

COOPERATIVE PRINCIPLES AND FAIR LABOR STANDARDS: VOLUNTEERING FOR FOOD CO-OPS

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ABSTRACT

Groceries across the United States are leaving the urban core and contributing to the food insecurity with which approximately 40 million people struggle. Food cooperatives, which are owned by members of the community, can help fill this void. The owners often volunteer their time to serve their community by working at the food co-op. The Department of Labor, the agency responsible for enforcement of the Fair Labor Standards Act (FLSA), warns that this practice is unlawful because volunteers must work only for non-profits and must perform only public service tasks. In this Article, we argue that food cooperatives located in food deserts do not violate the FLSA when the owners volunteer to work without compensation. The applicable court precedent indicates that in certain cases, volunteers may work for for-profits and that working for a food cooperative in a food desert is one such instance. In any event, when considering the nature and mission of a food cooperative, one located in a food desert is properly characterized as a non-profit for FLSA purposes. Whether the food co-op operates as a for-profit, non-profit, or not-for-profit, owners should be able to volunteer for humanitarian tasks like assisting the elderly and disabled with transportation and shopping, teaching cooking classes, and providing childcare.

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INTRODUCTION

Approximately 40 million people struggle with hunger in the United States.¹ In certain areas, redlining and a lack of grocery stores contribute to this food insecurity.² The USDA classifies these areas where people do not earn enough income, many are without vehicles,

1. See *Facts About Poverty and Hunger in America*, FEEDING AM., <https://www.feedingamerica.org/hunger-in-america/facts> [https://perma.cc/6UYG-5YM7] (last visited Feb. 3, 2020); USDA ECON. RESEARCH SERV., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/key-statistics-graphics.aspx> [https://perma.cc/SHG7-Z78Y] (last visited Feb. 3, 2020). *But c.f. Food Security in the U.S: Measurement*, USDA ECON. RESEARCH SERV., <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/measurement/#hunger> [https://perma.cc/4ZAZ-KTNZ] (last visited Feb. 3, 2020) (“USDA does not have a measure of hunger or the number of hungry people. Prior to 2006, USDA described households with very low food security as ‘food insecure with hunger’ and characterized them as households in which one or more people were hungry at times during the year because they could not afford enough food. ‘Hunger’ in that description referred to ‘the uneasy or painful sensation caused by lack of food.’”).

2. See Nathan A. Rosenberg & Nevin Cohen, *Let Them Eat Kale: The Misplaced Narrative of Food Access*, 45 *FORDHAM URB. L.J.* 1091, 1097, 1099 (2018).

and commercial grocery chains have abandoned as food deserts.³ One potentially viable way to help combat food insecurity and provide a grocery in such an area is to open a food cooperative (co-op) owned by the members of the community.⁴

Community members who want to open a food co-op face challenges, such as educating the community about a cooperative entity, procuring funding, and implementing an innovative business plan.⁵ Groceries are well-known to operate on thin margins, usually around 2%.⁶ Food co-ops can operate despite this difficult business environment because they are financed by large numbers of community residents, partner with other local organizations, and return surplus earnings to the owners, which circulate in the community, rather than sending them back to a corporate headquarters.⁷

One way that some food co-ops lower the cost of doing business is by operating owner–volunteer programs, where the grocery owners

3. See *id.* at 1104; Ruelle Seymour, *Food Deserts Are Ripe for Business*, 44 B.C. ENVTL. AFF. L. REV. 421, 421–22 (2019); Catherine Brinkley et al., *If You Build It with Them, They Will Come: What Makes a Supermarket Intervention Successful in a Food Desert?*, WILEY 1, 1 (Aug. 14, 2018). Scholars and activists have criticized the term “food desert,” noting that the idea implicit in a desert that simply opening more grocery stores will solve food insecurity is problematic. They propose using instead a term like “food apartheid” that recognizes that redlining and racism as well as lack of reliable transportation and culturally relevant food products all factor into food insecurity. See Rosenberg, *supra* note 2, at 1106; Christine Byrne, *It’s Great That We Talk About “Food Deserts”—But It Might Be Time to Stop*, HUFFPOST (July 4, 2019, 5:45 AM), https://www.huffpost.com/entry/food-desert-problem-access-healthy-options_n_5d1b910ee4b082e55370dee5?guccounter=1 [<https://perma.cc/8NQD-EJ6G>]. We use the term “food desert” because it provides a term defined by the USDA that can provide a relatively straightforward basis for permitting certain food co-ops to use volunteers.

4. See Jonathan Brown, *Beyond Corporate Form: A Response to Dan DePasquale, Surbhi Sarang, and Natalie Bump Vena’s Forging Food Justice Through Cooperatives in New York City*, 45 FORDHAM URB. L.J. 1121, 1130–31 (2018); see also Brinkley, *supra* note 3, at 1. *But see* Rosenberg, *supra* note 2, at 1108 (asserting the majority of reliable studies find no association between a grocery and improved health outcomes).

5. See Brown, *supra* note 4, at 1131–32.

6. Tiffany C. Wright, *What Is the Profit Margin for a Supermarket?*, AZCENTRAL <https://yourbusiness.azcentral.com/profit-margin-supermarket-17711.html> [<https://perma.cc/93MY-554Q>] (last visited Feb. 3, 2020); see also Mary Ellen Biery, *The 15 Least Profitable Industries in the U.S.*, FORBES (Oct. 3, 2016, 8:53 AM), <https://www.forbes.com/sites/sageworks/2016/10/03/the-15-least-profitable-industries-in-the-u-s/#4dd1a9dd618a> [<https://perma.cc/EE88-SB43>].

7. See Roland Hall & Bruce Mayer, *Updating Food Cooperative Member Labor Issues*, COOP. GROCER 14, 14 (Mar.–Apr. 2018).

volunteer their time, without pay, to the cooperative, sometimes in return for a discount on grocery products.⁸ The Department of Labor (DOL) has indicated, however, that co-ops, as for-profit businesses, cannot lawfully utilize volunteer programs and must instead pay workers as employees.⁹ Cooperative guidance emphasizes the risk of co-op owners volunteering their time and labor because of the DOL's position.¹⁰ We participated in community engaged research and looked beyond the DOL's position and the guidance emphasizing it. We initially struggled to find on-point authority, given the lack of legal literature about the circumstances in which the Fair Labor Standards Act (FLSA) permits volunteering for a for-profit entity generally or a food co-op specifically. As stated by one scholar in the article *Our Nation's Forgotten Workers: The Unprotected Volunteers*, "[a]lthough volunteerism is vitally important to this country, little scholarly attention has been paid to it, especially in relation to employment law."¹¹ We kept digging and discovered that ample authority, including Supreme Court precedent and some of the DOL's own statements and practices, indicate that owners of food co-ops operating in food deserts can volunteer for public service activities without running afoul of the FLSA.

In this Article, we make the creative yet pragmatic legal argument that food co-ops, located in food deserts, can lawfully use volunteers. We also explain the types of work in which volunteers can engage. Other law review articles explain how food cooperatives can help communities achieve food equity if their growth is supported by state and local public policy¹² and how charities can support mission-related investing in cooperatives to combat income inequality, especially with recommended changes to state laws.¹³ None, however, argue that the DOL should permit volunteer programs, which can be critical to maintaining a food cooperative in an area where people are faced with food insecurity. In Part I, we provide background information about food co-ops and the FLSA.¹⁴ Having provided the

8. See *id.*

9. See *id.*

10. See *id.*

11. Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 150 (2006).

12. See Dan DePasquale, Surbhi Sarang & Natalie Bump Vena, *Forging Food Justice Through Cooperatives in New York City*, 45 FORDHAM URB. L.J. 909, 918 (2018).

13. See Elaine Waterhouse Wilson, *Cooperatives: The First Social Enterprise*, 66 DEPAUL L. REV. 1013, 1016 (2017).

14. See *infra* Part I.

necessary background, in Part II we make the argument that food co-op owners can volunteer without violating the FLSA for a wide range of tasks that will help their co-op stay in business and provide healthy food to those who might otherwise lack it.¹⁵ The final Part concludes.¹⁶

I. BACKGROUND

In this Part, we first explain what a food co-op is and then explain why they use volunteer programs. We also provide background on the FLSA.

A. What Is a Food Co-op?

Cooperatives are businesses that are owned and governed by the people who use them.¹⁷ Normally each co-op owner has one vote and, at a minimum, elects the board of directors.¹⁸ In the most participatory cooperatives, sometimes termed “collectives,” the owners run and govern the business, including voting on many business decisions.¹⁹

Cooperatives have a long history worldwide.²⁰ The principles embraced by modern cooperatives date back to the formation of the Rochdale cooperative in England in 1844.²¹ The principles are:

- Capital is provided by members and bears “a fixed rate of interest”;
- “[O]nly the purest provisions procurable should be supplied to members”;
- Transparency, in that the full weight and measure of a product should be provided and that “frequent statement and balance sheets should be presented to members”;
- “[M]arket prices should be charged and no credit given nor asked”;
- Surplus earnings “should be divided pro rata upon the amount of purchases made by each member”;
- Each member should have one equal vote, including women;

15. See *infra* Part II.

16. See *infra* Conclusion.

17. See Wilson, *supra* note 13, at 1016.

18. See *id.* at 1019, 1023.

19. See *id.* at 1023.

20. See *id.* at 1018.

21. See *id.*

- Management should be by “officers and committee elected periodically”;
- A set percentage of surplus “should be allotted to education.”²²

In the United States, co-ops are often formed to meet owners’ needs that are going unaddressed by the capital-focused market economy.²³

There are various types of cooperatives, such as producer co-ops, worker-owned co-ops, and consumer co-ops. Worker-owned co-ops are businesses owned by the people who work there.²⁴ An example of a well-known worker-owned cooperative is Equal Exchange.²⁵ Equal Exchange is a fair-trade coffee company that sources from small farmers rather than large plantations or agri-business.²⁶ Producer co-ops are businesses where other businesses or individuals, such as farmers, join together to process or sell their product.²⁷ Consumer co-ops are businesses owned by the people who shop or make purchases at the business.²⁸ A well-known consumer co-op is REI.²⁹ REI is a retailer of outdoor-adventure clothing and equipment, including popular brands such as The North Face and Patagonia.³⁰

A food co-op is a type of consumer co-op.³¹ The people who shop at the store own the store.³² By joining together and establishing and owning a store, they meet their basic need for food or for certain types of food. Their use of the store, by shopping at the store, is known as

22. *Id.* at 1019–20 (discussing the Rochdale Principles original model).

23. *Cf. id.* at 1016 (noting that historically owners of cooperatives “have often been a class of individuals in need of assistance”).

24. *See* Ariana Levinson et al., *Alleviating Food Insecurity via Cooperative Bylaws*, 24 *GEO. J. POVERTY L. & POL’Y.* 227, 234 (2019) (discussing employee ownership and management of cooperatives).

25. *See 30 Years of Building a New Food System: An Interview with Equal Exchange*, TESA COLLECTIVE (Apr. 2, 2019), <http://www.toolboxford.org/building-a-new-food-system-equal-exchange/> [<https://perma.cc/PGE3-B8KN>] (discussing the Equal Exchange’s history and operations).

26. *See id.*

27. *See* Marc Schneiberg, *Toward an Organizationally Diverse American Capitalism? Cooperative, Mutual, and Local, State-Owned Enterprise*, 34 *SEATTLE U. L. REV.* 1409, 1413 (2011) (describing producer co-op operations).

28. *See* DePasquale, *supra* note 12, at 918.

29. *See* Usha Rodrigues, *Entity and Identity*, 60 *EMORY L.J.* 1257, 1284 n.131 (2011).

30. *See* REI CO-OP, <https://www.rei.com/> (last visited Feb. 3, 2020).

31. *See* DePasquale, *supra* note 12, at 918.

32. *See id.*

“patronage.”³³ If the store makes more money than that necessary to run and improve it, then some of the surplus is returned to the owners in the form of a patronage dividend, which is their share of the surplus determined by how much they bought.³⁴

Often times when we think of a food co-op, we are thinking of a store that was established in the 1960s or 1970s and sells healthy food.³⁵ Historically, several of these cooperatives operate in low-income areas providing food that would otherwise be available only in groceries considerable distances away.³⁶ For instance, the Park Slope Food Co-op opened in New York City in 1973.³⁷ Sevananda Cooperative in Atlanta opened in the 1970s as well, at a time when whites were fleeing the urban core, a city’s downtown and immediately adjacent areas.³⁸

Food co-ops have also been established in the United States by communities of color who were excluded from the capital-centered market economy.³⁹ For example, Dolores Huerta and the United Farm Workers established a food cooperative in the 1960s as they fought for better working conditions and pay for farmworkers.⁴⁰ Jessica Gordon Nembhard’s pathbreaking book, *Collective Courage*, describes how historically Blacks in the United States overcame racism and violence by establishing cooperatives, including food co-ops.⁴¹

33. See *Patronage & Tax*, CO-OP LAW.ORG, <https://www.co-oplaw.org/finances-tax/patronage/> [<https://perma.cc/6V69-XUWN>] (last visited May 8, 2020).

34. See *id.*

35. See DePasquale, *supra* note 12, at 919 (“As part of the broader counter-culture movement, a new wave of cooperatives opened in the 1960s and 1970s. In 1979, the United States had roughly 3000 food cooperatives and wholesale food buying clubs.”).

36. See *id.* at 919–20 (discussing food co-ops fighting poverty and racism).

37. See *id.* at 921.

38. See Allison Salerno, *The Survival of Sevananda, Atlanta’s Only Co-op Grocery Store*, ATLANTA MAG. (July 23, 2019), <https://www.atlantamagazine.com/dining-news/the-survival-of-sevananda-atlantas-only-co-op-grocery-store/> [<https://perma.cc/S5RZ-KHVP>].

39. See DePasquale, *supra* note 12, at 920.

40. See William C. Bryson, *Clean Revolution, Brass Tacks*, HARV. CRIMSON (Oct. 22, 1968), <https://www.thecrimson.com/article/1968/10/22/clean-revolution-pbobbne-evening-early-last/> [<https://perma.cc/5WKZ-35H8>]. This UFW food co-op was brought to our attention by Dolores Huerta’s post-movie comments at the Speed Art Museum in Louisville, Kentucky, in January 2018.

41. See *generally* JESSICA GORDON NEMBHARD, *COLLECTIVE COURAGE: A HISTORY OF AFRICAN AMERICAN COOPERATIVE ECONOMIC THOUGHT AND PRACTICE* (2014) (discussing how establishing co-ops helped African Americans overcome racism and violence).

Recently, a growing movement intends to open food cooperatives in low-income areas as groceries across the country abandon the urban core.⁴² These areas are sometimes known as “food deserts,” areas where large numbers of people are food insecure due to historical redlining, systemic poverty, and grocery closures.⁴³ Mandela Grocery Cooperative in Oakland, California, has been in business since 2010 and provides half-priced food and vegetables to those who receive SNAP.⁴⁴ In 2012, Nola Food in New Orleans became a food cooperative.⁴⁵ In 2015, Nu Waters, which is a farm as well as a store, opened in Houston.⁴⁶ Also, in 2015, Seward Community Co-op opened a new branch in a historically low-income area of Minneapolis.⁴⁷ Currently there are initiatives in Detroit, Dayton, Cincinnati, and Louisville to open groceries in areas without a grocery or suffering from recent grocery closures.⁴⁸

B. Member Volunteer Programs

When food co-ops first emerged in the 1960s and 1970s, many of them relied on their members to perform necessary tasks such as cleaning the floors, bagging groceries, stocking shelves, and ringing up customers.⁴⁹ “The common approach of such [owner]-worker programs was to provide [owner]-workers with discounts on goods, rather than wages.”⁵⁰ These programs benefitted the food co-ops because, in the beginning, co-ops were not in a position to hire employees to perform such tasks.⁵¹ While the owners benefitted from store discounts, they also enjoyed helping their co-ops grow.⁵² “A further benefit remarked upon by many such member-workers was the

42. See Brinkley, *supra* note 3, at 1.

43. *Id.*

44. See Levinson, *supra* note 24, at 238; Leah Halliday & Michele Foster, *A Tale of Two Co-ops*, 9 J. AG. FOOD SYS. & COMM. DEV. 239, 249 (2020).

45. See Levinson, *supra* note 24, at 237.

46. See *id.*

47. See *id.*; Halliday & Foster, *supra* note 44, at 242–43.

48. See Levinson, *supra* note 24, at 237–38; see also Steve Dubb, *Community Wealth: Creating a New Community Economic Base in Detroit*, 17 J.L. SOC’Y 113, 115–16 (2015).

49. *Ask Co-op Cathy: Are All Food Co-ops Consumer-Owned?*, COOP. DEV. INST. (Oct. 28, 2014), <http://cdi.coop/cathy-food-coops-consumer-owned/> [<https://perma.cc/583H-7R34>].

50. See Hall & Mayer, *supra* note 7, at 14 (advising food cooperatives not to use volunteer programs given risks of FLSA coverage).

51. See *id.*

52. See *id.*

resulting strength of community among the members and their cooperative.”⁵³

Beginning in the 1980s, awareness arose among food co-ops of the legal issues surrounding the applicability of the FLSA minimum wage and overtime pay requirements.⁵⁴ A violation of the FLSA would negatively impact owner-worker programs.⁵⁵

C. General Background on FLSA

The FLSA, enacted in 1938,⁵⁶ is the federal law which sets the minimum wage and overtime requirements.⁵⁷ “More than 143 million American workers are protected (or ‘covered’) by the FLSA, which is enforced by the Wage and Hour Division of the U.S. Department of Labor.”⁵⁸ The Congressional Declaration of Policy in the FLSA states the intent “to address ‘labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers’ and to support the ‘free flow of goods in commerce’ by preventing labor disputes.”⁵⁹ Congress planned to eliminate “the unfair competition that Southern employers gave Northern employers because of the dearth of wage and hour regulations in the South.”⁶⁰

The FLSA “contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to [the] Act, were not deemed to fall within an employer-employee category.”⁶¹ The Act defines “employee” broadly as “any individual employed by an employer,”⁶² and “employ” as “to suffer or permit to work.”⁶³ The FLSA’s definition of “employee” “is

53. *Id.*

54. *See id.*

55. *See id.*

56. *See* Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA’s Future*, 13 N.Y.C. L. REV. 107, 107 (2009).

57. *See* U.S. DEP’T OF LABOR, *Fact Sheet #14: Coverage Under the Fair Labor Standards Act (FLSA)*, WHD (July 2009). The minimum wage is currently \$7.25 per hour. *Id.*

58. *Id.*

59. Harris, *supra* note 56, at 123–24 (quoting FLSA, 29 U.S.C. § 202(a) (2018)).

60. *Id.* at 124.

61. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947)).

62. § 203(e)(1).

63. § 203(g).

necessarily a broad one in accordance with the remedial purposes of the Act.”⁶⁴ The “striking breadth” of the definition of “employ,” further, “stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency law principles.”⁶⁵

The definition is not so broad, however, as to be limitless. The United States Supreme Court “has consistently construed [the FLSA] ‘liberally to apply the furthest reaches consistent with congressional direction,’ recognizing that broad coverage is essential to accomplish the goal of outlawing from interstate commerce goods produced under conditions that fall below minimum standards of decency.”⁶⁶ The Supreme Court has also explicitly recognized that an individual who, “without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit” is outside the sweep of the Act.⁶⁷

II. OWNERS OF FOOD CO-OPS THAT COMBAT FOOD INSECURITY SHOULD BE ABLE TO VOLUNTEER

Food co-ops that serve “food deserts” should be able to have members volunteer without violating the FLSA. The DOL, however, generally prohibits volunteering for for-profit businesses. Therefore, the literature about the FLSA and food co-ops suggests that no exception permits members to volunteer for food-cops.⁶⁸ We argue

64. Brock v. Superior Care Inc., 840 F.2d 1054, 1058 (2d Cir. 1988) (citing United States v. Rosenwasser, 323 U.S. 360, 363 (1945)).

65. Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 326 (1992).

66. Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290, 296 (1985) (citations omitted).

67. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947); see also Walling v. Nashville, C. & St. L. Ry., 330 U.S. 158, 160 (1947) (companion case holding that “persons training to become firemen, brakemen, and switchmen” are not employees covered by the FLSA).

68. See Laddie Lushin, *Co-Op Member Labor Programs Under the Fair Labor Standards Act: A Matter of Economic Reality*, 1, 5–6 (2009) (advising that no exception for volunteers excepts members from FLSA coverage, but arguably they are excepted under the economic realities test used for independent contractors); see also Hall & Mayer, *supra* note 7, at 14–15 (advising food cooperatives not to use volunteer programs given risks of FLSA coverage); Thane Joyal, *Who’s Watching Member Labor in Retail Food Cooperatives? So Much History, So Many Considerations*, COOP. GROCER, Jan.–Feb. 2012, at 26–28 (explaining although the Supreme Court interprets the FLSA to exclude uncompensated volunteers, the exclusion is extremely narrow and co-ops should “proceed with caution”); Martha

that in certain situations volunteers can work for for-profit entities without pay and that working to combat food insecurity in a member-owned cooperative is a situation where such volunteerism is permissible. Next, we argue that even if volunteers cannot work for for-profit entities without pay, a food cooperative should not be treated as a for-profit entity but should instead be subject to the rules governing non-profits. Finally, we argue that under the rules governing either for-profits or non-profits, volunteers are permitted to perform certain tasks for the co-ops they own.

A. Can Volunteers Work for For-Profit Entities Without Pay?

The law governing the use of volunteers by consumer cooperatives is limited. So, it turns out, is the law governing the use of volunteers by for-profit entities. Only the law governing the use of volunteers by non-profits and government entities is relatively well developed.⁶⁹

Even if classified as for-profits, cooperatives located in food deserts and intended to be a community solution to food insecurity should be entitled to have owners volunteer for humanitarian or public service purposes. While DOL documents indicate that for-profits cannot use volunteers, the Supreme Court has indicated that people

Hotchkiss, *Three Issues Facing Our Co-op*, HAMPDEN PARK CO-OP, <http://www.hampdenparkcoop.com/three-issues-facing-our-co-op> [<https://perma.cc/UHH8-NCKX>] (last visited Feb. 3, 2020) (volunteer program not in compliance because a for-profit co-op); *Legal Tools for Community Businesses and Nonprofits*, CMTY. ENTER. LAW, <http://communityenterpriselaw.org/employmentlaw/> [<https://perma.cc/7SCS-6TWH>] (last visited Feb. 3, 2020) (using example of an unlawful grocery co-op of 300 low-income people working to get affordable access to good food); *Legal Information, Best Practices, and Supporting Tools for Cooperatively Owned Business and Organizations*, CO-OP LAW.ORG, <https://www.co-oplaw.org/governance-operations/employment-law/#Who-Can-Be-Considered-a-VOLUNTEER> [<https://perma.cc/2HBT-9QPE>] (last visited Feb. 3, 2020) (explaining most co-ops are not non-profits and owners cannot volunteer unless they are independent contractors, interns, or partners).

69. See Bradford J. Williams, “Interns” vs. “Volunteers”—Free Labor Under the FLSA?, 20 NO. 11 COLO. EMP. L. LETTER 1 (describing requirements to constitute a private-sector nonprofit volunteer not entitled to pay); U.S. DEP’T OF LABOR, *Fact Sheet #14A: Non-Profit Organizations and the Fair Labor Standards Act (FLSA)*, WHD (Aug. 2015) [hereinafter *Fact Sheet #14A*].

can volunteer for for-profits,⁷⁰ and the DOL permits internees and trainees to work for for-profit entities without pay.⁷¹

We understand and agree with the rationale behind the broad DOL ban on for-profits using volunteers. It ensures that one company does not have an unfair advantage over the other by lowering labor costs and, most importantly, ensures that workers are paid for their efforts. A bright-line rule is easier to administer than one with many exceptions, as demonstrated by differing interpretations by the courts and the DOL over the years regarding the test for determining who is an intern able to work without pay. But a narrow exception permitting members of food co-ops that are in areas designated by United States Department of Agriculture as food insecure would be relatively straightforward to apply.⁷² This narrow exception would enable communities to engage in self-help of bringing more food security and health to their neighborhoods.⁷³

This Section first explains the DOL's position that for-profits cannot utilize volunteers and how that position has been reiterated in various pieces of legal guidance. The Section then challenges this position by showing that the courts, including the U.S. Supreme Court, permit volunteering for for-profit businesses and that the DOL itself recognizes several exceptions to this purported absolute prohibition. Finally, the Section recognizes that some legal guidance advocates for the position that for-profits can utilize volunteers, further undermining the DOL's complete prohibition on volunteering for a for-profit business.

1. *The DOL's Prohibition on Volunteering for For-Profits*

The DOL states on its web page that employees cannot volunteer for for-profit enterprises.⁷⁴ As part of the administration of the FLSA, officials of the DOL Wage and Hour Division may provide official

70. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

71. See U.S. DEP'T. OF LABOR, *Fair Labor Standards Act Advisor*, <https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> [<https://perma.cc/8KY6-RD2W>] (last visited Feb. 3, 2020).

72. See *Nutrition Digest: USDA Defines Food Deserts*, AM. NUTRITION ASS'N, <https://web.archive.org/web/20190406055550/http://americannutritionassociation.org/newsletter/usda-defines-food-deserts> [<https://perma.cc/8CRK-PUX6>] (last visited Feb. 3, 2020).

73. Rodriques, *supra* note 29, at 1309 (“The nonprofit form is not the only one that can create a distinctive identity; cooperatives can as well.”).

74. U.S. DEP'T. OF LABOR, *supra* note 71 (“Under the FLSA, employees may not volunteer services to for-profit private sector employers.”).

written explanations of what the FLSA requires in fact-specific situations.⁷⁵ These opinion letters are provided to help employers, employees, and other members of the public understand their rights and responsibilities under the law.⁷⁶ In one opinion letter, the DOL Wage and Hour Division notes that “we have a longstanding policy of limiting volunteer status to those individuals performing charitable activities for not-for-profit organizations.”⁷⁷ In the case addressed by the opinion, “a mail order company offering general merchandise to the public through a catalog” wished to permit volunteers for non-profit communities and church groups to gift-wrap the merchandise on the company’s premises before shipping to customers.⁷⁸ The company would “donate a sum of money to the group” providing the volunteers.⁷⁹ The DOL opined that the individuals working for the groups would be employees of the company.⁸⁰ The gift-wrapping services “would not in themselves contribute to community or religious programs” but rather “are going to a profit-seeking company.”⁸¹ The letter directed that the company must comply with the FLSA as to the gift-wrapping individuals even if the company “does not plan to control the hours of the volunteers, will not directly supervise them, [and] will only establish general rules of conduct.”⁸²

In another opinion letter, the DOL applied the prohibition to a grocery store requiring that students bagging groceries to raise money for charity be paid as employees by the grocery.⁸³ The grocery had a program that operated on periodic weekends to permit students belonging to community organizations to bag groceries and help carry them to customers’ cars.⁸⁴ The students received tips from the customers which were then given to the community organization to

75. See U.S. DEP’T. OF LABOR, *Final Rulings and Opinion Letters*, <https://www.dol.gov/whd/opinion/guidance.htm> [<https://perma.cc/GJA5-2DBY>] (last visited Feb. 3, 2020).

76. See *id.*

77. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter ¶ 32,827 (July 18, 1996); Sungho Cho & Joshua Smith, Chen v. Major League Baseball: *Hybrid Collective Action Under Rule 23 and the Fair Labor Standards Act 216(b)*, 25 J. LEGAL ASPECTS SPORT 154 (2015) (“A private for-profit enterprise may not use the exemption as a defense in FLSA litigation.”).

78. See U.S. Dep’t of Labor, Wage & Hour Div., *supra* note 77.

79. *Id.*

80. See *id.*

81. *Id.*

82. *Id.*

83. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter ¶ 31,072 (Oct. 7, 2002).

84. See *id.*

which they belonged.⁸⁵ The opinion concluded that the students were employees subject to the FLSA because “the bagging activities were an integral part” of the groceries’ business for which it paid regular employees when the students were not present.⁸⁶ The opinion reasoned that the grocery was “organized for a business purpose, engages in ordinary commercial activities, and serves the general public in competition with other commercial enterprises” and that the “students expected to receive compensation for their services in the form of customer tips.”⁸⁷

Another opinion letter explicitly addresses a food co-op’s member volunteer program, finding that in the circumstances where members performed duties integral to the business, they were employees.⁸⁸ The letter did not, however, describe the circumstances under which a member might be a true volunteer.⁸⁹ This 1997 opinion letter was a response to a letter in which owners of a cooperative grocery store asked a number of questions concerning the application of the FLSA to the co-op.⁹⁰ The questions asked are unknown, but the cooperative indicated “that cooperative members volunteer to stock shelves, sweep floors, slice meat, and operate cash registers in the store in exchange for discounts on purchases.”⁹¹ The discounts were used by the owners at any time during the two-week period after they were earned.⁹² Accordingly, the co-op asked if their “practice violate[d] the minimum wage provisions of the FLSA.”⁹³ The DOL explained:

Under section 3(g) of the FLSA, “employ” is defined as “to suffer or permit to work.” However, the Supreme Court has made it clear that the FLSA was not intended “to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another.” . . . [T]he Department follows this judicial guidance in the case of individuals serving as unpaid volunteers in various community services. Individuals who volunteer or donate their services, usually on a part-time basis, for *public service, religious or humanitarian objectives*, not as employees and without contemplation of pay, are not

85. *See id.*

86. *Id.*

87. *Id.*

88. *See* U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Jan. 21, 1997) at *1.

89. *See id.*

90. *See id.*

91. *Id.*

92. *See id.*

93. *Id.*

considered as employees of the religious, charitable and similar nonprofit corporations that receive their service.⁹⁴

The DOL further reasoned that the Supreme Court has recognized that part ownership “in a cooperative does not preclude the existence of an employer-employee relationship.”⁹⁵ The DOL asserted that “the fact that the company is not operated for profit also is immaterial.”⁹⁶ According to this opinion letter, cooperative owner-members are likely to be employees under the Act because even though they are owners, part ownership or any other proprietary interest of a member in a cooperative does not preclude the existence of an employer-employee relationship.⁹⁷ The DOL, thus, generally asserts that volunteers can work for religious and charitable nonprofits but not for for-profit businesses, including food co-ops.

2. *Guidance Affirming Volunteering for a For-Profit Is Prohibited*

Much of the literature providing guidance for employers instructs for-profit businesses not to use volunteers because doing so would violate the FLSA.⁹⁸ For example, one law letter advises, “The FLSA prohibits for-profit private-sector entities from using volunteers because doing so could create an end-run around the basic ‘remedial and humanitarian’ purpose of the Act to protect workers from exploitation. So for them, the answer is simple: They can’t have volunteers.”⁹⁹ Several scholarly articles have also interpreted the FLSA to prohibit volunteering for for-profit entities.¹⁰⁰ These law

94. *Id.*

95. *Id.*

96. *Id.*

97. *See id.*

98. *See, e.g.,* Maureen Minehan, *No Good Deed Goes Unpunished: When Volunteers Are Really Employees*, 326 EMP. L. COUNS. NL 1 (Oct. 2017) (“Under the Fair Labor Standards Act (FLSA), individuals cannot volunteer for private employers.”); *see also* Williams, *supra* note 69 (“Private-sector for-profit employers should remain extremely wary of using unpaid interns in light of the stringent six-part test described above and the cost of a potential DOL audit or lawsuit.”).

99. Dinse, Knapp, McAndrew, P.C., *Volunteer or Paid Employee? Overtime or no Overtime?*, 16 NO. 5 VT. EMP. L. LETTER 1 (July 2011).

100. *See* Neyci Lopez, *Keeping Up with the Kale and Radishes: Urban Agriculture and the Protection of Farmer and Gardner Health*, 22 QUINNIAC HEALTH L.J. 107, 122 (2018) (“According to the Department of Labor, under the Fair Labor Standards Act, volunteers may not volunteer services to for-profit private sector employers.”) (internal parenthetical omitted); Cho & Smith, *supra* note 77 (“A private for-profit enterprise may not use the exemption as a defense in FLSA litigation.”);

review articles and legal materials reaffirm the DOL's position that volunteers may not work for for-profit businesses. As discussed in the next Subsection, the Supreme Court and lower courts, contrary to the DOL's position, permit volunteering for for-profit businesses in certain circumstances.

3. *The Courts Permit Volunteering for For-Profits*

In *Walling v. Portland Terminal Co.*, the Supreme Court clearly stated that an individual who, “without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit” is outside the sweep of the Act.¹⁰¹ In *Walling*, the workers worked for a private for-profit railroad company and were found to be trainees who did not need to be paid for the time they spent “taking a course in practical training.”¹⁰² The Court reasoned that the potential workers attending the training did not provide any “immediate advantage” to the employer,¹⁰³ and one article emphasizes that the case addressed trainees and argues it does not permit volunteers.¹⁰⁴ The Court, however, was very clear that those working without promise or expectation of compensation are not covered by the FLSA.¹⁰⁵ This is an explicit statement by the highest court that volunteers for for-profit businesses are permissible.

In the seventy years since that statement, the Supreme Court has not again been asked to address the question of whether volunteering for a for-profit business is permissible. However, two circuit courts have reasoned that volunteering without pay for a for-profit entity is permissible.¹⁰⁶ The Supreme Court has addressed the related issue of volunteering for a private sector non-profit that is running a commercial business in *Tony Alamo Foundation v. Secretary of*

Kelley Jordan, *FLSA Restrictions on Volunteerism: The Institutional and Individual Costs in a Changing Economy*, 78 CORNELL L. REV. 302, 330–31 (1993).

101. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947); *see also* *Walling v. Nashville, C. & St. L. Ry.*, 330 U.S. 158, 160 (1947) (companion case holding that “persons training to become firemen, brakemen, and switchmen” are not employees covered by the FLSA).

102. *See* Jordan, *supra* note 100, at 319.

103. *Id.* at 320.

104. *See* Rubinstein, *supra* note 11, at 153.

105. *See* *Walling*, 330 U.S. at 152.

106. *See* *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 768 (6th Cir. 2018); *Rogers v. Schenkel*, 162 F.2d 596, 598 (2d Cir. 1947).

Labor.¹⁰⁷ The Court upheld the lower court's findings that the commercial businesses that the Foundation owned, "includ[ing] service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy," were an enterprise covered by the FLSA.¹⁰⁸ The Court explicitly recognized that "[a]n individual may work for a covered enterprise and nevertheless not be an 'employee.'"¹⁰⁹ The Court upheld the district court's determination that the workers were employees and not volunteers.¹¹⁰ To reach this determination, the Court applied a modified economic realities test focused on factors including the length of time the workers were dependent on the employer and whether they expected to receive in-kind benefits despite protestations that they were volunteers.¹¹¹ The Court emphasized there was no reason to fear that coverage of the Foundation's employees "will lead to coverage of volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy" because the Act reaches only "ordinary commercial activities" and "only those who engage in those activities in expectation of compensation."¹¹² While the Court held that a non-profit engaging in commercial activities may subject employees to the FLSA requirements, it did not address the reverse question of whether for-profits may have volunteers engaged in public service activities who are not subject to the FLSA requirements.¹¹³ In fact, the Court concluded that "[o]rdinary volunteerism is not threatened by this interpretation of the statute."¹¹⁴

Indeed, several circuit courts have applied the Supreme Court's interpretation of the FLSA that excludes volunteers for for-profit businesses from coverage.¹¹⁵ The Second Circuit held in *Rogers v. Schenkel* that a plaintiff worker for a private for-profit plating company was a volunteer not entitled to compensation under the FLSA.¹¹⁶ The plaintiff was a helper who worked for the company for

107. See generally *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290 (1985).

108. *Id.* at 292, 299.

109. *Id.* at 299.

110. See *id.* at 301.

111. See *id.*

112. *Id.* at 302.

113. See *id.* at 296.

114. *Id.* at 303.

115. See, e.g., *Rogers v. Schenkel*, 162 F.2d 596, 598 (2d Cir. 1947).

116. See *id.* at 597–98.

almost a year.¹¹⁷ The plaintiff wanted to perform “service to further the war effort” and arranged with one of the defendant business partners to serve as a helper.¹¹⁸ On several occasions, the plaintiff declined to submit a report of time worked, stating that “his services were voluntary, and that he had no reason to want any wages and would not accept any wages in any form.”¹¹⁹ The plaintiff was an inexperienced worker who “needed constant supervision by a plater in the performance of his work.”¹²⁰ The lower court found that “[d]uring the first six months of his work, he did even less than the usual helper customarily does.”¹²¹

The *Cathedral Buffet* case involved a for-profit buffet with a religious purpose that provides low-cost meals.¹²² On appeal, the Sixth Circuit reversed the district court’s ruling that the economic realities indicated “the volunteers used by the Buffet were actually employees.”¹²³ The court remanded, finding it undisputed “that the volunteers who worked at” the restaurant had no expectation of receiving compensation.¹²⁴ The court began by stating that “[d]espite its for-profit status,” the restaurant “does not generate a profit” and was subsidized by the church that was the sole shareholder of the business.¹²⁵ The court explained that in a case involving purported volunteers, a court must first determine the “threshold inquiry” of whether the worker had any expectation of compensation before moving on to apply the economic realities test.¹²⁶ The Court recognized that in some cases where workers had no expectation of compensation, but had been coerced into that position, they could constitute employees rather than volunteers.¹²⁷ The coercion has to be “economic in nature, not societal or spiritual.”¹²⁸ The court reasoned that despite the broad remedial nature of the FLSA, it “does not go so

117. *See id.* at 597.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *See Hugler v. Cathedral Buffet, Inc.*, No. 5:15CV1577, 2017 WL 1287422, at *4 (N.D. Ohio Mar. 29, 2017), *rev'd and remanded sub nom. Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 764 (6th Cir. 2018).

123. *Acosta*, 887 F.3d at 764, 768; *Hugler*, 2017 WL 1287422, at *10.

124. *Acosta*, 887 F.3d at 763.

125. *Id.*

126. *Id.* at 766.

127. *See id.* at 768.

128. *Id.* at 767.

far as to regulate when, where, and how a person may volunteer her time to her church.”¹²⁹

As recently as June 2019, the Circuit Court for the District of Columbia addressed the issue of whether volunteers for for-profits are excluded from the coverage of the FLSA and concluded they are.¹³⁰ The court explicitly stated in this case against a for-profit business that “[t]he Act does not extend its protections to workers who are volunteers rather than employees.”¹³¹ Rhea Lana, the company at issue in the case, runs “consignment sales of children’s merchandise.”¹³² The consignors can volunteer and work at the sales.¹³³ The workers set up the sale, operated the cash registers, restocked merchandise during the sale, assisted customers, and cleaned and closed up after the sale.¹³⁴ “They are not paid for that work but instead are given the opportunity to shop at the sales earlier than the general public.”¹³⁵ The DOL determined that Rhea Lana’s workers qualified as “employees” under the FLSA, and Rhea Lana argued that determination was arbitrary and capricious.¹³⁶ The court held that the DOL “correctly employed a totality-of-the circumstances approach” and “considered whether the workers had an expectation of compensation,” “the degree of control exercised by the employer[,] and the extent to which the workers’ services were integral to Rhea Lana’s business.”¹³⁷ The court held that the DOL’s application of the test to the facts was not clearly erroneous.¹³⁸

For evidence of the workers’ expectation of in-kind compensation, the Department cites Rhea Lana’s “solicitations to the workers to sign up for shifts in exchange for the opportunity to shop early” and Rhea Lana’s “offer to pay people \$8 per hour to work shifts at the sales when it could not induce enough individuals to work in exchange for the opportunity to shop early.” The Department also points to statements from the workers . . . [f]or evidence of the control exerted by Rhea Lana over its workers, the

129. *Id.*

130. *See* Rhea Lana, Inc. v. United States Dep’t of Labor, 925 F.3d 521, 522 (D.C. Cir. 2019) (holding that the DOL’s determination that persons who worked at consignment stores, but who were not paid for their work but were able to shop sales at consignment stores before the general public, qualified as employees under FLSA was not arbitrary and capricious).

131. *Id.*

132. *Id.* at 521.

133. *See id.* (explaining the consignors’ responsibilities).

134. *See id.* at 523.

135. *Id.* at 522.

136. *See id.* at 524.

137. *See id.* at 526.

138. *See id.* at 527.

Department references statements from workers indicating that they “were supervised by Rhea Lana’s employees.” And for evidence that the work was integral to Rhea Lana’s business, the Department cites Rhea Lana’s admission that the workers “were the lifeblood of their sales events.” The Department also notes statements from workers indicating that their labor was “for the benefit of Rhea Lana’s general sales operations.”¹³⁹

Several district courts have also reasoned that under certain circumstances volunteers for for-profit businesses are not or would not be covered by the FLSA.¹⁴⁰ In one case, AOL, a for-profit entity, used volunteers for many tasks, including monitoring chat rooms and administrative tasks.¹⁴¹ The Federal District Court for the Southern District of New York entertained AOL’s argument that the plaintiffs were volunteers not subject to the FLSA but found genuine issues of material fact remained as to whether they were volunteers or employees.¹⁴² Therefore, the court denied AOL’s motion for summary judgment.¹⁴³ In the opinion, the court noted that for-profits are different from non-profits and the public sector because they are driven by a profit-motive.¹⁴⁴ At a non-profit, any benefit to the entity is a benefit to the larger public, whereas a for-profit entity might pressure or coerce a volunteer to work for free as an incentive to obtain paid employment.¹⁴⁵ The court concluded that the issue of whether the

139. *Id.* at 527 (citations omitted).

140. *See, e.g.,* *Figurovski v. Marbil Inv’rs, LLC*, 2018 U.S. Dist. LEXIS 54756, at *24–26 (E.D.N.Y. Mar. 30, 2018) (determining that the wife of a live-in building superintendent who assisted him was not an employee of the company); *see also* *Liebesman v. Competitor Group, Inc.*, 2015 U.S. Dist. LEXIS 61150, at *15 (E.D. Mo. May 11, 2015) (“[T]he factual record must be developed to determine whether she was an employee or a volunteer under the economic realities test.”); *Sontheimer v. Gen. Med., PC*, No. 1:14-cv-417, 2015 WL 12591749, at *5 (W.D. Mich. Oct. 7, 2015) (determining that a nurse who voluntarily worked for her physician husband was not an employee of the physician’s employer); *Jeung v. Yelp, Inc.*, 2015 U.S. Dist. LEXIS 107427, at *5–6 (C.D. Cal. Aug. 13, 2013) (“If plaintiffs and other putative class members are, at most, volunteers, no claim under the FLSA will lie.”); *Emanuel v. Rolling in the Dough, Inc.*, No. 10 C 2270, 2012 WL 5878385, at *1 (N.D. Ill. Nov. 21, 2012) (finding a woman who assisted her domestic partner who managed a pizza business was not employed by the business); *Genarie v. PRD Mgmt., Inc.*, No. 04-2082 (JBS), 2006 U.S. Dist. LEXIS 9705, at *39–41 (D.N.J. Feb. 17, 2006) (applying economic realities and totality of the circumstances tests to determine a worker for a for-profit building management company was an employee and not a volunteer).

141. *See* *Hallsisey v. Am. Online, Inc.*, No. 99-CIV-3785 (KTD), 2006 U.S. Dist. LEXIS 12964, at *3–5 (S.D.N.Y. Mar. 10, 2006).

142. *See id.* at *10.

143. *See id.* at *15.

144. *See id.* at *22–23.

145. *See id.* at *22.

workers were volunteers or employees for purposes of the FLSA presented “difficult and novel questions of law.”¹⁴⁶

In *Okoro v. Pyramid 4 Aegis*, the District Court for the Eastern District of Wisconsin stated that the economic realities test is normally used to determine if a worker is an independent contractor and “is of limited assistance” in a case where whether a worker was a volunteer or employee is at issue.¹⁴⁷ In *Okoro*, a worker helped another individual start a group home business.¹⁴⁸ The court explicitly stated it was “unable to find any regulations addressing the circumstances under which a person can ‘volunteer’ for a for-profit entity and have his work not fall under the provisions of the FLSA.”¹⁴⁹ The court concluded, however, that “to say that one cannot under any circumstances volunteer for a for-profit entity might be too sweeping a statement.”¹⁵⁰ The court applied “a reasonableness standard that takes into account the totality of the circumstances.”¹⁵¹ It looked at the economic realities and (1) whether there was an expectation or contemplation of compensation, (2) “whether the employer received an immediate advantage,” (3) “the relationship of the parties,” and (4) “the goals of the FLSA.”¹⁵² The Plaintiff’s work to start the company provided it an immediate benefit and did not interfere with the business in any way.¹⁵³ She worked for almost a year and “had a reasonable expectation that she would be compensated for her work.”¹⁵⁴ The court concluded she was an employee.¹⁵⁵ The court agreed with the DOL that “the exemption for volunteers rarely if ever applies in the context of for-profit enterprises.”¹⁵⁶ The court asserted that one important reason for prohibiting volunteers is that “employers who engage unpaid ‘volunteers’ gain an unfair competitive advantage from the payment of substandard wages, or . . . no wages at all.”¹⁵⁷

Although the Supreme Court in *Goldberg v. Whitaker House Cooperative Inc.* found that cooperative owners constitute employees,

146. *Id.* at *38.

147. *Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 WL 1410025, at *6, *9 (E.D. Wis. Apr. 23, 2012).

148. *See id.* at *1.

149. *Id.* at *8.

150. *Id.*

151. *Id.* at *9.

152. *Id.*

153. *See id.* at *10.

154. *Id.*

155. *See id.*

156. *Id.* at *7.

157. *Id.*

the case did not involve an owner-volunteer program for a consumer co-operative.¹⁵⁸ In *Goldberg* no one argued that the workers, who worked in their own homes knitting, crocheting, and embroidering garments, were volunteers.¹⁵⁹ Instead the court addressed the issue of whether cooperatives and their full-time workers performing work integral to the business were not covered by the FLSA by virtue of the business form.¹⁶⁰ The cases discussed in this Part that directly address the issue of volunteers support the position that the FLSA permits volunteers for for-profit entities in limited circumstances.¹⁶¹ Thus, the DOL's warnings that volunteers are not permitted to work for for-profit entities are overbroad.

4. *The DOL's Recognition of Exceptions to Its Prohibition*

The DOL does recognize exceptions to its prohibition on volunteering for for-profit entities.¹⁶² In particular, interns and trainees are allowed to work without pay.¹⁶³ The law governing interns and the circumstances in which they are excluded from coverage of the Act are well-developed.¹⁶⁴ Additionally, the DOL permits volunteers to work at for-profit hospitals.¹⁶⁵

In an opinion letter the DOL reiterated its longstanding policy prohibiting volunteers for for-profits, while acknowledging that on "rare occasion, we have considered as volunteers, and not employees, individuals who perform[] activities of a charitable nature for a for-

158. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 29, 32 (1961).

159. See *id.* at 32.

160. See *id.* We plan to author a second article arguing that owner classification alone does not exclude food co-op members from the Act's coverage. Volunteers are excluded as argued in this Article, and owners who function like partners are excluded. See Ariana R. Levinson & Chad Eisenback, *Cooperative Ownership and the Fair Labor Standards Act*, 2021 MICH. ST. L. REV. (forthcoming May 2021).

161. See, e.g., *Okoro*, 2012 WL 1410025, at *7–8.

162. See Emily Bodtke, *When Volunteers Become Employees: Using a Threshold-Remuneration Test Informed by the Fair Labor Standards Act to Distinguish Employees from Volunteers*, 99 MINN. L. REV. 1113, 1125–26 (2015).

163. See *id.*

164. See *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, WAGE & HOUR DIV., <https://www.dol.gov/whd/regs/compliance/whdfs71.htm> [<https://perma.cc/MP6R-RP8S>] (last updated Jan. 2018) [hereinafter *Fact Sheet #71*]; see also U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 30, 1964).

165. See U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter ¶ 32,797 (Sept. 11, 1995).

profit hospital, where the hospital does not derive any immediate economic advantage from the activities of the volunteers and there is no expectation of compensation.”¹⁶⁶ The letter explained that the narrow exception permits volunteers at for-profit hospitals and hospices “to perform activities of a charitable nature, such as running errands, sitting with patients so that a family may have a break, and going to funerals.”¹⁶⁷ The letter reasoned that “these types of activities” have “humanitarian and, for some, religious implications, and are what the Supreme Court was referring to when it mentioned ‘ordinary volunteerism.’”¹⁶⁸ The narrow exception does not permit employees of a for-profit hospital or hospice service to volunteer for the employer, and it does not permit volunteers “to do activities such as general office or administrative work that are not charitable in nature.”¹⁶⁹ This suggests that there are times when individuals working at a for-profit business are considered volunteers not covered by the Act. These exceptions to the prohibition indicate the possibility that the DOL would also recognize a narrow exception for cooperative members to volunteer for humanitarian activity oriented toward the poor feeding themselves if it is a narrow exception that is easy to implement.

5. Some Guidance Material Indicates For-Profits Are Permitted to Utilize Volunteers Without Pay

Some secondary sources have also intimated that volunteering without pay for a for-profit business is permissible. The Restatement of Employment Law § 1.02 states that “[n]onprofit enterprises are generally subject to the same employment-law obligations toward employees as are for-profit enterprises.”¹⁷⁰ “Thus, the distinction between volunteers and employees applies whether the principal operates as a for-profit, nonprofit, or government enterprise.”¹⁷¹ While the Restatement does not specifically focus on the FLSA and acknowledges that certain statutes may cover volunteers as well as employees, it does indicate that people who receive no material

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. RESTATEMENT OF EMPLOYMENT LAW § 1.02 (2015).

171. *Id.*

inducement and are not coerced to work generally constitute volunteers even when working for a for-profit.¹⁷²

The *Wage and Hour Law: Compliance and Practice* March 2019 update states that while the Act and regulations “define volunteers for the purpose of public agency employment,” and the “courts and opinions issued by” the Wage and Hour Division govern volunteers in the private sector, “the principles are basically the same.”¹⁷³ “The persons must volunteer their services freely and without pressure or coercion from an employer.”¹⁷⁴ The update states that the Wage and Hour Division examines “volunteers for [for-]profit organizations more closely” than for non-profits but permits people to “volunteer their services to for-profit organizations.”¹⁷⁵

Finally, a Cornell Law Review article from 1993 argues forcefully that “Congress did not intend the FLSA to prevent” the broad range of volunteer services the DOL currently prohibits.¹⁷⁶ Specifically, the article maintains that “Congress did not intend for the Act to be applied strictly in situations where there is no evidence of employer coercion.”¹⁷⁷

The case law and commentary thus indicate that even if a cooperative is technically a for-profit rather than a non-profit, its humanitarian mission to uplift its member permits the same types of true volunteerism for a cooperative grocery in a food desert as is permitted for a non-profit.

B. Food Cooperatives in Food Deserts Are Not For-Profits When Owners Volunteer for Humanitarian Objectives

Like other non-profits, food cooperatives operating to address food insecurity should be able to benefit from the help of volunteers in meeting their social justice purpose of combatting hunger. The DOL and the courts permit volunteers to perform certain tasks for private

172. *See id.*

173. LES A. SCHNEIDER & J. LARRY STINE, 1 WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE § 3:15 (2019).

174. *Id.*

175. *Id.*

176. Jordan, *supra* note 100, at 303.

177. *Id.* at 309; *see also Fact Sheet #71, supra* note 164, at n.1 (noting that WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations).

sector non-profits without pay.¹⁷⁸ “Individuals who volunteer or donate their services, usually on a part-time basis, for *public service, religious or humanitarian objectives*, not as employees and without contemplation of pay, are not considered as employees of the religious, charitable and similar *non-profit* organizations that receive their service.”¹⁷⁹ In some states, co-ops are permitted to incorporate as non-profits.¹⁸⁰ Food co-ops that incorporate as a non-profit can have volunteer programs for volunteers who fit within the requirements of the FLSA, as long as it is not contrary to state wage and hour law.¹⁸¹

Cooperative groceries starting to combat food insecurity should be classified as not-for-profits despite their technical designation as for-profits for incorporation purposes. The FLSA uses the term “nonprofit” without definition,¹⁸² and the DOL uses the term “similar” to modify nonprofit, indicating that entities that function like charitable non-profit corporations can be designated nonprofits for FLSA purposes. Even co-ops technically classified as a for-profit are not-for-profit because they use a patronage structure rather than returning profit to capital investors.¹⁸³ A food co-op with this entity structure and a mission of addressing food insecurity should be classified as non-profit rather than for-profit.¹⁸⁴ In this Part, we first explain how co-ops, although technically not non-profits, do not operate as for-profits either. Second, we argue that because food co-ops in a food desert serve a public service purpose, these co-ops should be classified as non-profits. Finally, we explain how the owners volunteer for humanitarian rather than business purposes.

178. See U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter ¶ 31,072 (Oct. 7, 2002).

179. See *elaws Fair Labor Standards Act Advisor*, U.S. DEP’T OF LABOR, <https://webapps.dol.gov/elaws/whd/flsa/docs/volunteers.asp> [<https://perma.cc/ZN4D-3L93>].

180. See DePasquale, *supra* note 12, at 919 (noting that consumer co-ops can organize as non-profits); see also Uniform Limited Cooperatives Association Act, 29 U.S.C. § 511 (2018); MASS. GEN. LAWS ANN. ch. 157A, § 6-7 (West 2005); James B. Dean & Thomas Earl Geu, *The Uniform Limited Cooperative Association Act: An Introduction*, 13 DRAKE J. AGRIC. L. 63, 66 (2008).

181. See *Fact Sheet #71*, *supra* note 164.

182. See 29 U.S.C. § 203(e)(5), (r)(2)(A)–(B), (s)(1)(B) (2018).

183. See Rodrigues, *supra* note 29, at 1310.

184. See *id.*

1. *Cooperatives Operate to Return Patronage to Members, Not to Reap a Profit*

The entire premise of a co-op is that it does not operate for profit but rather returns any surplus to the co-op owners based on their use of the co-op.¹⁸⁵ For consumer co-ops this means that no one buys up shares in order to sell them and make a profit.¹⁸⁶ Instead, those who own the store purchase their food from the store and share in any surplus according to the amount of purchases they have made.¹⁸⁷

As explained by Professor Elaine Wilson,

a cooperative's mission is not necessarily to make a profit or to increase shareholder value; rather, the cooperative's mission is to serve the needs of its members Historically, these members have often been a class of individuals in need of assistance Because the history of the cooperative is rooted in social change, the cooperative movement has developed a set of internationally recognized values that emphasize democracy, community, equality and sustainability, which are inherent to all cooperatives.¹⁸⁸

Her article “demonstrates that many of the values inherent in the cooperative model are, in fact, charitable.”¹⁸⁹

Traditionally, many authors and practitioners have viewed consumer-owned cooperatives as for-profit entities,¹⁹⁰ but their business structure actually does not operate to make a profit. Patronage is a dividend distributed by a cooperative, not because of any interest in the cooperative owned by the distributee, but because of the owner's patronage of the business conducted by the cooperative.¹⁹¹ A dividend is better termed a patronage refund because it is paid to members out of the surplus of a cooperative in an amount determined by the patron's use of the cooperative's facilities.¹⁹²

185. Victor Pestoff et al., *Volunteering in Consumer and Service Cooperatives*, in 1 THE PALGRAVE HANDBOOK OF VOLUNTEERING, CIVIC PARTICIPATION, AND NONPROFIT ASSOCIATIONS 454, 454 (David H. Smith et al. eds., 2016) (“Co-ops have long been regarded as a special type of organization that operates on the market, but with the aim of serving the social or cultural needs of their members rather than generating profit for investors.”).

186. See Rodriques, *supra* note 29, at 1310.

187. See *id.* (noting co-ops resemble nonprofits and have a unique identity to further the needs of their owners).

188. See Wilson, *supra* note 13, at 1016–17.

189. See *id.* at 1018.

190. *Id.* at 1045 (“Clearly, the organizational test would prohibit a for-profit entity, such as a cooperative, from obtaining tax-exempt status, as it would be operated for the substantial private interests of the members of the cooperative.”).

191. See I.R.C. § 1382(b)(2) (2018).

192. See 18 AM. JUR. 2D *Cooperative Associations* § 14 (2019).

Two aspects of consumer co-ops that generally lead to classification as a for-profit are alleviated when a food co-op operates in a food desert, as discussed in more detail in the next Subsection.¹⁹³ First, many consumer co-ops compete with other standard for-profit entities, such as in the grocery sector.¹⁹⁴ A food co-op in a food desert operates in an area that commercial groceries and other suppliers of healthy food have avoided or abandoned, minimizing the competition with those for-profit entities.¹⁹⁵ Second, many consumer co-ops permit non-owners to shop at the store.¹⁹⁶ Their shopping might create a profit not based on patronage. When a food cooperative is located in a food desert, it likely will not operate with a profit, but rather be sustained by community giving. Also, those non-members shopping in the food cooperative are probably precisely the people living in the community designated as a food desert for whom the food cooperative exists.

2. Cooperative Groceries in Food Deserts Are Designed to Remedy the Problem of Grocery Closures and Meet a Basic Humanitarian Need for Healthy Food

In addition to having a business structure that is unlike a traditional for-profit grocery, the mission of a food co-op in a food desert is charitable, unlike a traditional for-profit grocery.¹⁹⁷ A food co-op in a food desert is designed to fill a need for a basic necessity—food—in an area traditional groceries have avoided or exited because they are unable to turn a profit.¹⁹⁸ It is also designed to recirculate wealth in the community and to serve as a community space,¹⁹⁹ thereby improving the economic status of a traditionally redlined community. Its operation is much more similar to a non-profit.

By permitting volunteers, resources are freed up to provide those who are employed by the cooperative a living wage and benefits,

193. See, e.g., SEVANANDA NAT. FOODS MKT., <https://www.sevananda.coop/member-services/> [<https://perma.cc/Y6D5-2MH4>] (last visited Feb. 3, 2020).

194. See *id.*

195. See *id.*

196. See *id.*

197. See *id.*

198. See, e.g., GEM CITY MKT., <https://gemcitymarket.com/> [<https://perma.cc/A79N-6Y63>] (last visited Feb. 3, 2020) (emphasizing the mission of food access).

199. See, e.g., SEVANANDA NAT. FOODS MKT., *supra* note 193 (emphasizing that shopping does not enrich the bottom line of a corporate grocery headquartered outside the community).

rather than hiring more people at minimum wage standards.²⁰⁰ Food deserts are generally correlated with areas with high unemployment, and providing some quality jobs in the neighborhood is a venerable public policy goal.²⁰¹ The mission is to combat food insecurity and create wealth in low-income communities suffering from historic discrimination and redlining. Given these public service goals of a food cooperative designed to improve food access, the DOL and courts should classify these entities as non-profits for FLSA purposes, regardless of their state incorporation or tax status.²⁰²

In fact, in a similar situation, the DOL has recognized that a non-profit religious community where members receive food, shelter, medical care, and funding is not covered by the FLSA.²⁰³ The DOL opinion letter emphasizes that the members receive payments based not on how much work they have provided, but according to need.²⁰⁴ The members of the commune performed various tasks, including manufacturing devices for those with mobility limitations and furniture for children and schools.²⁰⁵ The DOL reasoned that the entities were not for-profit and the members did not “expect to receive compensation in exchange for their services.”²⁰⁶ The DOL noted that these members were not fined based on poor job performance or deprived of benefits based on absenteeism.²⁰⁷ The DOL explicitly recognized the same factors would be determinative in a case based on secular ideology.²⁰⁸

A food cooperative that provides healthy food in an area deserted by corporate grocery chains is a secular version of the religious

200. See, e.g., *A Brief Overview*, APPLE ST. MKT., <https://www.applestreetmarket.coop/apple-street-market-2/> [<https://perma.cc/6H5Q-XURU>] (last visited Feb. 3, 2020) (including a desire to provide “family sustaining job opportunities” in its vision statement).

201. See Daniel Reyes, *How Cooperative Grocery Stores Are Bringing Food Access to Low-Income Neighborhoods*, COOPERATIVE DEV. INST. (Apr. 24, 2015), <https://cdi.coop/food-coops-food-deserts-low-income-communities/> [<https://perma.cc/H96Q-F3QW>].

202. See *Acosta v. Cathedral Buffet, Inc.*, 887 F.3d 761, 763, 768 (6th Cir. 2018) (emphasizing that a for-profit restaurant did not generate a profit and was subsidized by a church permitting volunteers to clean, wash dishes, serve cake, chop vegetables, and man the cash register).

203. See U.S. Dep’t of Labor, Wage & Hour Div., FLSA 2018-29, Opinion Letter (Dec. 21, 2018) at *1–2.

204. See *id.* at *2.

205. See *id.* at *1.

206. *Id.* at *2.

207. See *id.*

208. See *id.*

community. The food co-op is an entity established by and owned by community members to provide for a basic economic need—food. It returns earnings to the consumer-owners based not on how much they work but based on how much they purchase—which reflects their level of need for food.²⁰⁹ The DOL has adopted a regulation that specifically permits those who work at food banks and receive groceries therefrom to volunteer.²¹⁰ The intent animating that regulation—to ensure that people are able to provide food for themselves, their families, and their communities—warrants similarly treating food co-ops located in food deserts as non-profits.

3. *Cooperative Owners Volunteer for Public Service and Humanitarian Purposes*

If food cooperatives are classified as non-profit, or at least not for-profit, rather than as for-profit entities where the DOL arguably prohibits volunteers, then owners are undoubtedly permitted to volunteer for public service and humanitarian purposes. The Supreme Court has distinguished between “ordinary volunteerism” and work performed with an implied expectation of compensation,²¹¹ and the DOL permits volunteering for public service, religious, or humanitarian objectives.²¹²

In *Tony Alamo*, the Supreme Court addressed whether workers for a religious non-profit were employees.²¹³ The Court upheld the lower court’s determination that the workers were not volunteering for public service because they had an implied expectation that they would receive food, shelter, clothing, and other benefits.²¹⁴ The Court highlighted that the workers were “entirely dependent” on the non-profit, working for periods significantly longer than one week.²¹⁵ The DOL has explained:

A volunteer generally will not be considered an employee for FLSA purposes if the individual volunteers freely for public service, religious or

209. See Reyes, *supra* note 201.

210. See 29 C.F.R. § 786.350 (2018) (excluding volunteers at private, non-profit food banks from the definition of “employee” under the Fair Labor Standards Act).

211. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303 (1985).

212. U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter ¶ 32,797 (Sept. 11, 1995); Jordan, *supra* note 100, at 320.

213. See *Tony Alamo*, 471 U.S. at 291–92.

214. See *id.* at 301 n.22.

215. See *id.* at 301.

humanitarian objectives, and without contemplation or receipt of compensation. Typically, such volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.²¹⁶

The DOL has, however, specifically held that food co-op members who “volunteer to stock shelves, sweep floors, slice meat, and operate cash registers” do so for business purposes and not for public service or humanitarian objectives.²¹⁷ The DOL opinion letter opines that the purposes for which the workers volunteered would remain business purposes even if the employees were not provided discounts on purchases.²¹⁸ DOL posited that “the fact that the company is not operated for profit also is immaterial.”²¹⁹ We do not know the identity of the food cooperative at issue in the DOL letter, but the gist of the opinion letter indicates this was a for-profit cooperative competing with other groceries, not one located in a food desert with a mission of addressing food insecurity.²²⁰

Unlike the workers in the DOL case, the volunteers for a food cooperative located in a food desert work not for business purposes but to bring food to those living in food deserts whose food insecurity is a result of historical redlining and discrimination. When the owners do not receive compensation and have no expectation of compensation but instead volunteer to foster solidarity with the community and address the need for healthy food, they act for humanitarian reasons. Many times, food co-ops do not have surplus earnings to pay a patronage dividend, undermining the argument that owners expect to receive compensation in the form of the patronage rebate.²²¹ Under the test for “ordinary volunteerism,” many tasks that food cooperative owners perform should be permissible volunteerism, and the types of tasks are described in the next Section.

216. See *Fact Sheet #14A*, *supra* note 69.

217. See U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Jan. 21, 1997) at *1.

218. See *id.*

219. *Id.* at *2.

220. See *id.*

221. See, e.g., CENTRAL CO-OP, *Patronage Dividends* <https://www.centralcoop.coop/page.php?PID=1032> [<https://perma.cc/3AMJ-SKVC>] (stating inability to pay dividend for 2016); see also DAVE GUTKNECHT, PATRONAGE DIVIDENDS FOR FOOD CO-OPS 1 (“[T]he majority of food co-ops are not taking advantage of the patronage dividend option.”).

C. Permissible Tasks for Food Co-op Volunteers

We argue that consumer-owners of a food co-op operating to alleviate food insecurity in an area designated by the USDA as a food desert should be permitted to volunteer for certain public service tasks regardless of whether the co-op is technically a non- or for-profit. To ascertain the types of permissible tasks, this Section reviews DOL guidelines and cases where courts have determined that volunteering was permissible given the totality of the circumstances. The first Subsection teases out the types of factors courts consider, and the second applies them to the example of a food cooperative to suggest the types of tasks volunteers can lawfully engage in without pay.

1. *Factors Considered to Determine Whether Volunteer or Employee*

The courts use a variety of tests with factors similar to those used by the DOL to determine if a worker for a non-profit is a volunteer or employee. Mitchell H. Rubinstein explains that some courts apply the economic realities test under the FLSA to determine whether a volunteer is an employee,²²² and others have not expressly adopted any one test. Those courts examine the totality of the circumstances.²²³ Rubinstein notes that using the economic realities test developed to distinguish an independent contractor from an employee does not work well because it focuses on control, and many volunteers are subject to tight oversight and control.²²⁴

A case involving the live-in-fiancé of a live-in maintenance worker is an example of a court applying the economic realities test to determine whether a worker for a private for-profit entity was an employee rather than a volunteer.²²⁵ The court applied the following test to determine that the fiancé was employed by the building management company, which sometimes assigned her work directly in addition to the work she shared with her partner:²²⁶

The economic reality test requires the court to look to the following factors: (1) the degree of the employer's control over the worker's activity; (2) the worker's opportunity to exercise management skill to influence profit or

222. See Rubinstein, *supra* note 11, at 171.

223. See *id.* at 172.

224. See *id.*

225. See *Genarie v. PRD Mgmt., Inc.*, No. 04-2082, 2006 U.S. Dist. LEXIS 9705, at *36-37 (D.N.J. 2006).

226. See *id.*

loss; (3) the degree of skill and independent initiative required to perform the task; (4) the permanence or duration of the work relationship; (5) the degree to which the work is an integral part of the employer's business; and (6) the worker's investment in his tools, equipment, etc.²²⁷

Additionally, the court considered other factors in assessing the totality of the circumstances.²²⁸ The court reasoned that the fiancé did not work without “expectation of compensation” because she received an apartment in exchange for her work.²²⁹ She did not perform her work as a “public service,” and the work was performed with undue pressure “to appease . . . management’s demands and to retain her position and the apartment she shared with her daughter and [fiancé].”²³⁰

The Tenth Circuit also used a combined approach considering the “totality of circumstances . . . based on objective facts” and “applying the factors of the ‘economic reality’ test.”²³¹ In *Padilla v. AFSCME*, a volunteer president for a statewide union of public sector employees sought to be classified and paid as an employee.²³² The district court found the president was a volunteer and not an employee, and the Tenth Circuit affirmed.²³³ The president was employed full-time by a water district at the time he served for the union.²³⁴ He was permitted under a “lost-time payments policy” to apply to the union for pay if he had to take uncompensated leave from the water district to perform union duties.²³⁵ The district court relied on the factors that the president was “not economically dependent” on the union, did not receive wages from the union, and knew per policy he could only receive payments for lost time and not wages.²³⁶ The union did not control the president’s schedule, services, or time worked and did not hire or fire the president.²³⁷

Hallissey v. AOL is an example of a case where the court relied only on the totality of the circumstances test and not the economic

227. *Id.*

228. *See id.* at 40.

229. *Id.* at 41.

230. *Id.*

231. *Padilla v. Am. Fed’n of State, Cty. & Mun. Emps., Council 18*, 551 F. App’x 941, 943 (10th Cir. 2014).

232. *See id.* at 942.

233. *See id.* at 943–44.

234. *See id.* at 942.

235. *Id.* at 942–43.

236. *Id.*

237. *See id.* at 943–44.

realities test.²³⁸ The plaintiffs worked as part of AOL’s community leader program.²³⁹ They serviced online communities, and their duties “varied considerably.”²⁴⁰ “Plaintiffs’ duties included, for example: managing and updating message boards, moderating chat rooms, serving as ‘guides’ to AOL subscribers, updating content on forums, serving as online tutors, and running other activities such as fantasy sports leagues or trivia contests.”²⁴¹ Some plaintiffs were more specialized and had administrative duties. All the plaintiffs “spent a substantial amount of their time (approximately one-third) offline, performing administrative tasks,” and AOL required submission of the number of hours they worked.²⁴² In return for working, plaintiffs received “free AOL access, a leather AOL compact disc case, discounts at the AOL employee store, expanded space for web pages, and free anti-virus software.”²⁴³ The court reasoned that whether the workers had an expectation of compensation is a critical factor to assess.²⁴⁴ The court also looked at:

- whether the workers received compensation;
- whether they were dependent on AOL for basic needs;
- whether they worked because AOL, with its “superior bargaining power,” required work as a community leader to eventually obtain a paid position with AOL;
- AOL’s status as a for-profit business;
- whether plaintiffs’ work was “an integral part of AOL’s business”;
- whether their duties were similar to those of paid employees;
- whether they were closely monitored;
- whether the worker or AOL was the primary beneficiary of the work; and

238. See *Hallissey v. Am. Online*, No. 99-CIV-3785, 2006 U.S. Dist. LEXIS 12964, at *13–40 (S.D.N.Y. 2006); see also *Biziko v. Van Horne*, 2019 WL 3928575, at *41 (N.D. Tex. Aug. 20, 2019) (quoting *Purdham v. Fairfax Cty. Sch. Bd.*, 637 F.3d 421, 428 (4th Cir. 2011) (“Courts ‘review ‘the objective facts . . . to determine whether the totality of the circumstances’ establish volunteer status”)); *Manning v. Brantley Baptist Ctr.*, No. 91-3847 1993 U.S. App. LEXIS 38278 (5th Cir. Feb. 26, 1993) (detailing that a non-profit offered shelter and food to participants in rehabilitation program who were not employees).

239. *Hallissey*, 2006 U.S. Dist. LEXIS 12964 at *3.

240. *See id.* at *3.

241. *Id.*

242. *Id.* at *5.

243. *Id.*

244. *See id.* at *12.

- whether the worker worked primarily for enjoyment or personal benefit.²⁴⁵

The court determined that genuine issues of material fact, as to most of these factors, precluded a determination of summary judgment that the workers were volunteers and not employees.²⁴⁶

In one of the limited circumstances where the DOL permits volunteerism for for-profits, that of nurses for hospitals,²⁴⁷ the DOL Wage and Hour Division considers a number of factors to determine whether an employee engages in “ordinary volunteerism” which is used to connote public service or humanitarian purposes:²⁴⁸

- (1) the nature of the entity receiving the services;
- (2) the receipt by the worker (or expectation thereof) of any benefits from those for whom the services are performed;
- (3) whether the activity is less than a full-time occupation;
- (4) whether regular employees are displaced;²⁴⁹
- (5) whether the services are offered freely without pressure or coercion; and
- (6) whether the services are of the kind typically associated with volunteer work.²⁵⁰

The DOL permits volunteers to run errands, sit with patients, and go to funerals.²⁵¹

In one opinion letter, the DOL found that volunteers who worked for one organization as peer reviewers of other industry organizations were not employees.²⁵² The volunteers worked as peer reviewers because of the information they could learn and use “to gain a

245. *Id.* at *13–40.

246. *See id.* at *40.

247. *See supra* Subsection II.A.4 (detailing narrow circumstances in which DOL permits volunteering for a for-profit).

248. *See* U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Sept. 11, 1995).

249. *See also* U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Sept. 28, 1998) (finding that volunteer ushers who perform same service as paid ushers are employees).

250. *See also* U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (July 31, 2001); Williams, *supra* note 69.

251. *See* U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Sept. 11, 1995).

252. *See* U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Aug. 26, 2005).

competitive advantage in their respective fields,” as well as for religious and charitable reasons.²⁵³ These volunteers were reimbursed for expenses incurred, such as airfare, lodging, and meal costs.²⁵⁴ They continued to be paid by their regular employers during the time they engaged in peer review duties, which was up to six days per year.²⁵⁵ The DOL emphasized that the volunteers were not paid by the organization and performed “their services without contemplation of pay.”²⁵⁶

Thus, the DOL and the courts will consider the following types of factors to determine if co-op owners engage in “true volunteerism”:

- the nature of the entity receiving the service;
- whether the worker received benefits or compensation;
- whether the worker had an expectation of compensation;
- whether the lack of pay resulted from the entity’s coercion or pressure;
- whether work was required to eventually receive a paid position;
- whether the entity was the primary beneficiary of the work;
- whether the work was integral to the entity;
- whether the work was similar to that of paid employees;
- whether employees are displaced;
- whether the work was part- or full-time;
- whether the worker was dependent on the entity for basic needs;
- whether the worker worked primarily for pleasure or personal benefit;
- whether the work was humanitarian or performed as a public service; and
- whether the work is the type traditionally perceived as volunteer work.

253. *Id.*

254. *See id.*

255. *See id.*

256. *Id.*; *see* U.S. Dep’t of Labor, Wage & Hour Div., Opinion Letter (Aug. 28, 2018) (explaining examination graders were volunteers when they serve due to professional achievement and to give back to the profession, use their vacation time, and receive from the non-profit reimbursement of transportation, accommodations, and meals, but no pay).

Some courts may additionally consider other factors from the economic realities test, such as the degree of employer control over the worker's activity or the worker's exercise of management skill to earn a profit, but these factors are not as effective in distinguishing a volunteer from an employee as the other factors courts have considered.

2. Types of Tasks Owners Can Volunteer for Without Pay

This Subsection applies the factors to a hypothetical food co-op that just opened its first grocery store in a food desert and is allowing their members to volunteer. By doing so, it illustrates a lawful volunteer program under the FLSA and types of tasks that a volunteer can lawfully engage in.

a. Nature of the Entity

The nature of the entity receiving the volunteer service is a cooperative grocery store that, being in a food desert, has a purpose of eliminating their community's lack of food access and maintaining economic sustainability for the community.²⁵⁷

b. Whether the Worker Received Benefits or Compensation

The volunteers work for free. The volunteer workers do not receive any benefits or compensation for their volunteer services because the only benefit to them is of moral satisfaction for supporting a business that is of humanitarian nature and purpose.

c. Whether the Worker Had an Expectation of Compensation

The volunteer should not have any expectation of compensation for their volunteer service. Patronage dividend is determined by how many purchases an owner makes and is unrelated to whether they volunteer or not, and if so, how often.

257. See *supra* Section II.B.

d. Whether the Lack of Pay Resulted from the Entity's Coercion or Pressure, Including Whether Work Was Required to Eventually Receive a Paid Position

Volunteer services should be without pressure or coercion so owners can opt to volunteer or not and are treated as owners with full voting rights regardless of whether they volunteer or not. The lack of pay would not result from the food co-op's coercion or pressure because the food co-op simply requests if any members from the co-op membership would like to volunteer for the sustainability of the co-op. Also, the lack of pay has no correlation with a possible paid position because all members who volunteer are treated neutrally regardless of the number of volunteered hours. Owners who volunteer will not be preferred over owners who do not, or outside candidates, for any employee positions that become open.

e. Whether the Entity Was the Primary Beneficiary of the Work

The community and individual owner are the primary beneficiaries of the volunteer work. The food co-op relies on paid employees, who perform tasks like stocking shelves, running cashiers, and sweeping floors to run the co-op. The volunteers engage in activities that they personally enjoy. In so doing, they enjoy the company of neighbors and better their community.²⁵⁸

f. Whether the Work Was Integral to the Entity

There are many types of tasks that are not integral to running a grocery that volunteers can engage in. Work like stocking shelves, running cash registers, and sweeping floors is likely integral to the food co-op. But work outside of the daily function of a typical grocery store is not integral to the food co-op's performance as a grocery. These tasks would include hosting a weekly cooking class, training community members and employees on financial literacy or dispute resolution, serving as a volunteer recruiter or delivery driver, or fundraising for community events. Moreover, tasks not typically provided by a grocery but often associated with charity are not integral

258. *Cf. Issacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1309–10 (4th Cir. 1971) (noting that volunteer work done by a conscientious objector benefited the “public good in the community in which it operates,” the plaintiff, and other conscientious objectors).

to the food co-op. These tasks would include helping the elderly or disabled with errands including transportation to the food co-op and carrying and bagging purchases for them, painting a mural on the building, decorating or cooking for community events, or providing childcare for shoppers or at community events.

g. Whether the Work Was Similar to That of Paid Employees

The food co-op should make sure that volunteers do not engage in work of the type paid employees do. If an employee is absent or on vacation, the co-op should have another paid employee fill in or hire a paid temporary employee. Volunteers should not be doing the type of day-to-day work that is typical in a grocery store such as stocking shelves, receiving payments for products, and sweeping the floors. Other tasks, however, are not similar to what employees do and might include volunteering as a recruiter, serving as delivery driver for food services, or teaching a cooking class.

h. Whether Employees Are Displaced

The volunteers should not displace regular employees. Because the work is not integral to the grocery and because the co-op ensures absent employees are substituted with other employees, the volunteered work should not replace any of a paid employee's work.

i. Whether the Work Was Part- or Full-time

The volunteer work should be solely part-time. Ideally, the co-ops will limit volunteers to a minimal amount of weekly or monthly hours, such as two hours a week or five hours a month.

j. Whether the Worker Was Dependent on the Entity for Basic Needs

The worker is not dependent on the food co-op for basic needs. The amount of time an owner can volunteer is minimal and unrelated to their rights as an owner or ability to shop for food in the store. The owner will need other employment or government aid to meet their basic needs, although the food co-op certainly can aid in meeting their basic need for food access.

k. Whether the Worker Worked Primarily for Pleasure or Personal Benefit

The workers typically volunteer for their pleasure in supporting their community by owning a food co-op that provides sustainability and accessible food. There should be no personal benefit gained by any individual worker because no volunteer is given anything in return for their volunteer services (besides a thank you).

l. Whether the Work Was Humanitarian or Performed as a Public Service

The work performed is humanitarian because the reason for opening and making sure that the food co-op is a successful business is not for money.²⁵⁹ The purpose is to maintain a place where there is accessible food and community empowerment where anyone can have an equal share and equal vote in a business they own. This business is a humanitarian project in itself because it is similar to a food pantry but allows members of the community to equally own and support the project. Work that in another context might be commercial can lawfully be performed by a volunteer when it is for public service and serves a community mission. For instance, selling Girl Scout Cookies is widely recognized, and specifically recognized by the DOL, as a public service task.²⁶⁰

m. Whether the Work Is the Type Traditionally Perceived as Volunteer Work

Many of the tasks performed by the volunteers will be the type of work traditionally perceived as volunteer work. The courts and the DOL have provided examples of work that is considered volunteer:

For example, members of civic organizations may help out in a sheltered workshop; women's organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or the elderly; mothers may assist in a school library or cafeteria as a public duty to maintain effective services for their children; or fathers may drive a school bus to carry a football team or band on a trip. Similarly, individuals may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross; working with children with disabilities or disadvantaged

259. See *supra* Section I.B.

260. See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *Fact Sheet #75: Youth Peddling Under the Federal Child Labor Provisions of Fair Labor Standards* (July 2010).

youth; helping in youth programs as camp counselors, scoutmasters, or den mothers; providing child care assistance for needy working mothers; soliciting contributions or participating in benefit programs for such organizations; and volunteering other services needed to carry out their charitable, educational, or religious programs.²⁶¹

Work like teaching dispute resolution or financial literacy, planning or volunteering for a community event at the co-op, providing childcare, and assisting the elderly and disabled with transportation and shopping will likely be viewed as traditional volunteer work. Other work may not traditionally be perceived as volunteer work, such as painting a mural or delivering food. In the circumstances of a food co-op located in a food desert, the other factors indicate this work is volunteer rather than traditional grocery work like stocking shelves, operating cash registers, and sweeping floors.

n. Totality Analysis

The large majority of the factors suggest that co-op owners are volunteers when they work without pay for a small amount of time each week or month performing tasks such as hosting a weekly cooking class, training community members and employees on financial literacy or dispute resolution, serving as a volunteer recruiter or delivery driver, fundraising for community events, helping the elderly or disabled with errands including transportation to the food co-op and carrying and bagging purchases for them, painting a mural on the building, decorating or cooking for community events, or providing childcare for shoppers or at community events. While some of these tasks may not traditionally be perceived as volunteer work, the other factors outweigh that perception.

CONCLUSION

In this Article, we have demonstrated that food co-ops located in food deserts should lawfully be able to use volunteers to perform public service tasks. Contrary to the DOL's stated position that for-

261. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., *FLSA Coverage: Employment Relationship, Statutory Exclusions, Geographical Limits*, in FIELD OPERATIONS HANDBOOK 10b03(c) (Mar. 31, 2016); *see also Isaacson*, 450 F.2d at 1309 ("The volunteer nurse's aide, the person who mans a canteen or sales booth without compensation, the parent who donates services for an entertainment or fund-raising activity are familiar figures in everyday life.").

profit entities cannot use volunteers, the courts have held that people can volunteer for for-profits, and the DOL has carved out some exceptions to the prohibition. The DOL should make an additional exception for owners who volunteer to sustain their food co-op and alleviate hunger in their community. Even if the DOL does not, the courts should follow persuasive precedent and recognize such an exception. Doing so is consistent with Supreme Court precedent that states that the FLSA does not cover those who work for a for-profit entity “without promise or expectation of compensation, but solely for . . . personal purpose.”²⁶² Permitting owners to volunteer at their food co-op does not undermine the working conditions of the food co-op’s employees. The volunteers actually contribute to sustainable economic development in low wage areas by making living wages for co-op employees possible. The food co-op does not undermine other grocery businesses because commercial groceries have abandoned the area due to inability to make a profit.

If the DOL will not make an exception to the prohibition on for-profits having volunteers, then food co-ops located in food deserts should be classified as non-profits when applying the FLSA to their operations. As discussed in the first Part of this Article, a food co-op does not exist to make a profit, so it is not a for-profit entity.²⁶³ Instead, a food co-op is designed to satisfy an unmet need of its owners, such as healthy, affordable food. Rather than returning profits to investors, a food co-op, if it has any surplus, which is unlikely in a food desert, returns the surplus to the owners according to the amount of purchases they have made. Regardless of its technical designation under state incorporation law, a food co-op located in a food desert with a mission of alleviating food insecurity has a humanitarian not-for-profit mission and should be classified accordingly.

Finally, we explain the types of tasks that the DOL and courts should find permissible for food co-op owners to volunteer without pay. Volunteers will not stock shelves, operate cash registers, or sweep floors, all of which are duties integral to the business performed only by paid employees. Instead, volunteers will do the work that enables the food co-op to serve those in need and create a flourishing community space. Whether classified as a for- or non-profit, food co-op owners can engage in humanitarian and public service works such as teaching cooking classes, providing the elderly with transportation

262. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

263. *See supra* Section I.B.

and assistance, caring for children at community events, and training employees and owners on financial literacy and dispute resolution.

Enough food exists to feed the world, but approximately 40 million people in the United States struggle with hunger.²⁶⁴ Food co-ops located in food deserts can help alleviate food insecurity. Co-op owners want to volunteer to sustain their co-op and their community. The DOL and courts should permit them to do so.

264. *Facts About Poverty and Hunger in America*, *supra* note 1.