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This is Exhibit F referred to in the affidavit of Kiara Sander sworn before me this 19 day of Nov 2015

A commissioner for taking affidavits

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MEMORANDUM

DATE:

TO: Liz Smith, Assistant Director, Fraud Prevention and Labor Standards
Kelly Kane, Industrial Relations Agent

FROM: Katy Dixon, Assistant Attorney General

SUBJECT: **Employer "benefit" in cases interpreting the "trainee" exception to employment relationships under FLSA (supplement to memo #311)**

Previously, you had asked for a legal memorandum on whether minor-aged hockey players for the Western Hockey League (WHL) were, under Washington law, in an employment relationship with the teams for which they played. In my October 22, 2014 memo, I advised that the only exception to the broad definition of employee contained in the Industrial Welfare Act that might apply to the players is the exception for interns/trainees. However, the players probably do not meet each of the six elements to qualify as trainees under the Department and the DOL's policy because, for one thing, the WHL teams receive an immediate benefit by being able to field a team that includes minor players.

You have asked for more background on how federal courts have interpreted the element in the Department of Labor's (DOL) six-part policy on trainees that requires that an employer not receive an immediate benefit from the trainee's labor. The DOL's fact sheet states that an intern is exempt only if *all* of the six elements of the test are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;

4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.[1]

With respect to element No. 4, courts have not been wholly consistent in concluding what constitutes a benefit to an employer and the determination ends up being very specific to the facts of each case. While some courts have suggested that *any* benefit would be enough to create an employment relationship, most courts have weighed the educational benefit to the purported trainee against the benefit to the business to see which is greater. Courts have consistently looked at whether the work of the trainee displaces other labor — whether the business would have to hire or use other employees to complete the work, had they not had the trainees.

In many cases the courts have considered unpaid pre-employment training, ranging from a few days to a couple months. Courts have generally held that a business does not benefit from the trainees until they actually begin work, so that there is no obligation to pay for this pre-employment training. Courts also look to whether the business is aided or impeded by the presence of trainees, including whether paid staff have to take time away from their regular duties to train or supervise the trainees.

In educational or rehabilitative contexts, the courts look to the overall purpose of the program to determine who is benefiting most. Two cases specifically address minor workers: *Reich v. Shiloh True Light Church of Christ* and *Solis v. Laurelbrook Sanitarium & School.* In both cases the courts weighed the commercial value of the labor to the employer against the educational value of the program to the students/trainees, and came to different conclusions.

In *Shiloh,* the federal district court concluded that the church was using the labor of minors for commercial purposes and that there was no credible educational component to the construction work they were doing. However, in *Laurelbrook*, the federal court of appeals held that students in a nonprofit religious boarding school could work in kitchen, housekeeping and nursing programs, even when proceeds from this work directly funded the school's operation, because the benefit to the school was offset by the time that instructors had to spend to supervise the students. The court also felt that the students did not displace other employees and that the school did not compete with other institutions

[1]The Department has an administrative policy that mirrors DOL's six-part test, with the word "trainee" substituted for the word "intern" along with a few other small linguistic differences. *See* Administrative Policy ES.C.2

for labor. The court also concluded that there was a significant educational value to the work program.

Below is a survey of the facts of other cases where federal courts have considered the employment status of purported trainees, particularly the facts that courts have considered relevant in determining whether the employer was receiving an immediate benefit from the trainee's work.

Cases where purported trainees were *not* employees:

Walling v. Portland Terminal Co., 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947). This was a one week pre-employment training for railroad employees. The court found no benefit to the employers because they only provided railroad brakemen training comparable to that which would have been provided at a vocational school and the company's business was actually impeded by the presence of the trainees, because they had to be supervised by regular employees.

Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011). Here boarding school students at a religious school worked in kitchen, housekeeping and nursing work programs. The court found that any benefits received by the school were secondary to the purposes of religious training, that the school does not compete for labor and offers programs comparable to other vocational schools. The court concluded that the students gained the principal benefit because they gleaned practical skills about work, responsibility, and the dignity of manual labor in a way consistent with the religious mission of their school. Even though proceeds from the students' labor went to fund school operations, the court found that the students did not displace other workers and that staff had to spend time supervising their work.

Marshall v. Regis, 666 F.2d 1324 (10th Cir. 1981). This case concerned residence assistants (RAs) in liberal arts college dormitories who received financial aid, but not wages, in exchange performing for miscellaneous administrative tasks such as telephone coverage, mail distribution, unlocking doors, maintaining discipline and order within the halls and encouraging participation in campus activities. Plaintiffs contended that RAs were "employees" because they received compensation in the form of tuition waivers, and the College enjoyed an immediate economic benefit from their services. However, the court found that RAs did not displace other employees and the primary goal of the program was educational, so they were not employees despite the benefit provided to the college. The court held that the RAs were more like students in other campus programs receiving financial aid (such as athletes and those in student government) than they were like sales clerks at the bookstore (who the court concluded would qualify as employees).

Williams v. Strickland, 87 F.3d 1064 (9th Cir. 1996). Case involving homeless residents in a work program restoring furniture. The court concluded that the work therapy was strictly rehabilitative, to give participants a sense of self-worth and allow them to reenter the job market. A dissent in the case noted that the employer did fund its operations

through sale of the furniture, and that a rehabilitative focus does not preclude an employment relationship. *See Archie v. Grand Central*, 997 F.Supp. 504 (S.D.N.Y. 1998), where the court came to a different conclusion on similar facts.

Donovan v. American Airlines, 686 F.2d 267 (5th Cir. 1982). Flight attendants were chosen to attend a five-week unpaid pre-employment training program. Participants were told that they would probably report to their base station at the conclusion of training, so they should resign from their current job. Most, but not all, trainees accepted jobs with American Airlines at the conclusion of the program. Trainees were provided room and board during training. They learned specific American Airlines procedures, and did not displace regular airline employees during the training period. The court concluded that training program only created a pool of potential employees, and so was not immediately beneficial to the airline. Trainees do not begin to benefit the airline until their training ends.

Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993). Firefighters completed an unpaid ten-week long training program to learn fire science and basic firefighting procedures. If trainees successfully completed the program, the expectation was that they would be hired. Trainees staffed a truck that had previously been attended by volunteers. Although they were never called into service, they maintained the truck and its equipment in a state of readiness. On one occasion, while returning from a training exercise, the trainees responded to a car accident and provided paramedical services. However, the court concluded that trainees did not assume the duties of career firefighters and their presence did not obviate the need for qualified firefighters and emergency medical technicians to perform work. Any productive work performed by the trainees for the fire department was *de minimis*. The court found that there was a sound educational component to the program, and that the fire department did not benefit until the program had concluded, so the trainees were not employees.

Atkins v. General Motors, 701 F.2d 1124 (5th Cir. 1983). Trainees participated in a six to eight-week training in headlamp factory. The program combined classroom training with hands-on training. Students assembled and reassembled equipment, and cleaned the equipment and the area around it. Students would work on one machine until they reached a certain level of proficiency, and then rotate to another part of the production line. The trainees knew that they were not going to be paid for the class, and were not guaranteed a job at the end of it. The court found there were only two isolated instances where trainees performed work for the employer's benefit—uncrating a piece of machinery and doing some cleaning. This work activity was *de minimis* and the trainees were there principally for their own benefit. There was also evidence that trainees damaged equipment, and so impeded rather than benefited the business.

Petroski v. H&R Block, 750 F.3d 976 (8th Cir. 2014). This case involved tax preparers in an unpaid 24-hour retraining program. Tax preparers could complete the continuing education requirement through the company, or from another vendor. The court found no immediate benefit to employer because trainees do not complete tax documents during

the retraining program, and the trainees do not displace other employees or expedite the business. H & R Block's collection of a nominal fee for its training and its promotion as having well-trained tax preparers did not constitute an "immediate advantage" to the employer.

Cases where purported interns were found to be employees:

McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989). This case concerned a week long training for new vending machine employees. The court held that the employer benefited most from the unpaid training because the employees were taught limited skills, while the employer gained free labor and a free opportunity to review performance. The other employees were assisted, not impeded, in their work by the presence of the trainees. Virtually all trainees were hired after the training, meaning they should have been treated as employees from the very beginning.

Marshall v. Baptist Hospital, 473 F. Supp. 465 (M.D. Tenn. 1979). This case concerned a program for radiology students working at a hospital. The court found it important to assess "the validity of the program as an educational experience" to determine whether the primary benefit from the relationship flows to the learner or to the alleged employer. The court found it significant that approximately 39% of all procedures at the hospital were chest X-rays and virtually all chest X-rays were performed by trainees. In addition, the trainees were required to perform clerical duties for which the hospital would have had to hire other employees or require overtime work, if the hospital had not been able to use the students. The court weighed these facts against the fact that the internship program at the hospital did not include significant training opportunities from actual employees, concluding that the hospital was the primary benefactor from the relationship. The court noted that the trainees were shortchanged educationally, in that they generally did work without supervision or feedback from staff.

Glatt v Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (2013) concerned unpaid interns working for a movie company. The interns performed administrative tasks such as preparing invoices and cover letters, taking out trash and answering the phone – both on movie sets and in the corporate office. The movie company argued that the interns were being trained in the workings of the entertainment industry and were the primary beneficiaries of the arrangement. The court gave deference to the six DOL factors and concluded that the film company benefited immediately from the services of the interns because they did menial but important work, such as making photocopies and running errands, that would have otherwise required paid employees. The court found that there was no evidence that the interns impeded the business of the movie company.

Archie v. Grand Central, 997 F.Supp. 504 (S.D.N.Y. 1998). Here, homeless participants in a job training program performed clerical, maintenance and food service tasks. The court concluded that the participants benefited enormously by learning basic job skills, but that the employer gained a greater and immediate advantage because it was able to

offer the services of the trainees at below market rates, and because the trainees took the place of other workers and did not require direct supervision.

Reich v. Shiloh True Light Church of Christ, 895 F.Supp 799 (W.D.N.C. 1995) aff'd, 85 F.3d 616 (4th Cir. 1996). This was a church-run vocational program where 11 to 16 year-olds performed construction work. The court found that the church had converted its vocational program into a business competing with other contractors. The church completed 97 construction projects using minor labor and received fair market value for the projects and so received a direct benefit. The free labor of the minor workers displaced other workers and the court found no credible vocational or educational component to the work.

This opinion represents my own analysis as an Assistant Attorney General assigned to represent the Department of Labor and Industries. However, it is not an official opinion of the Attorney General's Office. Please feel free to call me at (206) 389-2770 if you have any further questions.

Federal Courts after Walling case (predates our test) 1947

7 found NOT EE

1 found to Be EE

Federal Dst (Trial level) Court

1 found NOT EE

5 found to be EE's

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Reich v. Shiloh True

minors in a church group

? Baileys v. Pilot's Ass'n

Boat Pilot program

Introduction

In the following cases, federal courts have considered whether a purported intern/trainee was exempt from the Fair Labor Standards Act (FLSA) or was an employee subject to the Act. The trainee exemption was first articulated by the U.S. Supreme Court in the 1947 decision in *Walling v. Portland Terminal Co.* 330 U.S. 148, 67 S. Ct. 639 (1947). The federal Department of Labor (DOL) subsequently developed a six-part policy to determine if an individual qualified as an intern. The DOL's fact sheet states that an intern is exempt from FLSA only if all six elements of the following test are met:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern, and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

As described below, federal courts have given various degrees of weight to this test. Some have agreed that each element must be met, while others have treated the elements as guidelines, but not required that every element be met. Still others have not applied the test, but generally weighed the benefit to the purported trainee against the benefit to the business to determine whether the individual was an employee under FLSA.

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FEDERAL COURTS APPLYING THE "TRAINEE" EXCEPTION TO FLSA					
Case	Court	Occupation	Was the DOL test applied?	EE?	Key facts
Walling v. Portland Terminal Co. 330 U.S. 148, 67 S. Ct. 639 (1947)	Supreme	Brakemen, railroad	No, Predates DOL test	N	No immediate advantage to employers, no expectation of compensation, the training serves only the trainee's own interest, same training might be provided in a school
FEDERAL COURTS OF APPEAL					
McLaughlin v. Ensley, 877 F.2d 1207(4th Cir. 1989)	4th Cir.	Stockers in one week training	No, Primary benefit	Y	Employer received most benefit, only limited training
Donovan v. American Airlines, 686 F.2d 267 (5th Cir. 1982)	5th Cir.	Flight attendants in six week training	No, Relative benefit (also would pass each element of DOL test)	N	No displacement of workers, fits with facts of *Walling*, employer can organize training as it sees fit
Atkins v. General Motors. 701 F.2d 1124 (5th Cir. 1983)	5th Cir.	Trainees in headlamp plant, six to eight week course	Yes, DOL test entitled to substantial deference	N	No immediate advantage to employer, benefit to the employer was minimal and the trainees actually damaged things, impeding the business

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Solis v. Laurelbrook Sanitarium, 642 F.3d 518 (6th Cir. 2011)	6th Cir.	Students in kitchen, housekeeping and nursing	No, Primary Benefit (DOL test too rigid)	N	Primary benefit runs to students, who do not displace other workers because the work would not exist without the educational program	
Petroski v. H&R Block, 750 F.3d 976 (8th Cir. 2014)	8th Cir.	Tax preparers in 24 retraining	Yes, Primary benefit but DOL test also met	N	No immediate advantage to employer, benefit only starts when the tax preparers begin paid work	
Williams v. Strickland, 87 F.3d 1064 (9th Cir. 1996)	9th Cir.	Homeless resident of rehab program	Not addressed, court used "economic reality" test	N	No express or implied agreement for compensation, primary benefit runs to worker	
Marshall v. Regis, 666 F.2d 1324 (10th Cir. 1981)	10th Cir.	Resident assistants at college	Not addressed, court used a "totality of circumstances" test	N	Educational benefit greater than the benefit to employer, and there was no displacement of other employees	
Reich v. Parker Fire, 992 F.2d 1023 (10th Cir. 1993).	10th Cir.	Firefighter trainees in ten week course	Somewhat. DOL test relevant but not conclusive	N	Workers did expect to be hired at the end of training, but all other factors of test support finding that these are trainees	
FEDERAL DISTRICT (TRIAL LEVEL) COURT						
Marshall v Baptist Hospital, 473 F. Supp. 465 (M.D. Tenn. 1979) Reversed on other	Tennessee District Court	Radiology students	Primary benefit (no DOL)	Y	Program not educationally sound, employees were displaced, interns functioned as integral to operations of the hospital	

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grounds at: 668 F.2d 234 (6th Cir. 1981)					
Glatt v Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (2013)	New York District Court	Movie set interns	DOL no single factor controlling (*no support for primary benefit in Walling)*	Y	Immediate advantage to employers, no unique educational advantage to interns → impedes their education
Archie v. Grand Central Partnership, Inc. 997 F. Supp. 504 (S.D.N.Y. 1998)	New York District Court	Homeless in job program	DOL no single factor	Y	Defendants obtained greater advantage (although workers obtained significant advantage also), workers expected compensation, filled out payroll sheets, employment agreement included stipend and bonuses (they are kids)
Reich v. Shiloh True Light, 895 F.Supp 799 (W.D.N.C. 1995) aff'd, 85 F.3d 616 (4th Cir. 1996)	North Carolina District Court	Minors in church group	Economic realities (cites 10 facts/elements)	Y	Primary and immediate benefit to employer, exploitation of minors over period of years, labor of minors converted this into a commercial enterprise, not an educational establishment
Bailey v. Pilots' Ass'n for Bay & River Delaware, 406 F. Supp. 1302 (E.D. Pa. 1976)	Pennsylvania District Court	Boat pilot apprentice program	No, Economic Reality	Y	Immediate benefit to employer, and the apprentices displaced other employees.

O'Neill v. East Florida Eye Institute, 11-CV-14384, 2012 WL 8969062, at *1 (S.D. Fla. Apr. 17, 2012) *aff'd sub nom. Kaplan v. Code Blue Billing & Coding, Inc.*, 504 Fed. Appx. 831 (11th Cir. 2013)	Florida District Court	Student at eye clinic	Not clear, but applied DOL factors	N	No expectation of compensation, employer received little benefit