whether or not the artist in Reid was an employee.
75. Cmty. for Creative Non-Violence, 490 U.S. at 742 n.8.
77. Id. at 324 (citing Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701 (4th Cir. 1986)).
78. For a discussion of the primary purpose test, see infra notes 85-93 and accompanying text.
79. Indeed, the Court notes that after the Supreme Court opinions in both NLRB v. Hearst Publ’ns, 322 U.S. 111 (1947) (adopting the primary purpose test under the NLRA) and U.S. v. Silk, 331 U.S. 704 (1944) (adopting the primary purpose test under the Social Security Act), Congress amended those statutes, demonstrating that common law principles were the key to determining the statute’s definition of employee. Nationwide Mut. Ins. Co., 503 U.S. at 326.
82. E.g., Speen v. Crown Clothing Corp., 102 F.3d 625, 631 (1st Cir. 1996).
concentrating on the formal structure of the employment, rather than on the reality of the relationship.\textsuperscript{84}

\textbf{B. Primary Purpose Test}

The Supreme Court has applied the primary purpose test several times. In \textit{Hearst}, the Court rejected the common law standard because it resulted in inconsistent rulings and because there was a need for uniformity in labor law since it was national legislation.\textsuperscript{85} Instead, the Court adopted what became known as the "primary purpose test":

\begin{quote}
Whether, given the intended national uniformity, the term "employee" includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning. . . ." Rather "it takes color from its surroundings . . . [in] the statute where it appears," and derives meaning from the context of that statute, which "must be read in light of the mischief to be corrected and the end to be attained."
\end{quote}

However, in applying this primary purpose test, the Court also indicated that, in doubtful situations, courts could examine "underlying economic facts" and the underlying "economic relationship" to help determine whether or not someone was an employee.\textsuperscript{87} Thus, the Court recognized early in its labor law jurisprudence that economic relationships were important to determining whether or not someone was an employee, laying the ground work for what later became the "economic realities" test.\textsuperscript{88} Indeed, three years later, in a case concerning the definition of employee for Social Security tax purposes, the Court, while purporting to

\textsuperscript{84} \textit{Id.}

\textsuperscript{85} \textit{NLRB v. Hearst Publ'ns}, 322 U.S. 111, 123 (1944).

\textsuperscript{86} \textit{Id.} at 124 (citations omitted).

\textsuperscript{87} \textit{Id.} at 129.

\textsuperscript{88} It was not until 1968 in \textit{NLRB v. United Ins. Co. of America}, 390 U.S. 254 (1968) that the Court would again grapple with the distinction between an employee and an independent contractor under the NLRA.

As a result of the 1947 amendments to the Act, which expressly excluded independent contractors, the Court abandoned its earlier decision in \textit{Hearst}. The Court held that in determining employee status under the NLRA, the proper standard to be applied was the common law agency test. \textit{United Ins. Co. of America}, 390 U.S. at 256.

Nevertheless, it should be noted that the NLRB, like courts, see infra notes 106-117 and accompanying text, has sometimes utilized a blended approach of the common law and the economic reality tests to determine employee status. See Robert A. McCormick & Amy Christian McCormick, \textit{The Myth Of The Student-Athlete: The College Athlete As Employee}, 81 \textit{WASH. L. REV.} 71, 92 (2006) (noting that the NLRB's common law test for determining who is an employee has included elements of the economic reality test). For the NLRB's recent treatment of this issue, see \textit{St. Joseph News-Press}, 345 NLRB No. 31 (2005).
follow primary purpose test from *Hearst*, concluded that the workers in question were employees because such workers were employees “as a matter of economic reality.”

It appears that the NLRB applied a variant of the primary purpose test in *Brown University*. In *Brown*, the Board held that graduate students were not employees under the NLRA because the relationship between the university and student was “primarily an educational one, rather than an economic one.” *Brown*, however, purported to apply the common law

---


In *Silk*, the Supreme Court adopted the same criteria and the *Hearst* analysis to determine whether or not a worker was an employee for Social Security Act, 42 U.S.C. § 1001 et. seq., purposes. As it did with respect to the *Hearst* decision, Congress later responded by amending the Social Security Act to state that common law standards apply in determining employee status. Dowd, *supra* note 83, at 92.


91. Courts have issued conflicting opinions regarding the employment status of graduate students in non-NLRB cases. For example, students have been held as non-employees for prevailing wage purposes under New York law. *In re Onondaga-Cortland-Madison Bd. of Cooper. Educ. Servs. v. McGowan*, 728 N.Y.S.2d 109 (N.Y. App. Div. 2001). One court has even summarily held that graduate students are not employees under Title VII. *Pollack v. Rice Univ.*, No. H-79-1539, 1982 WL 296 (S.D. Tex. 1982). Additionally, a court has held that resident assistants are not employees under the FLSA. *Marshall v. Regis Educ. Corp.*., 666 F.2d 1324 (10th Cir. 1981). On the other hand, graduate assistants have been held to be employees under Title VII. *Cuddeback v. Fla. Bd. of Educ.*., 381 F.3d 1230 (11th Cir. 2004); *Ivan v. Kent State Univ.*., 863 F. Supp. 581 (N.D. Ohio 1994). See also EEOC Decision No. 88-1, at *7 (1988) (holding medical interns are employees under Title VII); *Bagley v. Hoopes*, No. 81-1126-Z, 1985 WL 17643, at *4 (D. Mass. 1985) (stating students receiving work study are employees under Title VII). The Supreme Court has not addressed this issue and has only recognized that trainees whose labor provides no immediate advantage to the employer are not employees under FLSA. *Walling v. Portland Terminal Co.*., 330 U.S. 148, 153 (1947). An analysis of the status of graduate students and related student workers is beyond the scope of this article. See generally Gregory, *supra* note 6 (discussing status of volunteer student interns and the potential for abuse); Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW. 243, 253-55 (2004) (discussing the NLRB decision in *Brown University* which held graduate students were not employees under the NLRA); *Yamada, supra* note 6 (examining legal and policy implications of student internships with particular emphasis on employment); Robert A. Epstein, Note, *Breaking Down The Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search For Employee Status on the Private University Campus*, 20 ST. JOHN’S J. LEGAL COMMENT. 157 (2005) (discussing whether graduate students are employees under the NLRA or Title VII); Ortner, *supra* note 64 (discussing employment status of unpaid interns under Title VII).

92. *Brown Univ.*., 342 N.L.R.B. 483, 487 (2004). Our nation’s universities are relying upon graduate student labor “more than ever before as a cost-effective way to operate institutions of higher learning.” Epstein, *supra* note 91, at 158 (footnote omitted). The issue of whether or not graduate assistants, or similar types of student workers, are employees has generated a significant amount of controversy and litigation. The NLRB has flip flopped on this issue several times; first holding that they are not employees, *Leland Stanford Junior Univ.*., 214 N.L.R.B. 621 (1974), then holding that they are, *N.Y. Univ.*., 332 N.L.R.B. 1205 (2000), and then returning to its original holding that they are not employees.
standard.

C. Economic Reality Test

The economic reality test developed because of the narrow focus of the common law test on the standard of control. This test examines the balance of power in the putative employment relationship. In 1947, the Court arguably first adopted the economic reality test in a Social Security tax case when it recognized that while control was characteristically associated with employment, with respect to social legislation, courts need to examine employees "who as a matter of economic reality are dependent upon the business to which they render service." The Court further indicated that the totality of circumstances must be considered when determining employee status.

The Supreme Court adopted the economic realities test in *Tony and Susan Alamo Foundation v. Secretary of Labor*, which is the only

under the NLRA because they are primarily students, Brown Univ., 342 N.L.R.B. 483 (2004). See also McCormick & McCormick, supra note 88, at 93-96 (reviewing historical treatment of students by the NLRB).

The presidential appointed and highly political NLRB is well known to overrule its own decisions when its composition shifts due to a change in Presidential administration. See Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 167 (1985) (stating that when Congress created the NLRB, it “sought in an agency whose membership would change periodically with new administrations in the White House a measure of built-in flexibility”). Indeed, at the 58th NYU Annual Conference on Labor, the keynote speaker, NLRB Chairman Robert J. Battista, candidly stated that the “Board majority will generally reflect . . . the views of the President” and that “fluctuations are part of the deliberative process built into the Act.” Robert Battista, Chairman, Nat’l Labor Relations Bd., *The NLRB At 70: Its Past and Its Future* (May 20, 2005), available at http://www.nlrb.gov/nlrb/press/releases/r2559.pdf. See also JULIUS G. GETMAN ET AL., *LABOR MANAGEMENT RELATIONS AND THE LAW* 10 (2d ed. 1999) (stating that NLRB decisions are often based upon political considerations); James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 223 (2005) (stating that the NLRB operates in “an openly partisan manner”); Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees’ Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 7 n.28 (1990) (discussing political nature of NLRB). For an interesting twist to the graduate student/employee debate, see McMormick & McMormick, supra note 88, which argues that student athletes at universities are employees under the NLRA even after *Brown Univ.*

93. See *Brown Univ.* 342 N.L.R.B. at 483, 490 n.27 (considering the common law standard as a factor in determining that graduate assistants are not employees).
94. See Dowd, supra note 83, at 102 (noting decisions that expanded the definition of employee to embrace previously ignored protected groups); see also Stone, supra note 53 (stating the common law test of employee status is narrower than the economic realities test).
96. *Id.* at 130 (“It is the total situation that controls”).
97. 471 U.S. 290 (1985). See also supra notes 30-35 and accompanying text
Supreme Court case that addressed whether a volunteer, instead of an independent contractor, is an employee.

The employer, a non-profit religious foundation that ministered to the sick and needy, derived its income from commercial businesses. It staffed these businesses with former drug addicts, derelicts, and criminals before their rehabilitation by the foundation. These associates did not receive any cash payments, but instead relied on the foundation for food, clothing, shelter, and other benefits. Interestingly, the workers did not seek protection under the Act and actually protested their coverage.

The Court held that the workers’ protestations, even if sincere, were not dispositive. As the Court explained:

The test of employment under the Act is one of “economic reality,” see Goldberg v. Whitaker House Cooperative, Inc., 366 U.S., at 33, and the situation here is a far cry from that in Portland Terminal. Whereas in Portland Terminal, the training course lasted a little over a week, in this case the associates were “entirely dependent upon the Foundation for long periods, in some cases several years.” 567 F. Supp. at 562. Under the circumstances, the District Court’s finding that the associates must have expected to receive in-kind benefits—and expected them in exchange for their services—is certainly not clearly erroneous. Under Portland Terminal, a compensation agreement may be “implied” as well as “express,” 330 U.S., at 152, and the fact that the compensation was received primarily in the form of benefits rather than cash is in this context immaterial. These benefits are, as the District Court stated, wages in another form.

The Court rejected the argument that coverage of these associates would lead to coverage of other volunteers under the FLSA and stated that “[o]rdinary volunteerism is not threatened by this interpretation of the statute.”

In Cuddeback v. Florida Board of Education, the court applied the

---

98. Tony and Susan Alamo Found., 471 U.S. at 300-301.
99. Tony and Susan Alamo Found., 471 U.S. at 301.
100. Id. at 303.
101. 381 F.3d 1230 (11th Cir. 2004). But see Hoste v. Shanty Creek Mgmt., Inc., 592 N.W.2d 360 (Mich. 1999) (applying the economic reality test to a volunteer member of the National Ski Patrol System who received free lift tickets, skiing privileges for family members, free hot beverages, and reduced price merchandise to conclude that the individual was not an employee under Michigan Workers Compensation law because no hiring took place).
economic realities test to determine that a graduate student who worked in a professor’s laboratory was an employee under Title VII. However, the court also indicated that this issue should be resolved in light of the common law principles of agency, so it is questionable whether the court was applying the economic reality test or a hybrid test involving both the common law standard and the economic reality test. Applying this standard, the court held that the plaintiff was an employee because she received a stipend, benefits, and the terms of her employment were governed by a collective bargaining agreement. Further, the court noted that the school declined to reappoint her because of performance problems, relating to time and attendance, as opposed to academic reasons.102

Additionally, in Secretary of Labor v. Lauritzen,103 the Seventh Circuit applied the economic reality test to determine whether migrant workers were independent contractors under the FLSA. In describing the relevant factors, the court included the degree of employer control.104

As one can see, the economic reality test as interpreted by some courts, has started to look like the common law test set forth in the Restatement (Second) of Agency § 220, thus blurring the vision in a field of law that is already operating in a fog. Because the economic realities test has not been uniformly applied, some courts have expressly adopted a combination test that emphasizes key policy concerns. They have cleverly

---

102. Cuddeback, 381 F.3d at 1234-35.
103. 835 F.2d 1529 (7th Cir. 1987).
104. The Seventh Circuit summarized the factors courts should examine in making this determination:

In seeking to determine the economic reality of the nature of the working relationship, courts do not look to a particular isolated factor but to all the circumstances of the work activity. Certain criteria have been developed to assist in determining the true nature of the relationship, but no criterion is by itself, or by its absence, dispositive or controlling.

Among the criteria courts have considered are the following six:

1) the nature and degree of the alleged employer’s control as to the manner in which the work is to be performed;

2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;

3) the alleged employee’s investment in equipment or materials required for his task, or his employment of workers;

4) whether the service rendered requires a special skill;

5) the degree of permanency and duration of the working relationship;

6) the extent to which the service rendered is an integral part of the alleged employer’s business.

Id. at 1534-35.
coined it the hybrid test.¹⁰⁵

D. Hybrid Test

The hybrid test combines elements of both the common law test reflected in the Restatement of Agency and the economic reality test.¹⁰⁶ Indeed, a majority of the circuit courts appear to have adopted the hybrid test.¹⁰⁷ In a sense, they are seeking the best of both worlds. Several circuits, however, have noted that there is “little discernible difference

---


¹⁰⁶ See id. at 1464 (stating that a hybrid test used by the courts “combine[s] elements of the straightforward economic realities test and the common law agency test”). See also, Zinn v. McKune, 143 F.3d 1353, 1357 (10th Cir. 1998) (applying hybrid test in determining whether a state whistleblower is an employee under Title VII); Lambertsen v. Utah Dep’t of Corr., 79 F.3d 1024, 1028 (10th Cir. 1996) (applying the hybrid test to determine whether a teaching assistant employed by the department of corrections is an employee for Title VII purposes); Folkerson v. Circus Circus Enters., Inc., 68 F.3d 480, at *2 (9th Cir. Oct. 16 1995) (unpublished disposition) (adjudicating a Title VII retaliation claim for sex discrimination by a casino entertainer by applying the hybrid test); Wilde v. County of Kandiyohi, 15 F.3d 103, 106 (8th Cir. 1994) (advocating a hybrid test in ADEA and Title VII contexts); Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993) (remanding an ADEA claim to determine whether a shoe salesman was an employee under the hybrid test); Deal v. State Farm County Mut. Ins. Co. of Texas, 5 F.3d 117, 119 (5th Cir. 1993) (applying the hybrid test under the ADEA and Title VII to determine whether an insurance salesperson is an employee); Mares v. Marsh, 777 F.2d 1066, 1067-68 (5th Cir. 1985) (utilizing a hybrid test under Title VII); EEOC v. Zippo Mfg. Co., 713 F.2d 32, 37-38 (3d Cir. 1983) (outlining several standards and applying a hybrid test to resolve an ADEA claim made by a sales agent); Knighten v. State Fair of La., No. 05-1930, 2006 WL 725678, at *3 (W.D. La. Mar. 21, 2006) (adjudicating a dispute under Louisiana’s Whistleblower statutes by applying hybrid test to a non-profit employer); Cornish v. Texas Dep’t of Criminal Justice, No. 3:04-CV-0579R, 2006 WL 509416, at *6 (N.D. Tex. Mar. 2, 2006) (adjudicating a racial discrimination claim under Title VII and the Texas Commission on Human Rights Act by applying the hybrid test); Scott v. City of Minco, 393 F. Supp. 2d 1180, 1190 (W.D. Okla. 2005) (using the hybrid test to determine whether an officer is an employee of the state for gender discrimination purposes); Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) (utilizing a hybrid test under the Civil Service Act and Title VII).

¹⁰⁷ Wilde v. County of Kandiyohi, 15 F.3d 103, 105 (8th Cir. 1994) (explaining that “nearly every appellate court has applied a test described as a hybrid of the common-law test and the economic realities test”); Mares v. Marsh, 777 F.2d 1066, 1067 n.2 (collecting and analyzing conflicting case law applying the hybrid test); Wojewski v. Rapid City Reg’l Hosp., Inc., 394 F. Supp. 2d 1134, 1140 (D.S.D. 2005), vacated in part, 450 F.3d 338 (8th Cir. 2006) (noting that the Eight Circuit has adopted hybrid standard). See also Jeff Clement, Note, Lerohl v. Friends of Minnesota Sinfonia: An Out Of Tune Definition of “Employee” Keeps Freelance Musicians from Being Covered by Title VII, 3 DEPAUL BUS. & COM. L.J. 489, 495 (2005) (stating that “[t]he test most often applied for Title VII purposes is the hybrid test”).
between the hybrid test and the common law agency test."

One illustrative case, *EEOC v. Zippo Manufacturing Co.*, determined that district managers are independent contractors under the ADEA. The court found it significant that the employer exercised virtually no control over the putative employee other than keeping track of sales records and that the individuals in question had the ability to establish their own business by hiring their own employees and servicing their own customers in certain sales locations. In another case, *Deal v. State Farm County Mutual Insurance Co. of Texas*, the court determined that agents were independent contractors because the company did not supervise them or pay them directly.

On the other hand a factual question was found to exist under Title VII with respect to whether a mime at a hotel and casino was an employee. Though the mime was hired to perform an act she developed, the mime provided her own costume and was not trained by the hotel or supervised by the hotel, the hotel assigned the putative employee extra assignments, she had little discretion in terms of when and how long to work, the putative employee could not change her performance and was paid by the week as opposed to by the job.

Thus, we are left with four different tests for employee status though, in reality, they may not be so different. The lack of uniformity is not surprising given the circular definitions in the employment statutes themselves. Additionally, it is important to recognize that the common law definition of employee reflected in the Restatement (Second) of Agency,

---

109. 713 F.2d 32 (3d Cir. 1983).
110. *Id.* at 38.
111. 5 F.3d 117 (5th Cir. 1993).
113. *Id.* at *1-*2.
114. It should be noted that several academic commentators have argued that there is little difference between the various employment status tests. *See, e.g.*, Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case For Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. Rev. 239, 254 (1996); Clement, supra note 107, at 509; Valerie L. Jacobson, Note, *Bringing A Title VII Action: Which Test Regarding Standing To Sue Is The Most Applicable?*, 18 Fordham Urb. L.J. 95, 108 (1990). Several circuits have come to the same conclusion as these commentators. *E.g.*, Lambertsen v. Utah Dept. of Corrs., 79 F.3d 1024, 1028 (10th Cir. 1996); Wilde v. County of Kandiyohi, 15 F.3d 103, 106 (8th Cir. 1994); Frankel v. Bally, Inc. 987 F.2d 86, 90 (2d Cir. 1993); *see also* Burt v. Broyhill Furniture Indus., No. CV 04-2929-PHX-MHM, 2006 WL 2711495, at *7 (D. Ariz. Sept. 18, 2006) (stating economic reality test is not materially different from common law test).
which all the other tests spring from, was not designed as a test for employment law purposes. Rather, it was originally developed under tort law principles to determine whether an employer had vicarious liability for the torts committed by those who might be advancing the firm's interests.\footnote{115. See Michael C. Harper, \textit{Defining The Economic Relationship Appropriate For Collective Bargaining}, 39 B.C. L. REV. 329, 334 (1998) (discussing the common law development of the definition of an employee); Dowd, \textit{supra} note 83, at 80 (analyzing the history of the common law standard). \textit{See also} NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 120 n.19 (1944) (stating that the common law right to control test evolved from tort concepts in order to distinguish an employee from an independent contractor for purposes of vicarious liability).}

The lack of uniformity is not a new or an unrecognized employment law problem. In 1993, President William Jefferson Clinton appointed a blue-ribbon commission, chaired by former Labor Secretary and Harvard professor John Dunlop, to examine the labor markets and to make recommendations to Congress.\footnote{116. \textit{ESTREICHER & HARPER}, \textit{supra} note 69, at 21.} One of the Commission's recommendations was the adoption of a single definition of "employee" that would apply to all labor and employment statutes.\footnote{117. As the Dunlop Commission Final Report explained: [E]ach major labor and employment statute--has its own definition of employee and its own way of drawing the line between employees and independent contractors. Many of these definitions appear to be quite similar. But they were created over a period of a half century, and their language is often vague or circular, leaving them open to a broad range of interpretations. As a result, the line has been drawn differently in the different statutes, depending on the inclinations of the agency at the time or Supreme Court doing the drawing. These differences in interpretation mean that a worker might be deemed an employee for purposes of the FLSA but an independent contractor for purposes of the NLRA, without any apparent policy justification for the disparity of treatment. The Commission finds no principled justification for this regulatory morass . . . . The law in this area should be modernized and streamlined: there is no need for every federal employment and labor statute to have its own definition of employee. We recommend that Congress adopt a single, coherent concept of employee and apply it across the board in employment and labor law. . . . The determination of whether a worker is an employee protected by federal labor and employment law should not be based on the degree of immediate control the employer exercises over the worker, but rather on the underlying economic realities of the relationship. . . . Workers who are economically dependent on the entity for whom they perform services generally should be treated as employees. \textit{U.S. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT} 64-66 (1994), available at http://digitalcommons.ilr.cornell.edu/key_workplace/2.} Unfortunately, Congress has not acted. Therefore, it is no wonder that courts have struggled with how a "volunteer" should be defined. Courts can not even get straight who an employee is.
V. APPLICATION OF EMPLOYMENT TESTS TO VOLUNTEERS

Just as courts are divided with respect to the applicable test to determine whether or not an individual is an employee or an independent contractor, courts are also divided with respect to the applicable test to distinguish between employees and volunteers. Courts have primarily issued conflicting opinions when addressing whether a "volunteer plus," as opposed to an ordinary volunteer, is an employee or not. ¹¹⁸

Thus, in order to determine whether the purported volunteers are employees under employment discrimination statutes, courts have applied the primary purpose test,¹¹⁹ the economic reality test,¹²⁰ and the hybrid test.¹²¹ Other courts have focused exclusively on whether the individual in question received any remuneration and examined what constitutes remuneration.¹²² Additionally, others have adopted a two-step approach requiring that the putative employer control the work and that the purported volunteer be hired.¹²³

Similarly, in examining whether a volunteer is an employee under the FLSA, some courts have applied the economic reality test,¹²⁴ while others

¹¹⁸. See supra notes 28-51 and accompanying text (describing distinction between an "ordinary volunteer" and a "volunteer plus").
¹²³. See, e.g., Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 220 (4th Cir. 1993) (using the two-prong test); O'Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997) (listing the factors taken into consideration under the two-factor approach). See infra notes 135-161 and accompanying text (discussing the two-part test).
have not expressly adopted any one particular test. Instead, they apply a
totality of circumstances test, which applies the statute in question in a
common sense manner by analyzing the facts of the particular case at
hand.\textsuperscript{125}

Most cases that have utilized one of the employment status tests
attempted to define the line between an employee and a volunteer by
utilizing a test developed to distinguish between an employee and an
independent contractor.\textsuperscript{126} However, the employment status of volunteers
has very little to do with the issue of whether or not someone is an
independent contractor. For example, simply because a volunteer in a
hospital gift shop is directly under the control of an administrator, because
the administrator sets the hours, may say nothing with respect to whether or
not he is an employee if he or she receives absolutely nothing in return. Yet, under most tests mentioned above that element of control would be an
important factor in determining his status.

In \textit{Clackamas Gastroenterology Associates v. Wells},\textsuperscript{127} the Supreme
Court recognized that the tests for determining whether or not someone was
an independent contractor or an employee were not very helpful in
determining whether physician shareholders were employees under the

\textsuperscript{125} See, e.g., \textit{Brock v. Superior Care, Inc.}, 840 F.2d 1054, 1059 (2d Cir. 1988) (opining
that courts should look at factors beyond those included within the economic reality test); \textit{Carter v. Dutchess Cmty. Coll.}, 735 F.2d 8, 11 (2d Cir. 1984) (applying a test that looked at
factors beyond the economic reality test).

For example, in \textit{Hallissey v. America Online, Inc.}, 99-Civ-3785, 2006 U.S. Dist.
LEXIS 12964 (S.D.N.Y. Mar. 10, 2006), the court held that a factual issue was present
whether or not "community leaders" who serviced internet message boards and chat rooms,
but received free internet access, a compact disc case, expanded web space, anti-virus
software, and employee discounts, were employees under the FLSA. In making this
determination, the court held that it was free to decide which factors were relevant. The
court concluded that the following factors were relevant: 1. whether plaintiffs had an
expectation of compensation; 2. whether plaintiffs were integral to AOL; 3. whether AOL
received any benefits; and 4. whether the employee received any benefits. \textit{Id.} at *12-\textsuperscript{39}.
The court described as "crucial" to this inquiry the question of whether or not plaintiffs had
any express or implied expectation of compensation. \textit{Id.} at *16.

On the other hand, in \textit{Cleveland v. City of Elmendorf, Texas}, 388 F.3d 522 (5th Cir.
2004), the court did not expressly outline the factors it needed to examine, instead simply
stating that the totality of the circumstances should be applied in a common sense manner.
However, the court appeared to concentrate on such factors as whether a commission, which
is a type of benefit necessary to become a paid peace officer, given to unpaid police officers
was a sufficient type of benefit to establish that the individuals in question were employees.
The court concluded that the unpaid police officers were not employees since that benefit
was not sufficiently tangible. \textit{Id.} at 527-529.

\textsuperscript{126} See notes 69-117 and accompanying text (discussing four different tests utilized by
courts to determine whether an individual is an employee).

\textsuperscript{127} 538 U.S. 440 (2003).
Americans with Disabilities Act. In that case, the Court held that the issue to be decided amounted to whether or not the shareholders managed the business as proprietors rather than employees. However, the Court did say that the common law element of control was “the principal guidepost that should be followed.”

Clackamas is a watershed case with respect to volunteers, due to the fact that the Supreme Court recognized that while traditional tests to determine employee status may be helpful, they were not binding because the court was not distinguishing between employees and independent contractors. Numerous lower courts have reached the same conclusion with respect to volunteers.

Additionally, a number of courts have recognized that the application of any employment status test in a rigid fashion does not make much sense in employment law. Thus, these courts have recognized that the test of employee status may change in certain situations.

---

128. Id. at 447-48
129. Id. at 442.
130. Id. at 448. The Court held that the following six factors should be considered in determining employment status:

1. Whether the organization can hire or fire the individual or set the rules and regulations of the individual’s work
2. Whether and, if so, to what extent the organization supervises the individual’s work
3. Whether the individual reports to someone higher in the organization
4. Whether and, if so, to what extent the individual is able to influence the organization
5. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
6. Whether the individual shares in the profits, losses, and liabilities of the organization.

Id. at 449-450 (citing EEOC Compliance Manual § 605:0009 (2000)).

131. Todaro v. Twp. of Union, 27 F. Supp. 2d 517, 534 (D.N.J. 1998) (finding that using tests to determine whether or not someone is an independent contractor is of limited use in determining whether or not someone is a volunteer under the FLSA). Accord Krause v. Cherry Hill Fire Dist. 13, 969 F. Supp. 270, 276 (D.N.J. 1997). See also Haavistola v. Cmty. Fire Co., 6 F.3d 211, 220 (4th Cir. 1993) (indicating that the right of control is critical in independent contractor cases, but not dispositive in volunteer cases); Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (finding that using a test to determine whether an individual is an independent contractor under Title VII is not very helpful in determining whether a volunteer is an employee).

132. See, e.g., O’Connor v. Davis, 126 F.3d 112, 115 (2d Cir. 1997) (declining to apply common-law agency test to determine employment status before finding the existence of a “hire”); Graves v. Women’s Prof’l Rodeo Ass’n, 907 F.2d 71, 74 (8th Cir. 1990) (declining the use of the economic realities test or the right to control test because the court found no approximation of an employment relationship between the parties); Hallissey v. America
While utilizing a case-by-case approach makes sense on some level, it leaves the employment status of volunteers in limbo. There is a great risk of inconsistency. It is submitted that regardless of which standard is adopted, with one exception, a single across-the-board standard needs to materialize. The one exception concerns the FLSA's treatment of volunteers working at public agencies, since the U.S. Department of Labor promulgated a specific regulation regarding volunteers.

A. The Two-Step Employment Status Test

In O'Connor v. Davis, the Second Circuit had to grapple with many of the same issues that courts have had to deal with in regard to volunteers. The plaintiff was doing her school-required fieldwork at the Rockland Psychiatric Center and was paid through her college's work-study program. She sought to bring a sexual harassment complaint against Rockland Psychiatric Center, but there was a problem as to her employment status. Rockland Psychiatric Center did not pay her, the college did. Her college also awarded her academic credit for her field work.

Plaintiff's Title VII complaint against Rockland Psychiatric Center was only viable if she was an employee. In analyzing this issue, the court found the common law agency test, which was applicable to Title VII claims, to be of little utility "because it ignores the antecedent question of whether O'Connor was hired by Rockland for any purpose. . . . [O]nly where a 'hire' has occurred should the common-law agency analysis be undertaken." The court then went on to analyze when a "hire" would occur. The court explained this as follows:

[T]he common feature shared by both the employee and the independent contractor is that they are "hired part[ies]," and thus, a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual have been hired in the first instance. . . . [C]ourts turn to


133. The need to reform American employment law to establish a single uniform test for employee status was one of the recommendations of the Dunlop Commission in 1993. See supra notes 116-117 and accompanying text. Although the Dunlop Commission did not address the status of volunteers, the same policy reasons which justify a single test of employee status would be applicable to volunteers.

134. See supra note 40-43 and accompanying text. This article makes no attempt to formulate the appropriate test for volunteers with regard to public agencies under the FLSA.

135. 126 F.3d 112 (2d Cir. 1997).

136. Id. at 115.
common-law principles to analyze the character of an economic relationship "only in situations that plausibly approximate an employment relationship." Where no financial benefit is obtained by the purported employee from the employer, no "plausible" employment relationship of any sort can be said to exist because . . . "compensation by the putative employer to the putative employee in exchange for his services . . . is an essential condition to the existence of an employer-employee relationship."137

In a later Second Circuit decision, the court, relying on O'Connor, summarized this two-part test as follows:

First, the plaintiff must show she was hired by the putative employer. To prove that she was hired, she must establish that she received remuneration in some form for her work. This remuneration need not be a salary, but must consist of "substantial benefits not merely incidental to the activity performed[.]" Once plaintiff furnishes proof that her putative employer remunerated her for services she performed, we look to . . . . the federal common law of agency.138

Thus, the Second Circuit requires that two conditions be satisfied for an individual to be considered an employee. First, the putative employee must be hired, which requires that he or she receive some form of economic remuneration. Second, the employer must control the work under the Second Restatement Agency standard. This is the analysis developing regarding the appropriate test to distinguish between volunteers and employees under the NLRA as well as under other employment laws.

Several cases involving the issue of volunteer employment status have applied elements of this two-step analysis. An auxiliary deputy sheriff was found to be a volunteer under the ADEA and Title VII because he received no monetary benefits other than the accoutrements of his trade, such as equipment and training.139 Because the volunteer in question received no compensation, the court did not have to address the applicability of the employer's right of control. Another court adopted the same type of

137. Id. at 115-116 (citations omitted).
139. Blankenship v. City of Portsmouth, 372 F. Supp. 2d 496 (E.D. Va. 2005). See also Pettyjohn v. Principi, No. CIV-03-230-C, 2005 U.S. Dist. LEXIS 30441 (W.D. Okla. 2005) (holding that hospital volunteers were not employees under Title VII); Keller v. Niskayuna Consol. Fire Dist. 1, 51 F. Supp. 2d 223 (N.D.N.Y. 1999) (holding that firefighters who received no pay or benefits were not employees under Title VII); Schoenbaum v. Orange County Ctr. for the Performing Arts, Inc., 677 F. Supp. 1036 (C.D. Cal. 1987) (holding that volunteers were not employees under the ADEA); Mendoza v. Town of Ross, 27 Cal. Rptr. 3d 452, 454 (Cal. Ct. App. 2005) (holding volunteers are not employees under California wrongful discharge law).
analysis and held that a volunteer firefighter was not an employee under the ADA because any remuneration he received was *de minimis*.

Several other courts have adopted this analysis in determining employee status outside the typical scenario of deciding whether someone is an independent contractor. One court held that a male rodeo contestant was not an employee of a non-profit rodeo association, which sponsored events open only to female rodeo contestants. The male plaintiff was not an employee under Title VII since he was not paid and compensation "is an essential condition to the existence of an employer-employee relationship." The court also stated that it will only examine the right to control test or the economic reality test after there is a plausible employment relationship. Similarly, a medical student could not state an ADA claim against a medical school because he did not receive any remuneration for the work that he performed.

Also, a doctor who was appointed to Cornell Medical Center as a visiting lecturer was not considered an employee under Title VII where he performed no services for Cornell and did not receive any salary or benefits other than use of the medical library. To be an employee, the putative employer must both pay the individual and control his work. The court rejected the argument that the significance of Cornell's appearance on plaintiff's resume was the "type of salary or other 'benefit' contemplated by Title VII." Plaintiff was simply a volunteer.

Another court held that an attorney who performed services for a bar association was not an employee under Title VII, even though the attorney was provided with clerical support and networking opportunities incidental to the services he performed. The court expanded on *O'Connor* and held that the benefits in question must rise to a minimum level of significance and these activities were not sufficiently substantial to meet this standard.

Additionally, the NLRB decided several cases involving volunteers that are critically important. Jurisprudence developed under the NLRA is particularly important in employment law because it is likely to be

---

141. Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990).
142. Id. at 74.
143. McGuinness v. Univ. of N.M. Sch. of Med., 170 F.3d 974 (10th Cir. 1998). See also supra note 118 and accompanying text.
145. Id. at 1005 n.14. While the court indicated that the plaintiff had use of Cornell's medical library in its description of the facts, this fact is not analyzed in the opinion. Presumably, library privileges alone are also not a sufficient economic benefit required under Title VII, at least where the doctor in question does not perform any services or receive any pay.
146. York v. Ass'n of the Bar of N.Y., 286 F.3d 122 (2d Cir. 2002).
Our Nation's Forgotten Workers

persuasive in other courts with respect to other areas of employment. Indeed, as I have previously written:

The National Labor Relations Act is the grandparent of most labor laws. As such, courts dealing with other areas of labor law, particularly employment discrimination, often look to NLRB decisions for guidance. Given the paucity of case law... astute parties may cite to NLRB case law when litigating in other forums.\(^\text{147}\)

The NLRB first addressed the issue of volunteers in 1999. In WBAI Pacifica Foundation,\(^\text{148}\) the NLRB had to decide if unpaid volunteers working at a radio station should be included in a bargaining unit with other employees. The Board held that such volunteers should not be included because they were not employees. The unpaid staff produced a majority of the radio programs and only one of them obtained travel reimbursement, though it appears others were eligible for this benefit.\(^\text{149}\) Unpaid staff was also allowed to file grievances as they were covered under the existing collective bargaining agreement.

In deciding whether the individuals in question were employees, the Board looked to NLRB v. Town & Country Electric, Inc.,\(^\text{150}\) which broadly interpreted the NLRA to include paid union organizers within the definition of employee. In that case, the Supreme Court examined the dictionary definition of employee as including "any 'person who works for another in return for financial or other compensation.'"\(^\text{151}\) The Board also cited with approval Black's Law Dictionary's definition of an employer as an organization that has the right to control the putative employee's work.\(^\text{152}\)

\(^{147}\) Rubinstein, supra note 92, at 12-13. See also Mitchell H. Rubinstein, Advisory Labor Arbitration Under New York Law: Does It Have a Place in Employment Law?, 79 ST. JOHN'S L. REV. 419, 437 (2005)("[I]n employment law, courts have often looked to decisions interpreting the older National Labor Relations Act ("NLRA") for guidance...").


\(^{149}\) Id. Under the applicable collective bargaining agreement, unpaid staff were also eligible for a childcare allowance. The Board did not view this as material since none of the individuals in question ever attempted to utilize this benefit.


\(^{151}\) Id. at 90 (quoting AMERICAN HERITAGE DICTIONARY 604 (3d ed. 1992)).

\(^{152}\) The Board quoted the Town & Country decision as follows:

The ordinary dictionary definition of "employee" includes any "person who works for another in return for financial or other compensation." American Heritage Dictionary 604 (3d Ed. 1992). See also Black's Law Dictionary 525 (6th ed. 1990) (an employee is a "person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material details of how the work is to be performed").

WBAI Pacifica Found., 328 N.L.R.B. 1273, 1274 (1999) (quoting Town & Country, 516...
Additionally, the Board indicated that it is appropriate to look at the policies and practices of the statute to determine employee status. Ultimately, the Board interpreted the Act to require “at least a rudimentary economic relationship . . . between employee and employer” and because this was lacking, the unpaid staff were not considered employees. Although the test has some similarity to the primary purpose test and the economic realities test, the Board is essentially adopting the same two-step approach as O'Connor did two years earlier.

Auxiliary choristers who performed services for the Seattle Opera were found to be employees by the NLRB and the D.C. Circuit. They were each paid a flat fee of $214.00 for their services, which consisted of seven to nine rehearsals and six to eight performances. That flat fee was once designated as an “honorarium,” but was later changed to indicate that it reflected transportation reimbursement. Again, without citing to O'Connor, the Court interpreted WBAI Pacifica Foundation as establishing a two-step analysis to determine whether or not someone was a volunteer. A person has statutory employee status if “(1) he works for a statutory employer in return for financial or other compensation and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed.” The Board and the D.C. Circuit majority did not view the $214 dollars as expense reimbursement, although it was labeled as such. The choristers were entitled to this fee even if they did not incur any expenses, and they were not required to submit any forms documenting these expenses. There was no dispute to the second prong of the test that the employer had the right to control the work in question.

The dissent viewed the majority’s decision as “arbitrary and ridiculous.” It viewed the $214 flat fee as trivial and only a reimbursement for expenses given the amount of work that was performed. The dissent was also troubled by the fact that if the individuals were employees, the employer would be in violation of the FLSA minimum.
wage provisions and the tax code since the employer did not provide a W-2 wage reporting form. Significantly, however, the dissent did not seem to disagree with the utilization of the two-part test. The disagreement was only with respect to the application of that test.159

The two-step approach of the NLRB seems to be the most practical test for distinguishing between volunteers and employees. The test has also been utilized in other areas of employment law.160 As recognized by the NLRB, elements of this test have also been used by the Supreme Court.161 This test takes into account the fact that in the least there must be a hiring, as well as the fact that the putative employer must control the work of the individual in question. While the application of this test, like the application of any test, might be difficult to apply in certain factual situations, the law is developed enough in employment law that the two-step approach should be adopted by the courts as the uniform standard.

VI. THE PROBLEM OF REMEDY

Since a pure volunteer does not receive any remuneration and a "volunteer plus" receives nominal compensation at best, the issue of remedy needs to be examined. At first blush, one might believe that such individuals, even if they were victims of unlawful discrimination or other types of unlawful employment practices, would not be able to obtain any remedial relief since they suffered no monetary damages due to their lack of receiving general wages.

However, injunctive relief might be available to volunteers in order to seek an end of the discriminatory practice in question.162 The volunteer

159. See also Children's Miracle Network, No. 31-CA-25115, 2001 WL 1782903, at *4 (N.L.R.B.G.C. Dec. 12, 2001) (stating that celebrity hosts on television shows are not employees since they only received reimbursement for expenses and that any good will associated with the event was too speculative to constitute a form of compensation).

Note that NLRB General Counsel Opinions are not decisions of the NLRB. The NLRB may or may not agree with such opinions. See, e.g., 2 Guide to Employment Law and Regulations § 17:225 (2006) (noting disagreement between NLRB and General Counsel of the NLRB with regard to a certain legal issue); Tuv Team Corp., 340 N.L.R.B. 756 (Sept. 30, 2003) (noting that the NLRB General Counsel opinions are not always agreed upon by the NLRB).

The NLRB General Counsel is separately appointed by the President of the United States and exercises general supervision over all NRLB attorneys other than administrative law judges and legal assistants. The General Counsel also acts as a prosecutor by bringing complaints before the NLRB, and has final authority, on behalf of the NLRB, in investigating charges and issuing complaints pursuant to statute. However, the NLRB adjudicates these complaints. 51A C.J.S. Labor Relations § 609 (2006).

160. O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997). See supra notes 135-139 and accompanying text (discussing O'Connor and later cases).

161. See supra notes 150-152 and accompanying text.

162. See Thomas v. Washington County Sch. Bd., 915 F.2d 922, 925 (4th Cir. 1990)
could also seek reinstatement to the position he or she previously held.\textsuperscript{163}

There is even authority which holds that plaintiffs can recover punitive damages even where the plaintiff did not establish that he or she was entitled to compensatory damages.\textsuperscript{164} The circuits, however, are split with respect to this issue.\textsuperscript{165} In an egregious case, it would not seem like such a great leap for a court in a circuit that does not require compensatory damages to award punitive damages to a volunteer.

The Supreme Court has held that an undocumented alien who is the victim of an unfair labor practice is not entitled to back pay.\textsuperscript{166} However, because the employer violated the law, the employer could be required: to cease and desist from committing unfair labor practices; to post a notice setting forth the rights of employees; and to outline the unfair labor practice which has been committed.\textsuperscript{167} Therefore, the fact that a volunteer or a "volunteer plus" may not be entitled to any compensatory damages does not mean that individual is not entitled to some form of relief from the courts.

\footnotesize{(discussing how a job applicant, who failed to establish that he was entitled to reinstatement under Title VII, was entitled to injunctive relief, which mandated that the employer adopt a non-discriminatory hiring process); EEOC v. Harris Farms, Inc., No. 02-6199, 2005 WL 3039204 (E.D. Cal. Sept. 30, 2005) (stating that, generally, victims of employment discrimination are entitled to injunctive relief, which is specifically designed to prevent future discrimination); Smith v. Berks Cmty. Television, 657 F. Supp. 794, 795 (E.D. Pa. 1987) (indicating that while an uncompensated volunteer would not be entitled to back pay under Title VII, he or she may be entitled to injunctive relief).}


\textsuperscript{164.} Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir. 1998) ("[U]nder federal law, when a jury finds a constitutional violation under a § 1983 claim, it may award punitive damages even when it does not award compensatory damages."). (quoting Erwin v. Manitowoc County, 872 F.2d 1292, 1299 (7th Cir. 1989); EEOC v. Pac. Int'l Equities, Inc., No. 98-1458, 2000 WL 989987 (S.D. Fla. May 26, 2000) ( awarding punitive damages of ten thousand dollars in addition to nominal damages of one dollar to plaintiff); c.f. Wright v. Bryan Mfg. Co., No. S85-751, 1989 WL 250931 (N.D. Ind. 1989) (showing that an award of nominal damages does not preclude an award of punitive damages).}

\textsuperscript{165.} Compare Timm, 137 F.3d at 1010 (permitting the award of punitive damages in the absence of an award of compensatory damages), with Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-18 (5th Cir. 1998) (holding that punitive damages must be reasonably related to the compensatory damages awarded).

I will leave it to others to further examine the intricacies involved with the circuit split. See MICHAEL J. ZIMMER ET AL., supra note 64, at 959 (collecting authorities). See generally Richard C. Tinney, Annotation, Sufficiency of Showing of Actual Damages to Support Award of Punitive Damages—Modern Cases, 40 A.L.R. 4th 11 (1985) (compiling decisions concerning the sufficiency of showing of actual damages to support punitive damages).


\textsuperscript{167.} Id. at 152.
Additionally, where an employee has committed misconduct that would have justified his termination had the employer known about it at the time of his termination, he may be awarded back pay up until the date the employer discovered the misconduct, but not reinstatement. It would seem that the opposite should be true with respect to volunteers. A volunteer should be eligible for reinstatement even though he would not be entitled to an award of back pay. Perhaps under Title VII the injured volunteer may also be entitled to emotional distress damages.

The injured volunteer would almost certainly be entitled to attorneys fees under Title VII, as a plaintiff only needs to establish nominal damages in order to recover attorney fees. Even without nominal damages, a plaintiff can be considered a prevailing party entitled to attorney fees if he or she establishes entitlement to injunctive relief or reinstatement.

Since a volunteer’s remedy is somewhat limited, some might question why a volunteer or a “volunteer plus” would choose to litigate. An individual’s voluntary service is important. To the extent that a volunteer take his or her volunteerism seriously, he or she may view the services performed no differently than those of a paid employee. In fact, if the individual feels aggrieved, he or she may be more offended than an employee who is at least getting paid. Thus, the volunteer, if he or she can afford it, may be more likely to litigate in order to make a statement against the organization through the lawsuit.

VII. CONCLUSION

This country needs volunteers for several critically important reasons. They provide free labor, which is critical to certain non-profit organizations that need more workers than they can afford to pay. Additionally, volunteerism provides students and other individuals, some of whom may be disabled, the opportunity to establish themselves.

There does not seem to be any dispute that our nation’s employment

---

171. Jordan, supra note 4, at 303.
172. Unfortunately, there are statistics indicating that employers tend to shy away from hiring individuals with disabilities. There is some debate about whether or not this is the result of employment discrimination against disabled workers. Id. at 306.
laws do not cover the pure or ordinary volunteer. However, conflicting opinions have been issued with respect to a certain type of individual whom I termed a “volunteer plus.” Usually, when volunteers receive something extra, such as a stipend or benefits, they are more likely to be found to be employees—but this is not always the case. Their employment status depends upon the type of benefits they receive and which type of test the court will utilize to determine employee status.

In the ideal world, it would be preferable not to have different standards to determine whether someone is an employee. However, it is Congress’ responsibility to change this if it desires one uniform standard. While it is submitted that a single uniform standard would further public policy by providing more certainty, it is significant that Congress has not acted to amend our employment laws to provide one clear definition of who an employee is. However, it would not be all that unusual for Congress to act to define the line between a volunteer and an employee, since there are other federal and state employment statutes which specifically include volunteers within its protection.

Unless Congress acts, there is likely to be great variation in this country with respect to which employment test should be applied in

173. Of course, where an individual receives a substantial benefit in exchange for services, courts have not had much trouble finding that such an individual is an employee notwithstanding the fact that the individual did not receive any wages. See, e.g., Genarie v. PRD Mgmt., Inc., No. 04-2082, 2006 U.S. Dist. LEXIS 9705, at *41 (D.N.J. Feb. 17, 2006) (stating that a maintenance worker who receives a free apartment is considered an employee under FLSA).

174. See United States Federal Employees’ Compensation Act, 5 U.S.C. § 8101(1)(B) (2006) (including within the definition of employee certain individuals who render service without pay or for nominal pay); Florida Workers’ Compensation Law, FLA. STAT. ANN. § 440.02(15)(d)(6)(West 2006) (including volunteers who work for state, county, city, or other governmental entities within the definition of employee under Workers’ Compensation Law); Pennsylvania Workers’ Compensation Law, 77 PA. CONS. STAT. § 1031a(2) (2005)(defining employee to include all members of volunteer ambulance corps); Utah Workers’ Compensation Law, UTAH CODE ANN. § 67-20-3(2)(a)(West 2006) (requiring supervising agencies to provide workers’ compensation for volunteer safety officers); McClung-Gagne v. Harbour City Volunteer Ambulance Squad, 721 So. 2d 799, 800 (Fla. Dist. Ct. App. 1998) (stating that a volunteer paramedic who injured his back while lifting a stretcher was entitled to workers compensation under Florida law); Borough of Heidelberg v. Workers’ Comp. Appeal Bd., 894 A.2d 861, 866 (Pa. Commw. Ct. 2006) (stating that a volunteer emergency medical technician who performed services for ambulance corps and had not earned wages for 32 years is entitled to workers compensation under Pennsylvania law). But see Hoste v. Shanty Creek Mgmt., Inc., 592 N.W.2d 360, 366 (Mich. 1999) (stating that a volunteer member of the National Ski Patrol who received free lift tickets, skiing privileges for his family, hot beverages, and reduced meals and merchandise was not an employee under Michigan Workers Compensation statute since he was not hired for pay); Walrond v. County of Somerset, 888 A.2d 491, 499 (N.J. Super. Ct. App. Div. 2006) (stating that volunteers are not covered under New Jersey Workers’ Compensation statute).
determining whether or not someone is an independent contractor or an employee. However, it is submitted that the appropriate test to determine whether a volunteer is an employee must both examine whether the putative employee was hired which involves an examination of whether the employee receives remuneration and whether his or her work is controlled by the employer.

Volunteers often share a likeness to employees in that they may report to work every day and may even work side by side with employees. There does not appear to be any reason why those volunteers should not be covered under the law—particularly if they satisfy the two-part test discussed throughout this article.

Finally, it is important to remember that simply because an individual is a volunteer, it does not necessarily follow that he or she does not have any recourse to challenge his or her termination from volunteer service. For example, discharged volunteers have brought claims under state defamation law,\textsuperscript{175} the whistleblower statutes,\textsuperscript{176} the First Amendment,\textsuperscript{177} as well as statutes which outlaw discrimination in places of public accommodation.\textsuperscript{178} One can even envision a volunteer bringing a common law tort action, such as assault or intentional infliction of emotional distress, against the company that the individual volunteers for.\textsuperscript{179} Of course, it is also possible that a volunteer may use a tort claim directly against an individual employee.\textsuperscript{180} Therefore, it is important for courts and

\textsuperscript{175} McAdoo v. Diaz, 884 P.2d 1385, 1389 (Alaska 1994) (finding that a discharged church volunteer states claim for defamation under Alaska law based upon termination letter, but does not have cause of action under state whistleblower statute since plaintiff was not an employee).

\textsuperscript{176} See id.

\textsuperscript{177} See, e.g., Hyland v. Wonder, 972 F.2d 1129, 1136 (9th Cir. 1992) (holding that an alleged loss of a valuable governmental benefit as retaliation was a valid First Amendment claim). \textit{But see New York State Law Officers Union v. Andreucci}, 433 F.3d 320, 327 n.5 (2d Cir. 2006) (explaining that the Second Circuit has not yet decided how claims of termination from volunteer positions should be analyzed under the First Amendment).


In addition to the ADA, the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a to 2000a-6 (2006), and 39 states, including the District of Columbia, outlaw discrimination in places of public accommodation. Desautels, \textit{supra} note 3, at 96 n.23 (listing statutes of jurisdictions that have enacted public accommodation statutes).

\textsuperscript{179} See, e.g., Chavez v. Thomas & Betts Corp., 396 F.3d 1088, 1099 (10th Cir. 2005) ((upholding plaintiff’s negligent retention and supervision tort claims) \textit{overruled in part on other grounds by} Metzler v. Federal Home Loan Bank, 464 F.3d 1164 (10th Cir. 2006)

\textsuperscript{180} See Hanford v. Plaza Packaging Corp., 778 N.Y.S. 2d 768, 768 (N.Y. 2004)
litigants to think outside the box of employment law—which this article has addressed—to determine whether there are any non-employment causes of action.\textsuperscript{181}

\textsuperscript{181} (finding that an employee may bring an action against employer and co-worker asserting intentional infliction of emotional distress and other claims).

181. I will leave it to others to explore in further detail non-employment causes of action applicable to volunteers.