NO. _____

IN THE

Supreme Court of the United States

DOUGLAS J. HOLDINGS, INC., ET AL.,

Petitioners,

v.

JOY EBERLINE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court Of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM M. JAY
GOODWIN PROCTER LLP
1900 N St., N.W.
Washington, DC 20036

GERARD J. CEDRONE
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

MATTHEW T. NELSON
Counsel of Record
AMANDA M. FIELDER
BRANDON J. CORY
WARNER NORCROSS + JUDD LLP
150 Ottawa Avenue, NW
Suite 1500
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

Counsel for Petitioners

(Additional counsel listed on inside cover)

MICHAEL G. BRADY
ADAM T. RATLIFF
WARNER NORCROSS +
JUDD LLP
2715 Woodward Avenue
Suite 300
Detroit, MI 48201

QUESTION PRESENTED

The Fair Labor Standards Act requires an employer to compensate "employees" for the work they perform. 29 U.S.C. 206, 207. But not all working relationships are characterized by employment. The question presented is:

Whether the Fair Labor Standards Act requires a court to consider all the circumstances of the parties' relationship, or only those discrete tasks identified by the plaintiff, in assessing whether a student, intern, or trainee is an employee under the Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioners are Douglas J. Holdings, Inc.; Douglas J. AIC, Inc.; Douglas J. Exchange, Inc.; Douglas J. Institute, Inc.; Scott A. Weaver; and TJ Weaver.

Petitioner Douglas J. Holdings, Inc. does not have a parent corporation, and no publicly traded corporation owns a 10% or greater interest in the company.

Petitioners Douglas J. AIC, Inc., Douglas J. Exchange, Inc., and Douglas J. Institute, Inc. are wholly owned subsidiaries of Petitioner Douglas J. Holdings, Inc.

Respondents are Joy Eberline, Tracy Poxson, and Cindy Zimmermann.

RELATED PROCEEDINGS

United States District Court (E.D. Mich.):

- *Eberline* v. *Douglas J. Holdings, Inc.*, 14-cv-10887 (Oct. 1, 2018) (order granting partial summary judgment to respondents)
- *Eberline* v. *Douglas J. Holdings, Inc.*, 14-cv-10887 (Mar. 1, 2019) (order certifying summary-judgment ruling for appeal)

United States Court of Appeals (6th Cir.):

- *In re Douglas J. Holdings, Inc.*, No. 19-0104 (Jul. 17, 2019)
- *Eberline* v. *Douglas J. Holdings, Inc.*, No. 19-1781 (Dec. 17, 2020)

TABLE OF CONTENTS

PETITION APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Regulations

TABLE OF AUTHORITIES—Continued

Page(s)

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Douglas J. Holdings, Inc.; Douglas J. AIC, Inc.; Douglas J. Exchange, Inc.; Douglas J. Institute, Inc.; Scott A. Weaver; and TJ Weaver respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Sixth Circuit's opinion, App. 1a–43a, is reported at 982 F.3d 1006. The United States District Court for the Eastern District of Michigan's opinion partially granting summary judgment, App. 45a–70a, is reported at 339 F. Supp. 3d 634. The district court's opinion certifying its summary-judgment opinion for appeal, App. 71a–81a, is unreported but available at 2019 WL 989284. The Sixth Circuit's order granting permission to appeal, App. 82a–83a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 2020. App. 44a. A petition for rehearing was denied on February 9, 2021. App. 84a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 203, 206, and 207 of Title 29 of the United States Code are set forth in an appendix to this petition. App. 85a–122a.

INTRODUCTION

This case raises a significant issue concerning when vocational training programs and internships create employment relationships for purposes of the Fair Labor Standards Act. The FLSA requires an employer to pay employees for their work, but not all working relationships are subject to the FLSA. The FLSA "was obviously 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." *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

In *Portland Terminal*, the Court concluded that trainees in a company-run training program were not employees. Since then, the regional circuits have diverged over how to apply the Court's decision to internships and vocational schools. But the court of appeals' decision below greatly expanded the scope of the conflict.

The Sixth Circuit held that courts should assess whether an employment relationship exists based solely on those segments of the parties' overall relationship challenged by the plaintiff. As Judge Batchelder explained in her dissent, the panel majority's minute-by-minute approach to determining whether students are employees—in which the answer may shift back and forth multiple times over the course of the workday—conflicts with the decisions of the other circuits. App. 37a–40a. The other circuits have recognized that the question of whether a student, intern, or trainee is an employee for purposes of the FLSA is resolved by the economic reality of the parties' whole relationship. See *Tony & Susan Alamo Found.* v. *Sec'y of Labor*, 471 U.S. 290, 301 (1985). And this analysis requires consideration of the

totality of the circumstances. See *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947).

The decision below creates immense practical problems. The court of appeals acknowledges that its analysis may result in a student, intern, or trainee being designated an employee when performing certain tasks but not others. Here, for example, cosmetology students spent time sanitizing the training salon during their downtime. Under the Sixth Circuit's approach, a student who spends 15 minutes wiping down the hair-washing station and changing a load of towels in the laundry between cutting guests' hair might be deemed an employee because of those 15 minutes—but only during that period. The practical complexities created by resolving the threshold issue of whether an employment relationship exists on a task-by-task basis are burdensome for courts and a record-keeping nightmare for schools, internship providers, and training programs.

As the dissent points out, the Sixth Circuit's decision conflicts with the decisions of three other circuits addressing cosmetology students who performed nearly identical activities. The other circuits concluded that the cosmetology students in each case were not employees of their school. More fundamentally, the other circuits assessed whether an employment relationship existed by considering the totality of the parties' relationship, not segments thereof.

The question presented affects any FLSA case arising from an educational, internship, or training relationship. The Court should grant certiorari and restore the nationwide predictability and uniformity to the application of the FLSA in the vocational-training context.

STATEMENT

A. Employee status under the FLSA

Enacted in 1938, the FLSA sought "to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage." *Walling* v. *Portland Terminal Co.*, 330 U.S. 148, 152 (1947). To that end, the FLSA requires an employer to pay its employees a minimum wage for services performed. See 29 U.S.C. 206, 207. The Act unhelpfully defines "employee" as "any individual employed by an employer" and "employ" as "to suffer to permit to work." 29 U.S.C. 203(e)(1), (g).

It did not take long before this Court was called upon to address the ambiguity of these definitions. In 1947, the Court decided two cases that would set the stage for how courts are to answer the "employee" question: one in the context of trainees, *Portland Terminal*, 330 U.S. at 149; and the other concerning whether workers were independent contractors, *Rutherford Food Corp.* v. *McComb*, 331 U.S. 722, 730 (1947). In both cases, the Court assessed the relationships between the employers and workers as a whole and identified the workers as either employees or not employees.

Portland Terminal concerned whether the FLSA compelled a railroad to pay wages to prospective railyard workers who participated in a training program operated by the railroad. 330 U.S. at 149. The Court observed that the trainees had no expectations of compensation, were not guaranteed a job, and did not displace regular employees. *Id.* at 150. To determine whether the trainees were employees, the Court contrasted an employment relationship with an educational relationship. The Court noted that the FLSA

did not treat people who worked without any expectation of compensation, and for their own advantage, as employees. "Otherwise, all students would be employees of the school or college they attended, and as such entitled to receive minimum wages." *Id.* at 152. The Court also observed that if the trainees had "taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school." *Id.* at 152–153. The Court held that the trainees were not employees. *Id.* at 153.

Later that same year, the Court held that workers in a meat-packing plant, who had ostensibly entered into independent contracts, were actually the plant's employees. *Rutherford Food*, 331 U.S. at 723–726, 730. The Court considered the workers' relationship with the plant and concluded that because the circumstances as a whole suggested that they worked "as a part of the integrated unit of production" with the plant, they were employees under the FLSA. *Id.* at 729. Addressing the district court's observation that certain aspects of the work contracts were inconsistent with an employee relationship, the Court stressed that the "determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity." *Id.* at 730.

The Court has since applied this analysis to determine that homeworkers for a cooperative were employees under the FLSA, *Goldberg* v. *Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961), and that volunteers who engaged in various commercial activities for a non-profit foundation were employees because they did so in expectation of receiving in-kind benefits, *Tony & Susan Alamo Foundation* v.

Secretary of Labor, 471 U.S. 290, 301–303 (1985). In each instance, the Court assessed the economic relationship as a whole. In *Alamo*, the Court described its approach as one that assesses the "economic reality" of the relationship between the employer and individual. *Id.*

In 1975, the Department of Labor adopted a multi-requirement test, taking six factual aspects of the training program observed by the Court in *Portland Terminal* and making each of them a requirement that had to be met for a trainee not to be an employee. See *Reich* v. *Parker Fire Protection Dist.*, 992 F.2d 1023, 1025–1026 (10th Cir. 1993) (quoting Wage & Hour Manual (BNA) 91:416 (1975)). The Department contended that the same multi-requirement test should be applied to internships and schools. See *Glatt* v. *Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 534 (2d Cir. 2016); *Solis* v. *Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 524–525 (6th Cir. 2011).

The Department's test was not well received. Most circuits rejected the test as too rigid. See, *e.g.*, *Glatt*, 811 F.3d at 536; *Laurelbrook*, 642 F.3d at 524–525.[1] Courts noted that under *Rutherford Food*, the question of whether an employment relationship exists must consider the totality of the circumstances so that no single factor in isolation is dispositive.

[1] Seven circuits rejected the Department's test. *Benjamin* v. *B & H Educ., Inc.*, 877 F.3d 1139, 1148 (9th Cir. 2017); *Schumann* v. *Collier Anesthesia, P.A.*, 803 F.3d 1199, 1209 (11th Cir. 2015); *Parker Fire*, 992 F.2d at 1027; *McLaughlin* v. *Ensley*, 877 F.2d 1207, 1209–1210 & n.2 (4th Cir. 1989); see *Hollins* v. *Regency Corp.,* 867 F.3d 830, 834–836 (7th Cir. 2017).

Parker Fire, 992 F.2d at 1027; *Laurelbrook*, 642 F.3d at 525.

Having rejected the Department's multi-criterion test, most circuits have coalesced around the concept that *Portland Terminal* requires courts to assess the totality of the parties' relationship to determine whether a student, intern, or trainee is the primary beneficiary of the educational or vocational relationship. Yet the courts have fractured over how to make that assessment.

After a number of circuits rejected its analysis, the Department of Labor scuttled its previous test. In its place the Department adopted a more flexible, multifactor approach to "align with recent case law" and "eliminate unnecessary confusion among the regulated community." (ECF No. 91-1, DOL Wage & Hour Div. Field Assistance Bulletin 2018-2 (Jan. 2018).)

The decisions below were made against this backdrop.

B. Factual Background

Douglas J. Institute, Inc. operates cosmetology schools in Michigan and Tennessee. Douglas J. AIC, Inc. operates a cosmetology school in Illinois.[2] App. 47a. These two entities are referred to as "Douglas J."

As in most states, cosmetology schools in Michigan are heavily regulated. For example, individuals cannot render cosmetology services to the public

[2] The other Petitioners, Douglas J. Holdings, Inc., Douglas J. Exchange, Inc., Scott A. Weaver, and TJ Weaver, do not operate cosmetology schools. Respondents included them as defendants based on enterprise-liability and personal-liability theories not at issue here.

without a license, and to obtain a cosmetology license, one must first complete 1,500 hours of study at a licensed cosmetology school. App. 4a. This includes at least 425 hours of classroom instruction and 965 hours of practical instruction. *Ibid.* These hours are divided among various skills, including sanitation. Michigan inspects cosmetology schools bi-annually to ensure compliance with these state laws, including the content of the instruction. App. 25a.

Consistent with the applicable state requirements, Douglas J's program offers both classroom instruction and clinic-based instruction at clinic salons. App. 4a–5a. The clinic salons emulate a true salon setting and are open to the public. *Ibid.* Only students provide services at the clinic salon, all under the supervision of licensed instructors. *Ibid.* The instructors assist and observe the students, and grade the students based on their technical execution. App. *Ibid.* Douglas J employs daytime staff to maintain the cleanliness of its school, guest-services personnel to assist clients, and a nighttime janitorial service to clean the facilities six nights each week. App. 28a.

Opportunities to practice on a guest in the clinic salon depend on members of the public coming in, so students are not guaranteed to have a full number of guests each day. App. 5a–6a. To ensure that students continue to make progress toward their state-mandated minimum hours, Douglas J provides students with activities they can perform between seeing guests. *Ibid.* The activity is the student's choice. App. 27a. At times, this includes cleaning, restocking, and laundering the clinic towels. App. 4a–6a, 8a. Douglas J applies all of these hours, including time spent on sanitation activities between guests, toward a student's 1,500-hour requirement. App. 4a–

6a, 8a. This system works well for Douglas J's students, who graduate, pass the state cosmetology licensing exam, and find cosmetology jobs at rates that greatly exceed the benchmarks established by its accreditors. (Accreditor's Report, ECF No. 56-20, PageID 1743.) Indeed, 85% of Douglas J students pass the state licensing exam, which the district court recognized was a "high rate." App. 56a.

C. Proceedings in the district court

Respondents are former Douglas J students who graduated from Douglas J's Michigan schools between 2011 and 2013. App. 46a. Starting in 2013, cosmetology students throughout the country sued various cosmetology and beauty schools alleging that students were employees under the FLSA. In 2014, respondents joined this litigation wave, filing this case in the United States District Court for the Eastern District of Michigan. Like all of the preceding cases, respondents alleged that they were "employees" under the FLSA and entitled to unpaid wages. Specifically, respondents alleged that they were entitled to compensation for all time spent working in Douglas J's student clinics—time they had counted toward the 965-hour and 1500-hour education requirements. App. 8a–9a.

Respondents made these allegations even though they later testified that they did not expect to be paid for the time in the student clinic. App. 5a. In addition, respondents understood that they would be responsible for finding employment after they successfully completed their education at Douglas J. App. 5a. Each respondent received from Douglas J what they requested—a cosmetology education that fulfilled the state practical-learning requirements and prepared them to pass the Michigan cosmetology exam and find

employment in the field. Indeed, each respondent passed the exam and obtained employment in the cosmetology industry after graduating from Douglas J. App. 46a.

Douglas J and respondents filed cross motions for summary judgment on the question of whether respondents could bring claims as "employees" under the FLSA.

The district court granted partial summary judgment to the respondents, concluding that the primary-beneficiary analysis does not require an "all-or-nothing determination of employee status." App. 60a. The court adopted the respondents' argument that it could "extract" certain tasks—cleaning, doing laundry, and restocking products—from the parties' whole relationship and examined whether *those tasks* were outside the educational framework. App. 30a. Because the court believed that the extracted tasks were outside the educational framework, the court determined that respondents were employees while performing those tasks. And it did so without even applying the primary-beneficiary test to those tasks. See App. 13a.

After extracting the sanitation tasks, the district court granted Douglas J partial summary judgment as to the rest of the respondents' time in the student clinic. App. 9a–10a.

Acknowledging that its holding was inconsistent with the decisions of various circuits on the same issue, the district court certified its summary-judgment ruling for appeal. App. 10a. The Sixth Circuit granted Douglas J's petition to appeal. App. 82a–83a.

D. Proceedings in the Sixth Circuit

The Sixth Circuit unanimously agreed that the district court had erred by declining to apply the primary-beneficiary test to the extracted tasks. App. 12a–13a. But the panel divided over whether courts should apply the primary-beneficiary test to just the activities that the district court had extracted or to the parties' relationship as a whole. App. 14a, 33a–37a. A majority of the panel agreed with the respondents that courts should "segment" each activity and analyze it separately. App. 12a. In dissent, Judge Batchelder rejected this "segmented" analysis and noted that the panel majority's decision was inconsistent with the rulings of three other circuits. App. 33a–37a.

The court of appeals first concluded that the tasks that the district court had extracted from the parties' relationship arose in the educational context. App. 12a–13a. The respondents were in the student clinics as part of the program; they alleged that they were assigned tasks by instructors; and they received academic credit for the tasks performed. *Ibid.* Thus, the "tasks spring from the students' relationship with Douglas J." App. 12a–13a. For that reason, the court held that the district court should have applied the primary-beneficiary test that the Sixth Circuit had adopted in *Laurelbrook*. *Ibid.*

The panel majority then turned to whether the primary-beneficiary test applies to the parties' relationship as a whole or just to the extracted tasks. App. 14a–20a. This is where things went awry. Despite acknowledging that the "proper approach for determining whether an employment relationship exists in the context of a training or learning situation

is to ascertain which party derives the primary benefit from the relationship," App. 11a (citation omitted), and highlighting factors discussed by other courts "like whether the purported employee had an expectation of compensation, derives educational value from the work, or displaces paid employees," *ibid.*, the court nonetheless concluded that relationships can, and should, be segmented for purposes of the FLSA analysis. App. 14a–20a. Under the panel majority's "targeted" approach, the primary-beneficiary analysis is only applied to the "segments" of the relationship for which the plaintiffs seek compensation. *Ibid.* Courts must not consider any benefits that flow to students from the rest of the relationship, but must decide whether students are employees for the purposes of those tasks only. App. 14a–15a, 20a, 23a. The panel majority asserted that its segmentation approach is consistent with the one-of-a-kind statutory exemption from the definition of employee for individuals who perform volunteer work for the same public agency that employs them so long as the volunteer work is not the same type as the work performed as an employee. App. 15a–16a (citing 29 U.S.C. 203(e)(4)(A)). The court remanded for the district court to apply this approach. App. 24a.

Judge Batchelder dissented in part. App. 24a–43a. She disagreed with the panel majority's "targeted" approach, which she recognized as inconsistent with Sixth Circuit precedent and creating a circuit split with the Second, Seventh, and Ninth Circuits. App. 24a. In deciding that cosmetology students were not employees, each of those courts of appeals analyzed the totality of the circumstances of the students' relationship with the school—not individualized tasks. App. 37a–39a. Judge Batchelder

would have followed the approach in those cases and applied the primary-beneficiary test to the entire relationship between Douglas J and the students to categorize them as either students or employees. App. 31a.

The dissent recognized that this Court has instructed that a determination of employee status "depends on 'the circumstances of the whole activity' and the parties' respective contributions 'to the accomplishment of a common objective.'" App. 31a (citing *Rutherford Food*, 331 U.S. at 727, 730). With this framework, the dissent considered how to apply the Sixth Circuit's version of the primary-beneficiary test, as articulated in *Laurelbrook*. The dissent observed there that the Sixth Circuit had considered several relationship-level factors such as the benefits to the students from the "hands-on" training; the competitive advantage the students gained in the job market from having attended the school; and the intangible value of "receiv[ing] a 'well-rounded education' that valued 'responsibility and the dignity of manual labor.'" App. 33a (quoting *Laurelbrook*, 642 F.3d at 531). The *Laurelbrook* court did not, "analyze each challenged activity . . . in isolation from the vocational-training context." App. 33a.

The dissent pointed out several factors that the district court could consider under a proper approach, but could not consider under the majority's segmentation approach. These factors include the benefits that flowed to both parties from the students' work at the clinic salons—the hands-on experience and instruction the students receive and the income Douglas J receives from paying customers—as well as the burdens, such as the time and effort spent supervising

and training the students. App. 33a–37a. By disallowing trial courts from considering these relationship-level factors, the dissent recognized that the panel majority split with the other circuits. App. 37a–40a.

The dissent also identified that the majority "confus[ed] the issue of whether a student is an employee with the issue of whether an employee is owed compensation." App. 40a. These issues require separate inquiries: the working time question is "narrowly focused on whether the employee is working during a particular time period," whereas the employee question "makes a broader inquiry, focusing on the benefits accrued to each party by virtue of the educational and working relationship." *Ibid*. By "eradicat[ing] any distinction between these distinct legal issues," the majority had run afoul of the purpose of the FLSA and this Court's guidance in *Portland Terminal*. *Ibid*. For these reasons, the dissent would have directed the district court to apply the primary-beneficiary test to the entirety of the students' relationship with Douglas J. App. 37a.

REASONS FOR GRANTING THE PETITION

The circuits are deeply divided about how to determine whether a student, intern, or trainee is an employee under the FLSA. The Sixth Circuit's decision below sharpens the division into a clear split on a threshold methodological issue, by directing that employee status should be assessed on a task-by-task basis and not based on the parties' overall relationship. Three other circuits confronting the same fact pattern have reached the opposite result. And the Sixth Circuit's minority position also conflicts with the decisions by this Court addressing how courts are to determine whether an employment relationship exists for purposes of the FLSA. The Court has not addressed the issue since its seminal decision in *Portland Terminal*. The Court should grant certiorari to provide clarity to the lower courts and to schools, internship providers, and employers.

I. The decision below splits from other circuits by assessing whether a student, intern, or trainee is an employee on a task-by-task basis.

The court of appeals' decision creates a circuit split. As the dissent observed, three circuits have held that cosmetology students who work in their schools' clinic salons are not employees under the FLSA. App. 37a. More fundamentally, the Sixth Circuit has split from the other circuits on *how* to assess whether and to what extent a student, intern, or trainee is an employee. The Sixth Circuit's segmentation approach sets it apart from the decisions of all the other circuits. No other circuit separates a learner's relationship into constituent tasks—sometimes just minutes in

length—and assesses whether the plaintiff or the school is the primary beneficiary of each task.

1. The other circuits evaluate the entirety of the working relationship between the student, intern, or trainee and the school, internship provider, or trainer. Indeed, as Judge Batchelder pointed out, three circuits have confronted materially identical facts—cosmetology training that entailed some cleanup and similar tasks—and have come to the opposite conclusion from the Sixth Circuit's.

The Second Circuit has adopted the most widely followed analysis. In *Glatt* v. *Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016), the court determined that the proper inquiry is "whether the intern or the employer is the primary beneficiary *of the relationship*." *Id.* at 536 (emphasis added). The court identified three features of the primary-beneficiary test: "it focuses on what the intern receives in exchange for the work"; it allows courts to consider the economic reality of the parties' relationship; and it recognizes that the intern-internship provider relationship differs from an employer-employee relationship because of the intern's "expectation of receiving educational or vocational benefits." *Ibid.*

The Second Circuit then identified a non-exhaustive list of factors to consider when determining if an intern is an employee. *Id.* at 536–537. As the dissent below points out, these factors assess "the *entirety* of the working relationship." App. 38a. The *Glatt* factors are:

- The extent to which there is no express or implied expectation of compensation.
- "The extent to which the internship provides training that would be similar to that which

would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions."

- Whether there is a connection between the internship and a formal education program.
- "The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar."
- "The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning."
- The extent to which the intern's activities complement or displace the work of paid employees.
- The extent to which the intern and employer understand that the intern is not entitled to a paid job at the end of the internship.

811 F.3d at 537. The Second Circuit explained that the breadth of the analysis may include "evidence about an internship program as a whole rather than the experience of particular interns." *Ibid.*

Glatt addressed internships, but the Second Circuit applied the same primary-beneficiary analysis to cosmetology students in *Velarde* v. *GW GJ, Inc.*, 914 F.3d 779 (2d Cir. 2019). There, the court explained that the primary-beneficiary test distinguishes students from employees by "disentangling the threads of a complex economic fabric and teasing out the respective benefits garnered by students and their commercial training programs . . . ." *Id.* at 785. The court explained that this analysis is "key to determining whether, for FLSA purposes, a trainee is serving *primarily* as an employee of that school or

training program—or is *primarily* a student." *Ibid*. In so doing, the court recognized that a cosmetology student may be required to engage in some activities that lack an educational benefit but still be a student because their activities of chief importance are educational in nature.

Applying the primary-beneficiary test "to balance flexibly the benefits received by the student and the economic realities of the student-entity relationship," the court had no trouble concluding that the plaintiff was the primary beneficiary of the relationship. *Id*. at 786. The court did so even though the plaintiff complained that he was required to perform clerical and janitorial tasks that he perceived to have no educational value. *Id*. at 786–787.

The Ninth Circuit adopted the primary-beneficiary test as set forth in *Glatt* and applied it to a cosmetology program as a whole without segmentation. *Benjamin* v. *B & H Educ., Inc.*, 877 F.3d 1139, 1146–1148 (9th Cir. 2017).[3] The court did so because it believed the primary-beneficiary test "best captures" this Court's economic-realities test in the educational context. *Id*. at 1147. The court assessed various relationship-level factors including the students' lack of expectation of compensation or employment, the students' receipt of academic credit, and that the students' participation ended when they

[3] The plaintiffs in *Benjamin*, *Hollins* v. *Regency Corp.*, 867 F.3d 830 (7th Cir. 2017) discussed below, and this case filed nearly identical complaints. (Compare Compl., ECF No. 1, PageID 1; with *Hollins* v. *Regency Corp.*, 13 C 07686 (N.D. Ill.) Compl., ECF No. 1; *Benjamin* v. *B & H Educ., Inc.*, 13-cv-4993 (N.D. Cal.) Compl. ECF No. 1.) Despite the common allegations in the three complaints, the district court below reached the opposite result by segmenting the parties' relationship.

had accumulated the state-required number of training hours. *Id.* at 1147–1148. The Ninth Circuit ruled that the cosmetology students were not employees even though they were required to spend time laundering linens, sanitizing work stations, and selling products. *Id.* at 1142, 1147–1148.

The Seventh Circuit also assesses whether students are employees without segmenting the student-school relationship. *Hollins* v. *Regency Corp.*, 867 F.3d 830, 836–837 (7th Cir. 2017). In another case involving a cosmetology student claiming to be an employee of his cosmetology school because he was required to sanitize the salon floor and restock products, the court determined that the student was not an employee because he was paying the school for instructional time including practical-training time, and the purportedly menial tasks were also part of the job of the cosmetologist. *Ibid.* The Seventh Circuit considered the full scope of the parties' relationship to conclude that no employment relationship existed. *Ibid.* The purportedly menial tasks, it concluded, were "incidental"—"not enough to tip the balance over to the 'employee' side of the line." *Id.* at 837. The Seventh Circuit thus agreed that either the plaintiffs were employees or they were not, and that there was a "line" between them—as opposed to the Sixth Circuit's zigzag.[4]

---

[4] The Tenth Circuit has explicitly rejected *Glatt*, but it also applies its test to the relationship as a whole. *Nesbitt* v. *FCNH, Inc.*, 908 F.3d 643, 646–647 (10th Cir. 2018). The court explained that its test "relies on the totality of the circumstances and accounts for the economic reality of the situation." *Id.* at 647. The court reiterated the district court's assessment, "'[p]ut another way, I look at the forest, not just the trees.'" *Ibid.*

2. It is noteworthy that there is a 3-1 split *just on the cosmetology student fact pattern*. But the significance of the issue extends to numerous other internship and training scenarios. Even after adding the circuit decisions from these other contexts to the mix, the Sixth Circuit's segmented approach is still distinct. The closest any other circuit has come to endorsing a segmentation approach is a hypothetical example from the Eleventh Circuit.

The Eleventh Circuit adopted the primary-beneficiary analysis from *Glatt*, including the seven factors that, as discussed above, assess the parties' overall relationship. *Schumann* v. *Collier Anesthesia, P.A.*, 803 F.3d 1199, 1211–1212 (11th Cir. 2015). The court applied the primary-beneficiary analysis and the *Glatt* factors to assess whether students seeking to become certified registered nurse anesthetists were employees of the anesthesiology practice where they performed clinical internships. *Ibid.* However, despite adopting the *Glatt* factors, the Eleventh Circuit suggested that the application of the primary-beneficiary test may not result in "an all-or-nothing determination." *Id.* at 1214–1215. The court said it could "envision a scenario" where a plaintiff primarily benefited from an internship but "the employer also takes unfair advantage of the student." *Ibid*. The court then posited a hypothetical example of a person engaged in a medical-related internship who is required "to paint the employer's house in order for the student to complete [the] internship." *Id.* at 1215. The court believed that in that situation, the student would be an employee for the time spent house

painting and a student within the "legitimate confines of the internship."[5] *Ibid.*

3. In contrast, the Sixth Circuit has taken a different approach, departing significantly from the analysis applied by all of the other circuits. Here, the court applied the primary-beneficiary test to particular tasks within the parties' relationship instead of the relationship as a whole. App. 14a. The panel majority identified the fact that its analysis allows a person to transition from employee to student and back from minute to minute as a "feature" of its approach. App. 22a. As the dissenting judge noted, this approach is at odds with the primary-beneficiary analysis adopted by the Second, Seventh, and Ninth Circuits. App. 37a–40a. Indeed, the Second Circuit had expressly noted that the primary-beneficiary analysis is not intended to require that vocational school students receive the "*optimal* learning experience." *Velarde*, 914 F.3d at 787.

The panel majority's contention that its application of the primary-beneficiary test is no different than that of the other circuits is belied by the result here. As the dissent explained, in every other case in which a cosmetology student has claimed to be a cosmetology-school employee, the circuit courts have

[5] The dissent distinguishes the Eleventh Circuit's hypothetical by noting that it involves two distinct relationships, "clearly demarcated by both time and place," unlike the activities at issue here. App. 36a.

held that the students are not employees.[6] App. 37a–40a (citing *Velarde*, *Benjamin*, and *Hollins*). And, as noted above, in *Benjamin* and *Hollins*, the plaintiffs filed complaints that are nearly identical to the respondents' complaint here, challenging the same activities that the respondents challenged here—the entire time spent in the clinic salon.

The panel majority's assertion that its application of the primary-beneficiary analysis is part of the mine run of cases is further undermined by the absence of any court adopting a segmentation or "targeted" approach to determine whether an employment relationship exists in any context. The closest the panel majority comes to identifying support for segmentation is its discussion of 29 U.S.C. 203(e)(4)(A). App. 16a. But that statute merely creates a narrow exemption to the rule that a person's employment status is considered based on the entire relationship between a person and their putative employer, limited to government employees who also volunteer in some different capacity (*e.g.*, a police officer who volunteers

---

[6] The district courts have reached the same result. *Guzman* v. *Lincoln Tech. Inst.*, 339 F. Supp. 3d 1048, 1057 (D. Nev. Sept. 10, 2018); *Winfield* v. *Civitano*, 2018 WL 5298748, at *7 (E.D.N.Y. Mar. 14, 2018); *Ford* v. *Yasuda*, 2017 WL 4676575, at *5 (C.D. Cal. June 20, 2017); *Gerard* v. *John Paul Mitchell Sys.*, 2016 WL 4479987, at *8 (C.D. Cal. Aug. 22, 2016); *Jochim* v. *Jean Madeline Educ. Ctr. of Cosmetology, Inc.*, 98 F. Supp. 3d 750, 758–760 (E.D. Pa. 2015); *Ortega* v. *Denver Inst. LLC*, 2015 WL 4576976, at *17 (D. Colo. July 30, 2015); *Atkins* v. *Capri Training Ctr., Inc.*, 2014 WL 4930906, at *10 (D.N.J. Oct. 1, 2014). In the one other case where a district court ruled that a cosmetology student was an employee, the court later reversed itself because of the Ninth Circuit's decision in *Benjamin*. *Guy* v. *Casal Inst. of Nev., LLC*, 2019 WL 2192112, at *5 (D. Nev. May 21, 2019).

as a sports referee). *Ibid.*; 29 C.F.R. 553.103(c). The fact that the statutory *exemption* is necessary evidences the FLSA's general rule that a person is either an employee or not an employee with regard to a particular employer.

Contrary to the panel majority's assertion, *Benshoff* v. *City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999), is not "an example of how courts have routinely segmented working relationships for the analysis of FLSA claims." App. 16a. There, the court determined that the plaintiffs, city firefighters, were not working for the city when they volunteered for private rescue squads. *Benshoff*, 180 F.3d at 147. What mattered was that the rescue squads were not the city; thus, the plaintiffs had *two* working relationships, not a single "segmented working relationship[]." *Ibid.*; App. 16a. The Sixth Circuit's analysis, by contrast, breaks a single working relationship with a single entity into employee and not-employee segments. Nothing in *Benshoff* supports that approach.

* * *

Nearly 75 years after *Portland Terminal*, the circuits are in disarray over how to determine whether a student, intern, or trainee is an employee for their school, internship provider, or trainer. The Sixth Circuit's approach creates a stark circuit split at the threshold of the analysis: even the circuits that disagree over what factors make up the "primary beneficiary" analysis agree that those factors must be applied to the working relationship *as a whole*. By contrast, in the Sixth Circuit, the analysis applies only to the specific activities challenged by the plaintiff. Indeed, the Sixth Circuit considers it a feature of its "targeted" application of the primary-beneficiary analysis that it allows a person to be both

a student and an employee for work performed during the same shift at the same location. This Court's intervention is necessary to provide a uniform national standard.

II. The Sixth Circuit's holding is wrong.

The question of whether an employment relationship exists under the FLSA is always determined by the economic realities of the relationship. The primary-beneficiary test simply tailors the economic-realities assessment to the educational, internship, and training context. The Sixth Circuit's decision misdirects the analysis to specific tasks and away from the economic reality of the parties' relationship.

First, the Sixth Circuit's "segmentation" analysis is contrary to this Court's determination that the existence of an employment relationship is based on the economic realities of the parties' relationship.

The FLSA applies only to employment relationships. See 29 U.S.C. 206, 207. The FLSA defines "employee" as "any individual employed by an employer," and "employ" as "suffer or permit to work." 29 U.S.C. 203(e)(1), (g). These definitions have been criticized, including by this Court, as "completely circular and explain[ing] nothing." *Nationwide Mut. Ins. Co.* v. *Darden*, 503 U.S. 318, 323 (1992) (applying the identical definition under ERISA). Accord *Laurelbrook*, 642 F.3d at 522 ("exceedingly broad and generally unhelpful"); *Glatt*, 811 F.3d at 534 ("unhelpful[]"); *Vanskike* v. *Peters*, 974 F.2d 806, 807 (7th Cir. 1992) ("circular").

In the absence of useful statutory definitions, the Court has directed that employment is assessed based on the "economic reality" of the relationship between the parties. *Alamo*, 471 U.S. at 301 (citing *Goldberg*,

366 U.S. at 33). And that assessment requires consideration of "the circumstances of the whole activity." *Rutherford*, 331 U.S. at 730.

The Sixth Circuit acknowledged these requirements, App. 11a, but concluded that the determination of whether a student is an employee should not be based on "the broader relationship as a whole," App. 14a. Instead, the court concluded that the primary-beneficiary analysis, and thus the assessment of whether a student is an employee, should be applied "only to that part of the relation-ship" for which the plaintiff seeks compensation. App. 14a.

The dissent correctly explains that the "economic reality" of the parties' relationship cannot be understood by assessing the relationship piecemeal. App. 35a. "The economic reality of the parties' *relationship*—the very reason for their affiliation—cannot be appreciated" without considering all of the circumstances. App. 35a.

Second, the Sixth Circuit conflated whether an employment relationship exists with questions of whether various tasks are compensable. App. 40a.

The Sixth Circuit defended its "targeted" approach for the "segmented" work by citing to several cases where courts had occasion to divide an employee's time between compensable and non-compensable activities, arguing that its new approach was no different. App. 21a–22a. But as the dissent pointed out, by conflating the primary-beneficiary test with this separate question, the court "confus[ed] the issue of whether a student is an employee with the issue of whether an employee is owed compensation." App. 40a.

The FLSA only applies if there is an employment relationship. Thus, the decision about whether time spent on call, donning and doffing work-related garments, and on lunchbreaks is compensable follows the threshold question of whether an employment relationship exists at all. See, *e.g.*, *Halferty* v. *Pulse Drug Co.*, 821 F.2d 261, 264 (5th Cir. 1987), *modified on reh'g on other grounds*, 826 F.2d 2 (5th Cir. 1987) (acknowledging that when a plaintiff brings an FLSA claim seeking compensation for certain tasks, "[t]he first issue we address is whether, under the FLSA, [plaintiff] is an . . . employee"). There is a good reason for this. People do not stop being employees while they are eating lunch. The term "employment" describes a relationship, but the compensable-time inquiry focuses on discrete tasks to determine whether an employee is working during a particular time. Compare *Alamo*, 471 U.S. at 301 (weighing factors like the length of the relationship between the parties and the parties' expectations to determine whether an employment relationship exists), with *Integrity Staffing Sols., Inc.* v. *Busk*, 574 U.S. 27 (2014) (considering whether time spent on security screenings fell within the undisputed employment relationship such that it was compensable time under the FLSA).

By prohibiting lower courts from considering these factors and instead focusing solely on the benefits that flow from the particular tasks at issue, the Sixth Circuit has converted the employment question into another version of the compensable-time question—essentially reading the threshold employee requirement out of the FLSA.

III. The question presented concerns an important issue of federal law that warrants review in this case.

The question presented raises a critical threshold issue under an important federal statute.[7] It warrants this Court's review because allowing the Sixth Circuit's approach to stand will have significant practical consequences for vocational schools and internship providers. Schools and internship providers must now ensure that *every moment* of a vocational program or internship primarily benefits the student over the school or risk a collective action for minimum wages under the FLSA for some portion of the program—at least if there is any chance they can be sued in the Sixth Circuit. Balkanizing a single relationship in this fashion creates uncertainty to which schools are sure to respond by restricting the activities for which students can obtain credit, and lengthening the time necessary for them to meet state-hours requirements.

This comes at a time when enrollment in vocational education is increasing as an alternative to traditional college. See Meg St-Espirit, *The Stigma of Choosing Trade School Over College*, The Atlantic (Mar. 6, 2019), https://tinyurl.com/4tjf2xfz (noting that from 1999 to 2014 trade-school enrollment in the

---

[7] This Court has explicitly acknowledged the importance of the employee question under the FLSA before. *Goldberg*, 366 U.S. at 29 (granting cert. "because of the importance of the problem in the administration of the [FLSA]"); *Rutherford Food*, 331 U.S. at 723 (reviewing "because of the importance of the issues presented by the petition for certiorari to the administration of the [FLSA]."); *Portland Terminal*, 330 U.S. at 149 ("Certiorari was granted because of the importance of the questions involved to the administration of the [FLSA].").

country rose about 67% compared to a 28% increase in traditional college enrollment). Indeed, as traditional college is perceived as increasingly less affordable, vocational schools are becoming more important for training the nation's high school graduates. Douglas Belkin, *Why an Honors Student Wants to Skip College and Go to Trade School*, Wall St. J. (Mar. 5, 2018), https://tinyurl.com/56zmyyfn (reporting that in light of increasing affordability concerns over traditional college, "U.S. high schools . . . are beginning to re-emphasize vocational education").

All of these programs are potentially implicated by the issue presented because it applies far beyond cosmetology schools. It affects the myriad forms of vocational training provided by schools and employers. Recent cases have applied the primary-beneficiary analysis to relationships ranging from attendees at a casino's "dealer school" to participants in residential rehabilitation programs who are required to perform work. *Vaughn* v. *Phoenix House N.Y., Inc.*, 957 F.3d 141 (2d Cir. 2020) (rehabilitation program participants); *Harbourt* v. *PPE Casino Resorts Maryland, LLC*, 830 F.3d 655 (4th Cir. 2016) (casino dealers). In the traditional education setting, the issue presented here arises at every level of vocational training from high school through graduate school. See, *e.g.*, *Laurelbrook*, 642 F.3d 518 (boarding school students); *Sandler* v. *Benden*, 715 F. App'x 40 (2d Cir. 2017) (students pursuing a master's degree in social work). The circuit split applies to unpaid internships too, including internships that are required to obtain the necessary practical experience to sit for state-licensing exams. *Wang* v. *Hearst Corporation*, 877 F.3d 69 (2d Cir. 2017) (fashion magazine interns); *Glatt*, 811 F.3d 528 (film company interns); *Schumann*, 803 F.3d 1199 (nurse anesthetist students

working at an internship to fulfill state-required training requirements).

In all of these contexts, the students and interns will likely be able to identify tasks that, in isolation, are either so mundane or repeated so often as to have little educational value. For every moment that an intern shadows a senior employee, participates in trainings, and observes meetings, the intern may spend twice as much time making photocopies, opening mail, and cleaning up after meetings. And for students in vocational programs, some days "may include relatively menial or repetitive tasks," but this does not mean that students do not still benefit from gaining familiarity with the "day to day professional experience" of a particular career. *Velarde*, 914 F.2d at 787 (quotation omitted). The Sixth Circuit's approach subjects internship providers and vocational-training programs to claims that an intern who resets conference rooms after observing a meeting, or the culinary-school student who washes the dishes, is actually an employee when those tasks are performed. This unworkable and uncertain segmentation will deter employers from offering internships altogether, even though internship experience remains one of the most important factors to potential employers.[8] And it will reduce the real-world nature of vocational training by deterring expectations that students keep busy while accruing hours for professional licensure.

---

[8] See Nathalie Saltikoff, *The Positive Implications of Internships on Early Career Outcomes*, Nat'l Ass'n of Colls. & Emp'rs J. (May 1, 2017) ("[S]tudents graduating with internship experiences, in general, are more likely than students without those experiences to find employment upon graduation."), https://tinyurl.com/y2f76me9.

The Sixth Circuit's new test logically applies in other contexts too, with surely unintended consequences. If students can "segment" their time between students and employees, then employers can "segment" a worker's time between being an independent contractor and employee. Indeed, in crafting its new test, the Sixth Circuit relied, in part, on its precedent guiding whether workers are employees or independent contractors. App. 10a–11a (citing *Donovan* v. *Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984)). Employers that follow the Sixth Circuit's lead could eliminate worker benefits for any portion of an employee's work that might more closely resemble that of an independent contractor than an employee. In an era where work-from-home has become the norm for many workers, this could mean a massive loss in worker benefits.

The Court has not addressed the application of the FLSA in the educational context since its *Portland Terminal* decision. And that case was about unpaid trainees in a company-run training program, a context that does not mirror many training relationships today. During the Court's nearly 75-year silence, other courts have developed divergent approaches, none more at odds with this Court's authority than the decision below.

Nor have courts been guided by the Department of Labor. Courts are generating differing multi-factor analyses in part because the Department of Labor has not adopted an applicable regulation and its guidance has been confined to summarizing judicial decisions. After courts widely rejected the Department's first approach, the Department reduced the scope of its guidance to internships only. And the Department's guidance is simply to adopt the factors devised by the

Second Circuit in *Glatt*. Administrative action is not going to resolve the split caused by the Sixth Circuit's decision.

This case raises a clean, purely legal question: does employee status on the entire working relationship vary based on what a student does each minute? There is nothing left to percolate below—the federal judiciary has gone from the "economic reality" test in *Goldberg*, 366 U.S. at 33, to the Sixth Circuit's new "targeted" approach assessing only the "segment of work at issue." The Sixth Circuit articulated its new test at length, and the dissent explained in detail why there is now a clear circuit split. The Court should grant certiorari to resolve the circuit split and reject the Sixth Circuit's segmentation approach to preserve stability for vocational schools and internships.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. JAY
GOODWIN PROCTER LLP
1900 N St., N.W.
Washington, DC 20036

GERARD J. CEDRONE
GOODWIN PROCTER LLP
100 Northern Avenue
Boston, MA 02210

MATTHEW T. NELSON
Counsel of Record
AMANDA M. FIELDER
BRANDON J. CORY
WARNER NORCROSS + JUDD LLP
150 Ottawa Avenue, NW
Suite 1500
Grand Rapids, MI 49503
(616) 752-2000
mnelson@wnj.com

MICHAEL G. BRADY
ADAM T. RATLIFF
WARNER NORCROSS +
JUDD LLP
2715 Woodward Avenue
Suite 300
Detroit, MI 48201

MARCH 17, 2021 *Counsel for Petitioners*

Appendix A

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0383p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JOY EBERLINE; TRACY POXSON; CINDY ZIMMERMANN,

Plaintiffs-Appellees,

v.

DOUGLAS J. HOLDINGS, INC.; DOUGLAS J. AIC, INC.; DOUGLAS J. EXCHANGE, INC.; DOUGLAS J. INSTITUTE, INC.; SCOTT A. WEAVER; TJ WEAVER,

Defendants-Appellants.

No. 19-1781

Appeal from the United States District Court
for the Eastern District of Michigan at Ann Arbor.
No. 5:14-cv-10887—Judith E. Levy, District Judge.

Argued: May 5, 2020

Decided and Filed: December 17, 2020

Before: COLE, Chief Judge; BATCHELDER and STRANCH, Circuit Judges.

COUNSEL

ARGUED: Matthew T. Nelson, WARNER NORCROSS + JUDD LLP, Grand Rapids, Michigan, for Appellants. John C. Philo, SUGAR LAW CENTER FOR ECONOMICS & SOCIAL JUSTICE, Detroit, Michigan, for Appellees. **ON BRIEF:** Matthew T. Nelson, Amanda M. Fielder, WARNER NORCROSS + JUDD LLP, Grand Rapids, Michigan, Adam T. Ratliff, WARNER NORCROSS + JUDD LLP, Southfield, Michigan, for Appellants. John C. Philo, Anthony D. Paris, SUGAR LAW CENTER FOR ECONOMICS & SOCIAL JUSTICE, Detroit, Michigan, Kathryn Bruner James, GOODMAN HURWITZ & JAMES, P.C., Detroit, Michigan, for Appellees.

COLE, C.J., delivered the opinion of the court in which STRANCH, J., joined, and BATCHELDER, J., joined in part. BATCHELDER, J. (pp. 18–31), delivered a separate opinion concurring in part and dissenting in part.

OPINION

COLE, Chief Judge. Plaintiffs Joy Eberline, Tracy Poxson, and Cindy Zimmermann are former cosmetology school students who sued defendants Douglas J. Holdings, Inc., Douglas J AIC, Inc., Douglas J. Exchange, Inc., Douglas J. Institute, Inc., Scott Weaver, and T.J. Weaver (collectively, "Douglas J"), the operators of the Michigan cosmetology schools that the plaintiffs previously attended. The plaintiffs claim that Douglas J owes them compensation under the Fair Labor Standards Act ("FLSA") for work performed during their time in school. The district court granted summary judgment to the plaintiffs on a subset of their claims, holding as a matter of law

that the plaintiffs were owed compensation under the FLSA for certain cleaning and janitorial work they were required to complete during their time as students at Douglas J.

We determine that the district court properly focused its partial summary judgment analysis on the specific work for which plaintiffs seek compensation, rather than on the entirety of the vocational training program in which plaintiffs participated. It failed, however, to correctly apply our decision in *Solis v. Laurelbrook Sanitarium & School, Inc.*, which governs FLSA claims in an educational setting. *See* 642 F.3d 518, 529 (6th Cir. 2011). We therefore reverse the district court's order granting summary judgment to the plaintiffs and remand for proper application of *Laurelbrook* to the work at issue.

I. BACKGROUND

A. Michigan's Regulation of Cosmetologists

We begin by recounting the complex regulatory structure that Michigan imposes upon cosmetologists and the schools that train them. Michigan law requires people to obtain a license before they can perform cosmetology services for the public. *See* Mich. Comp. Laws § 339.1203a(1). Specifically, the law prohibits people from performing "any form of cosmetology services, with or without compensation, on any individual other than a member of his or her immediate family without a license." *Id.* Those services include hair care, skin care, manicuring, and electrology. *Id.* § 1201(d), (f). To be licensed, a person must meet several requirements. He or she must be at least 17 years old and of good moral character, have at least a ninth-grade education, complete either a 1,500-hour course of study in a school of cosmetology

or a two-year apprenticeship at a licensed cosmetology establishment, and pass a licensing examination. *Id.* § 1207.

Cosmetology schools themselves must also be licensed. *Id.* § 1203b. To maintain its license, a cosmetology school must meet several requirements, including that it must follow a state-mandated curriculum. *Id.* § 1205. The distribution of instruction time included in a school's 1,500-hour cosmetology curriculum is set by state regulation. *See* Mich. Admin. Code R. 338.2161. The curriculum must include 425 hours of classroom instruction on theory, 965 hours of practical experience, and 110 hours that are not assigned to any specific topic. *Id.* Both the theoretical and the practical hours are further controlled in that they must be divided between several different cosmetology topics such as facials, manicuring and pedicuring, hairdressing, and hair coloring, as prescribed by regulation. *Id.*

B. Douglas J's Cosmetology Schools

Douglas J operates licensed cosmetology schools in Michigan. The plaintiffs in this case attended Douglas J's Ann Arbor, Grand Rapids, and East Lansing schools. At each school, Douglas J has classrooms that are used for theoretical instruction and operates a clinic salon where students work towards the 965-hour practical experience requirement set by the state. The clinic salons aim to "emulate a true salon setting," with "numerous styling stations . . . and a complete skin and nail spa." (Acad. Catalogue of Douglas J, R. 21-8, PageID 312.) The salons are open to the general public, and customers pay for beauty services provided by students under the tutelage of Douglas J's instructors. The salons also have a retail floor where apparel, tools, merchandise, skin and hair

care products, makeup, and other products are available for sale. Douglas J's curriculum materials state that this retail floor "gives students the opportunity to enhance their product knowledge and retail sales abilities—skills essential to a successful career in the beauty and wellness industry." (*Id.)*

Only students perform cosmetology services for customers in the salons, doing so under the supervision of licensed instructors. The instructors assist and observe the students working in the salon in order to evaluate their performance and ensure that the customers receive the service for which they paid. Ultimately, the students are graded for their work in the salon based on the technical execution of the service performed and the customer service experience provided.

Students sign an enrollment agreement with the school that does not include any mention of students being compensated for any of their time spent in salons, or for any other portion of their relationship with Douglas J. The plaintiffs in this case did not expect to be paid by Douglas J during their time at the school. The students also did not have an expectation of employment with Douglas J upon the completion of their educational training and knew that they would be responsible for finding employment as a cosmetologist after graduating.

Although students are not paid for their time in the salons, Douglas J does make a profit from the salons. These profits come from tuition paid by students, products purchased as required equipment by students, beauty products sold to customers in salons, and sales from salon services to the public. Douglas J employs the aforementioned licensed instructors and other guest-services personnel and also contracts with

a janitorial service. Among the guest services personnel employed by Douglas J are aesthetics workers who are expected to sweep, dust, and polish the salons; clean and stock the shelves; clean windows; and generally keep the school clean.

C. Cleaning and Janitorial Activities

Students are scheduled to work in the salons during set times, during which they may not always have a customer to work with. Douglas J provides its instructors with a list of acceptable activities to assign to students during such times. Some of these tasks appear to be related to the training of students for a career in cosmetology. Those activities include working on techniques using mannequins, assisting fellow students who are working with customers, and working on group projects with other students. Other tasks may be less related to the school's purpose. Students could also be asked to do laundry, restock shelves with products sold to customers, clean various stations where customer services are performed, and clean and replace coffee mugs, among other tasks.

Testimony from the students provides additional insight into the nature of these general cleaning and janitorial tasks. Eberline explained that students were required to wash, sort, and fold towels; sweep and dust the studio; clean glass surfaces; clean the break room microwave; and perform other jobs as needed. She added that students would not be permitted to leave until every station in the studio (not just the station used by the student) was so clean that "you could eat off of it pretty much." (Eberline Dep., R. 60-27, PageID 2325.) Poxson testified that students also were required to clean the break room, stock product shelves, and maintain shampoo and wax stations. She further described how students who were behind on

their hours could also come in on days when the salon was closed to customers and help give the salon and classrooms a "deep cleaning." (Poxson Dep., R. 60-28, PageID 2404.) Zimmermann explained that students would empty the trash and clean the boards, tables, and floors in the school's classrooms as well. Instructors were encouraged to assign students these janitorial tasks and Douglas J's president testified that a student who refused to perform these tasks would be sent home for the day, denying that student of the opportunity to gain additional hours toward his or her state-imposed requirement on that day and necessitating that the student make up the hours on another day.

The amount of time spent on these activities varied by student. Eberline estimated that she spent a half-hour on these tasks each day, and nearly four hours on slower days. The plaintiffs extrapolate Eberline's estimates to conclude that she spent roughly 348 hours on these tasks over the course of her time at Douglas J. Using similar methods, they estimate that Poxson spent 304 hours doing these tasks and that Zimmermann spent at least 150 hours.

The plaintiffs argue that the cleaning and janitorial activities are not included in Douglas J's curriculum or in the state requirements for cosmetology schools.[1] Moreover, Douglas J does not provide

---

[1] Douglas J and the dissent assert that these activities may have been included in the curriculum. Douglas J says that "Plaintiffs agree that, as part of their educational experience in the clinic, Douglas J trained them on proper sanitation procedures." Appellant Br. at 16. Michigan regulations do require instruction on sanitation and patron protection in cosmetology schools. *See* Mich. Admin. Code R. 338.2161. This instruction, however,

classroom instruction on these tasks or supervise students as they perform them as it does for curriculum-related activities in the salons, because, unlike other tasks in the salon, student performance on these activities is not graded by Douglas J's instructors. To the extent that students did not complete the cleaning and janitorial tasks, they fell to paid workers.

Students, however, received academic credit for the time spent on these tasks in the sense that the time went toward their total hours of practical experience required for graduation. Eberline testified that the students' logs for their hours—which specify how many hours were spent on particular tasks—did not include a spot for hours spent on these cleaning and janitorial tasks, so students were instructed to "magically make those numbers work" by apportioning the hours spent on these tasks to the areas where the students were short. (Eberline Dep., R. 60-27, PageID 2340.) Whether Douglas J was permitted to issue credit for this time under state regulation is unclear, *see* Mich. Admin. Code R. 338.2161, but the parties do not dispute that all plaintiffs were credited for their time working on janitorial and cleaning tasks while at Douglas J and graduated on time.

---

appears to be distinct from the tasks for which the students are seeking compensation, as the regulations refer to instruction on ensuring proper sanitation of a cosmetology station before and after providing service to a customer and the tasks the students complain about are undertaken when there are no customers for the student to serve, or when not in the salons at all. Moreover, the time spent on the tasks at issue here seems to exceed the amount of time that the regulations allow schools to devote to sanitation. *See id.*

D. District Court Proceedings

The students filed a complaint under the FLSA in the United States District Court for the Eastern District of Michigan, seeking compensation for all time spent working in Douglas J's clinics. The complaint included allegations stating a collective action and that the three named plaintiffs represent a class of similarly situated individuals. The parties agreed, however, to stay conditional class certification proceedings while they litigated the question of liability through summary judgment. Class certification proceedings remain stayed pending this appeal. After discovery concluded, the students moved for partial summary judgment, arguing that there was no genuine dispute of material fact as to their claim that they are entitled to compensation for time spent working on general cleaning and janitorial tasks. The plaintiffs did not seek summary judgment on their other claims. Douglas J also moved for summary judgment as to all the plaintiffs' claims.

The district court granted the plaintiffs' motion for partial summary judgment on the grounds that the cleaning and janitorial activities were far removed from the educational relationship between the parties and that Douglas J was taking advantage of the students by forcing them to perform the subject tasks. The district court found that the students were therefore employees under the FLSA. Accordingly, the court denied in part Douglas J's motion for summary judgment, but it granted summary judgment for Douglas J on the plaintiffs' remaining claims. The plaintiffs asked the district court to reconsider its decision to grant summary judgment to Douglas J on the plaintiffs' other claims for compensation. The dis-

trict court denied the plaintiffs' motion for reconsideration without prejudice, stating that the plaintiffs could refile following our decision in this appeal.

The district court then granted Douglas J's motion to certify the summary-judgment order for appeal to this court under 28 U.S.C. § 1292(b). We granted Douglas J's request for an interlocutory appeal. Thus, we have appellate jurisdiction over Douglas J's appeal under 28 U.S.C. § 1292(b). All the issues raised in this appeal are legal ones, so our review of the district court's grant of summary judgment is de novo. *Chao v. Double JJ Resort Ranch*, 375 F.3d 393, 396 (6th Cir. 2004).

II. ANALYSIS

The FLSA requires that employers pay employees a minimum wage. 29 U.S.C. § 206(a). The law—perhaps tautologically—defines "employee" to include "any individual employed by an employer." *Id.* § 203(e)(1). "Employ" is defined as "to suffer to permit work." *Id.* § 203(g). "Employers" include "any [individual, partnership, association, corporation, business trust, legal representative, or organized group of persons] acting directly or indirectly in the interest of an employer in relation to an employee." *Id.* § 203 (a), (d). The question in this case is whether students of Douglas J's cosmetology schools are employees at all.

In applying the FLSA's definition of employee status, courts have developed tests to analyze the question of whether an employment relationship exists. "Whether a particular situation is an employment relationship is a question of law." *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir. 1994). In general, "it is the 'economic reality' of the relationship between parties that determines whether their

relationship is one of employment or something else." *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) (quoting *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985)). This standard "is not a precise test susceptible to formulaic application." *Ellington v. City of East Cleveland*, 689 F.3d 549, 555 (6th Cir. 2012). Rather, the employment relationship "is to be determined on a case-by-case basis upon the circumstances of the whole business activity." *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)).

For vocational schools, we have rejected a proposed bright-line rule that no student can ever be considered an employee of his school. *Laurelbrook*, 642 F.3d at 523–24. In *Laurelbrook*, we explained that "determining employee status by reference to labels used by the parties is inappropriate." *Id.* at 524. Rather, "the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship." *Id.* at 529. To determine the primary beneficiary, we look at factors like whether the purported employee had an expectation of compensation, derives educational value from the work, or displaces paid employees. *Id.* And we may consider "[a]dditional factors that bear on the inquiry . . . insofar as they shed light on which party primarily benefits from the relationship." *Id.* A plaintiff who claims entitlement to compensation under the FLSA for work done in a training or learning situation will only be considered an employee when she does not derive the primary benefit from the relationship. *Id.*

But before reaching the primary-beneficiary analysis in this case, we must answer two questions. First, do we apply the primary-beneficiary test at all when the work at issue is not part of the school's educational curriculum? Second, given that the students claim an entitlement to compensation for some, but not all, of the work they performed during the course of the vocational program, do we apply the primary-beneficiary test to only that targeted segment of the program at issue or to the educational program as a whole? As we explain below, the *Laurelbrook* test governs this case and applies only to the activities at issue in the claim for compensation.

A. Applicability of the Primary-Beneficiary Test

We turn first to the question whether the primary-beneficiary test applies to the subset of the plaintiffs' claims presently before us. The district court determined that the test does not apply. It correctly observed that the primary-beneficiary test as announced in *Laurelbrook* is limited to situations where the activity in question occurs in a training or learning situation. After concluding that these activities fell outside of that situation, and thus the scope of *Laurelbrook's* holding, the district court fashioned a new test to ascertain whether the tasks at issue constitute compensable work.

Under the district court's approach, a court would ask whether the activity in dispute was "'well beyond the bounds of what could fairly be expected to be part of the internship' or educational program." *Eberline v. Douglas J. Holdings, Inc.*, 339 F. Supp. 3d 634, 643 (E.D. Mich. 2018) (quoting *Schumann v. Collier Anesthesia*, 803 F.3d 1199, 1214–15 (11th Cir. 2015)). If it is, the court would then consider "whether the

employer is taking unfair advantage of the student's need to complete the internship or educational program." *Id.* If the court found that the employer was in fact taking unfair advantage of the student's need to complete the educational program, it would determine that the relationship is one of employment for FLSA purposes so long as the time spent on the activities was not de minimis. It was under this test that the district court found that the plaintiffs were employees under the FLSA and granted their motion for partial summary judgment.

The district court erred in using this new test. Its error stems from its central premise for departing from *Laurelbrook's* test: that the activities at issue are "not within the training or learning situation." *Id.* at 645. To be sure, the janitorial tasks assigned to the plaintiffs were not a part of Douglas J's written curriculum, not required by the state regulations governing cosmetology education, and not directly supervised by instructors. But other aspects of the relationship between Douglas J and its students lead us to conclude that the janitorial work took place within the educational *context*, regardless of its ultimate educational benefit. The students were in the salons as part of the educational program, were assigned the tasks at issue by the same instructors who oversaw their practical training, received academic credit for the time spent on the tasks, and were told that they would be sent home—potentially delaying their graduation from the school—if they failed to complete the assigned tasks. We therefore conclude that the tasks spring from the students' relationship with Douglas J, meaning that we must analyze this FLSA claim related to those tasks under the primary-beneficiary test as laid out in *Laurelbrook*.

B. Application of the Primary-Beneficiary Test

We now turn to the second question: How does the primary-beneficiary test apply in a case where students in a training or learning environment seek compensation for some, but not all, of the work they perform during the course of the educational relationship with the school? The parties present competing visions. The plaintiffs contend that we should apply the primary-beneficiary test only to the segment of time for which they seek compensation, asking which party is the primary beneficiary of plaintiffs' janitorial work. Douglas J asks us to apply the test to the entire relationship between the parties and would have us conclude that FLSA plaintiffs are not entitled to compensation for any of the work they perform within the vocational training program so long as the trainees are the primary beneficiaries of the program as a whole.

We conclude that when a plaintiff asserts an entitlement to compensation based only on a portion of the work performed in the course of an educational relationship, courts should apply the primary-beneficiary test we laid out in *Laurelbrook* only to that part of the relationship, not to the broader relationship as a whole.

1. Propriety of a Targeted Approach for the Segment of Work at Issue

We start with *Laurelbrook* itself. There, the putative employer was a Seventh-Day Adventist high school where students learn "in both academic and practical settings." *Laurelbrook*, 642 F.3d at 520. As part of the practical curriculum, and in line with the school's "stated mission," students were assigned to

work in the school's kitchen and housekeeping departments, as well as in a sanitarium operated by the school. *Id.* The Secretary of Labor sued the school, contending that the students were employees under the FLSA based on the work they did as part of the school's practical learning program. *Id.* at 519.

After explaining the rationale for the primary-beneficiary test, we analyzed the work performed as part of the school's vocational training. *Id.* at 529–32. Instructive here, our analysis focused exclusively on the work that was the subject of the case. *Id.* To determine who was the primary beneficiary of this work, we considered the benefits of the students' kitchen, housekeeping, and sanitarium work to the school and the benefits that the students received from the work, ultimately concluding that the students were the primary beneficiaries because the practical learning that the work afforded students was part of the school's educational program. *Id.* Notably, we did not consider the unchallenged parts of the program, such as the parts of the curriculum that included traditional classroom instruction, as no party contended that the high school students were employees during the time they spent in class and only the vocational program was at issue. *Id.* Thus, we effectively adopted the test that the plaintiffs ask us to use here; we considered whether the students were the primary beneficiaries of the activities for which their status as employees was in dispute.

Comparisons to other areas of employment also support the conclusion that relationships can be segmented for purposes of an FLSA analysis such that a person is an employee in one part of the relationship but not another. For example, the FLSA exempts from

the definition of "employee" "any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency" when the individual "receives no compensation" and the services she volunteers to perform are "not the same type of services which the individual is employed to perform for such public agency." 29 U.S.C. § 203(e)(4)(A).

The Department of Labor has issued regulations governing when a person who is employed by the state in one capacity can be considered a volunteer in another capacity. *See* 29 C.F.R. § 553.103. These regulations clarify that a person can simultaneously have an employment- and a non-employment relationship with the same entity. The Fourth Circuit applied § 203(e)(4)(A) and the accompanying regulations to a case involving city firefighters who also worked on volunteer rescue squads that performed emergency medical services for the city. *See Benshoff v. City of Virginia Beach*, 180 F.3d 136 (4th Cir. 1999). It determined that the firefighters were not employees entitled to compensation when it came to their work on the volunteer rescue squads, even though they were employed by the city as firefighters. *Id.* at 149. This is just one example of how courts have routinely segmented working relationships for the analysis of FLSA claims.

Other circuits that have considered FLSA claims brought by cosmetology students also use a targeted approach that focuses on the segments of work at issue. The Ninth Circuit, for example, considered a case where students sought compensation for all time spent in salons but not their time receiving classroom instruction and applied the primary-beneficiary test to the time spent in the salons without considering the

time spent in the classroom. *Benjamin v. B&H Educ., Inc.*, 877 F.3d 1139, 1142, 1147–48 (9th Cir. 2017). And the Seventh Circuit's analysis in *Hollins v. Regency Corp.* encompassed a similar scope, focusing on how the time in the salons related to the educational goals of the cosmetology program to reject a claim that the students were entitled to compensation. *See* 867 F.3d 830, 836–37 (7th Cir. 2017). In the end, these cases rejected the plaintiffs' claims not because they were the primary beneficiaries of their entire relationship with their schools, but because the plaintiffs received the primary benefit of the segments of the relationship that were in dispute.

The dissent takes a different view of other circuits' approach to this question, arguing that we have split with three other circuits that "have held that cosmetology students who work at for-profit cosmetology schools are not employees under the FLSA." Dissent at 27. As an initial matter, our opinion today only addresses how district courts should analyze claims for compensation related to a segment of work performed by a student at a vocational school, and we do not reach the question of whether the plaintiffs prevail under that standard. So the fact that other circuits resolved broader student claims in favor of cosmetology schools based on the facts of those cases does not create a circuit split. This is especially so given that our precedent directs us to resolve disputes in this context by turning to the "economic reality" of the relationship between the parties "on a case-by-case basis" and that employment status is "not fixed by labels that parties may attach to their relationship." *Laurelbrook*, 642 F.3d at 522 (quoting first *Alamo*, 471 U.S. at 301, then *Donovan*, 736 F.2d at 1116, then *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (1950) (Frankfurter, J., dissenting)).

Insofar as the dissent argues that we have deviated from other circuits or our own precedent by applying the primary-beneficiary test to the segment of work at issue, it is similarly mistaken. Despite saying that other courts have "eschewed a 'segmentation' approach," Dissent at 27 n.7, the dissent does not identify a single case where another court has addressed a claim for compensation limited to a portion of an educational program and considered elements of the parties' broader relationship in applying the primary-beneficiary test. *Cf. Velarde v. GW GJ, Inc.*, 914 F.3d 779, 785–89 (2d Cir. 2019) (analyzing a cosmetology student's work in the clinic salon when he claimed an entitlement to compensation for all time in the salon); *Benjamin*, 877 F.3d at 1147–48 (same); *Hollins*, 867 F.3d at 837 (same, and noting that its holding was specific to the record of challenged activities before the court); *Jochim v. Jean Madeline Educ. Ctr. of Cosmetology, Inc.*, 98 F. Supp. 3d 750, 752, 755, 757–60 (E.D. Pa. 2015) (same); *Ortega v. Denver Inst. LLC*, No. 14-cv-01351-MEH, 2015 WL 4576976, at *13–17 (D. Colo. July 30, 2015); *Atkins v. Capri Training Ctr., Inc.*, No. 2:13-cv-06820 (SDW), 2014 WL 4930906, at *7–10 (D.N.J. Oct. 1, 2014); *Lane v. Carolina Beauty Sys., Inc.*, No. 6:90CV00108, 1992 WL 228868, at *3–4 (M.D.N.C. July 2, 1992) (considering a case where a former participant in a cosmetology school's teacher-training course sought compensation for all work done during enrollment in the course). Simply put, the dissent does not cite a case from this court or any other that used an approach inconsistent with the one we describe today. The primary-beneficiary test allows courts to separate claims brought by students who are merely doing the work their curriculum requires from those doing work that does not provide a similar

curriculum-based benefit to the students. Through this test, we advance the FLSA's stated objective of ensuring that a minimum wage is paid to all employees "engaged in commerce." 29 U.S.C. § 206(a). Adopting Douglas J's proposed approach of applying the primary-beneficiary test to the whole educational program as opposed to the portion of the program actually at issue runs counter to the purpose of the primary-beneficiary test. It would raise the potential of zones of exploitation in which schools could use their students in place of paid employees to complete work unrelated to the educational purpose of the program, so long as the amount of extra work was not so large as to render the school the primary beneficiary of the overall relationship. Nothing in our case law, nor in the language of the statute, indicates that Congress intended or anticipated this outcome under the FLSA. *Cf. Alamo*, 471 U.S. at 301–02 (noting that permitting an enterprise to use a workforce of volunteers who otherwise meet the criteria for employee status might have a wage-depressing effect across the market, which would be contrary to the purpose of the FLSA).

Here, because of Michigan's occupational licensing requirements, schools like Douglas J are an access point through which a person who wants to make a living as a cosmetologist must pass. To the students, then, the benefit of attending cosmetology school is not merely academic, it is a statutory requirement they must fulfill before they can work in their chosen profession. Douglas J's approach would let a school extract uncompensated labor from students that is non-educational so long as the value of that labor to the school does not exceed the value of the overall relationship to the students. But the benefit to the student is being able to work at all. In other words,

this approach could lead to the type of exploitation that the FLSA was designed to combat.

Our targeted approach solves this problem in accordance with the purpose of the FLSA. It rejects claims for compensation where the school receives an incidental benefit from a student's work as part of the educational program. But it allows for the possibility of compensation for labor that—although related to the educational relationship in an attenuated way—does not actually provide a benefit to students that exceeds the benefit of free labor received by the school.

The dissent also states that our approach isolates the challenged activities from their educational context. Dissent at 24. Quite the opposite. Our holding that the primary-beneficiary test may be applied specifically to a segment of the vocational training program does not mean that the segment being analyzed can or should be taken out of its context. Where the segment of work at issue provides benefits as a result of its place in the educational relationship, our test would consider those benefits. Thus, for example, the district court should consider the fact that the students here received academic credit for the challenged work and should evaluate the relationship between these activities and the school's curriculum. The district court should not, however, consider benefits that come from a different part of the broader relationship that is not connected to the work at issue.

2. Practical Considerations

Douglas J raises a variety of practical concerns with our application of *Laurelbrook* to this case. These concerns include that the approach will result in conflicting determinations based on similar facts, will

make FLSA claims in vocational-learning relationships more complex, and will require courts to separate a broader relationship into compensable and non-compensable tasks—all of which are related. None present serious challenges to the administrability of this rule.

The FLSA has long required fact-intensive analyses of employment circumstances. With any legal test, including the one that Douglas J proposes for this case, there is a possibility that different courts or judges might reach differing conclusions based on similar facts. Appellate review adequately addresses this concern.

Analyzing segments of the broader relationship also does not make the district court's job unduly complex. Courts are well-situated to conduct such a targeted analysis. We already do so, for example, when we consider claims brought by employees seeking compensation for their lunch breaks. In *Jones-Turner v. Yellow Enterprise Systems, LLC*, we held that emergency medical technicians were not entitled to compensation for their lunch breaks when they were expected to respond to emergency calls but were not required to stay in their trucks or perform other duties during the breaks. 597 F. App'x 293, 297–98 (6th Cir. 2015). We have also determined that mail carriers were not entitled to compensation for lunch breaks when they remained responsible for items and receipts that they were carrying during the break but were not otherwise required to perform duties related to their jobs during those periods. *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984). Similarly, we found that machine workers were not entitled to compensation when they were occasionally required

to respond to supervisor inquiries or machine breakdowns during the breaks because those interruptions were rare. *Myracle v. General Elec. Co.*, 33 F.3d 55, 1994 WL 456769, at *5 (Table) (6th Cir. 1994) (per curiam). In these cases, we require an analysis of the specific facts of the plaintiff employees' lunch break to determine if the plaintiffs are acting as employees during that time, an FLSA analysis that courts have experience undertaking. Thus, we are not persuaded that they would have difficulty analyzing segments of the broader educational relationship between school and student.

As for Douglas J's final concern, it is correct that our approach may result in a court finding some tasks to be compensable but not others. But this is a feature of the approach, as it allows people who are acting as employees under the FLSA to be compensated accordingly. And to the extent that Douglas J fears an increase in claims related to segments of an educational relationship, we have established safeguards. We already reject claims for compensation when they are based on activities undertaken for de minimis amounts of time or are too difficult in practice to record. *Aiken v. City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999). Indeed, if the time the plaintiffs spent on the extracurricular janitorial and cleaning tasks were de minimis, we might do so in this case. The record, however, reflects that some of the plaintiffs may have spent more than 20 percent of their time at Douglas J on those tasks. That amount of time is unlikely to be de minimis, and it is appropriate that our test requires a separate analysis of it.

3. Remand

Today, we only address the proper test to analyze claims like the one before us. As we have discussed,

the district court did not apply this test when it granted the plaintiffs' motion for summary judgment. And absent exceptional circumstances, we do not resolve issues until the district court has ruled on them first. *E.g.*, *United States v. Poole*, 407 F.3d 767, 773 (6th Cir. 2005). Exceptional circumstances are not present here, so we decline to reach a conclusion as to which party is the primary beneficiary of the time the plaintiffs spent working on general cleaning and janitorial tasks. Accordingly, we do not hold that either party should prevail under the test we now direct the district court to apply, and our analysis should not be read to imply that one party is more likely to prevail on the merits.

Instead, we remand to the district court to apply the primary-beneficiary test to the plaintiffs' motion for partial summary judgment as described herein. This will allow the district court to consider the multitude of factors relevant to the primary-beneficiary inquiry in this case. Under *Laurelbrook* these include: the plaintiffs' lack of expectation of payment; the educational value, both tangible and intangible, of the tasks under scrutiny; and the displacement of paid employees to the school's competitive benefit in the commercial marketplace, *see* 642 F.3d at 522, 529, 531; as well as any other considerations that may "shed light on which party primarily benefits from the relationship," *id.* at 529. Such additional considerations might include: the mandatory or voluntary nature of the tasks; the relationship of the work at issue to the school curriculum, state regulations, and the school's stated mission and educational philosophy; the type of work performed in the corresponding real-world commercial setting; and the academic credit received by the plaintiffs for the work. Additionally, before concluding any portion of plaintiffs'

work for Douglas J is compensable, the district court should determine whether the work at issue is for de minimis amounts of time or is practically speaking too difficult to record. *Aiken*, 190 F.3d at 758.

III. CONCLUSION

We therefore reverse the district court's order granting partial summary judgment to the plaintiffs and remand this case to the district court for further proceedings consistent with this opinion.

CONCURRING IN PART AND DISSENTING IN PART

BATCHELDER, Circuit Judge, concurring in part and dissenting in part. Three cosmetology-school graduates seek compensation for unpaid labor under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, claiming they worked as employees when they restocked beauty products and cleaned their schools' clinic salons. To determine whether an employment relationship exists in the educational context, we apply the primary-beneficiary test developed in *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 529 (6th Cir. 2011). Because the district court failed to properly apply that test, I concur in the judgment to reverse and remand. But the majority opinion likewise fails to properly apply our precedent and unjustifiably creates a circuit split with the Second, Seventh, and Ninth Circuits. I therefore respectfully dissent from the rest of the majority opinion.

I.

Michigan heavily regulates its cosmetology industry to ensure the health and safety of patrons receiving cosmetic services. Michigan's Department of Licensing and Regulatory Affairs (LARA) establishes sanitation standards necessary "to prevent the spreading of an infectious or contagious disease" and conducts routine inspections to ensure compliance with those standards. Mich. Comp. Laws § 339.1203(1). LARA expects cosmetologists to follow general state and local health regulations, *see* Mich. Admin. Code R. 338.2171(2)(b), and for salons to be "clean, safe, and sanitary at all times," *id.* § 338.2173. Hair clippings must be disposed of after servicing every patron; fresh towels must be supplied for every service; and sinks, tubs, and shampoo bowls must be "thoroughly cleanse[d] and sanitize[d] . . . immediately after each use." *Id.*

Individuals cannot render cosmetology services without a license, which can be obtained only after completing 1,500 hours of study at a licensed cosmetology school. Mich. Comp. Laws §§ 339.1203a(1), .1207(d). Schools must provide at least 190 hours of combined classroom and practical instruction—90 classroom hours and 40 practical hours—on sanitation, patron protection, personal hygiene, and salon management. Mich. Admin. Code R. 338.2161.[1] These health and safety topics are tested on the state-administered licensing examination; students must

[1] The LARA requires cosmetology schools to allocate a certain amount of time to each subject but allows up to 110 "unassigned hours"—i.e., hours not allocated to any specific topic. Mich. Admin. Code R. 338.2161. So, the regulation allows cosmetology schools to assign up to 150 hours of practical work related to sanitation-related topics.

achieve a score of 75% to pass the test and obtain a license. *Id.* §§ 338.2139, .2161. Fifteen percent of the multiple-choice questions test knowledge of infection control and client protection, covering topics such as disinfectants, bacteria, virus, fungus, and decontamination. R. 60-40, PageID: 2664. Ten percent of the questions ask about Michigan's cosmetology regulations, including licensing requirements and salon-management responsibilities. *Id.* at 2665. The multiple-choice exam also includes questions on relevant safety precautions for every cosmetic service. *Id.* at 2664–65. The "practical portion" of the exam scores students on whether they disinfected their workstations before and after servicing a client, *id.* at 2667, 2670, and practiced other safety criteria during every cosmetic service, *see, e.g.*, *id.* at 2668 (scoring students on whether they changed towels and cleaned spills).

The Douglas J Institute and its affiliate companies (together, Douglas J) operate several state-licensed, for-profit cosmetology schools in Michigan. Douglas J implements the LARA's curriculum requirements regarding sanitation and patron protection through five units of instruction. The first unit includes classroom instruction on safety requirements and guest-servicing skills, offering students opportunities to practice and test their knowledge. R. 56-11, PageID: 1644. According to Douglas J's written curriculum, students are taught how to: clean makeup brushes and wax pots, *see* R. 60-41, PageID: 2684, 2687; prevent infections, *id.* at 2688; and maintain a professional salon appearance, *id.* at 2677, 2695, 2700. Students practice sanitizing and disinfecting their tools, *id.* at 2679, 2683, 2688, 2700, and are tested on infection control, *id.* at 2689, and maintaining a professional image, *id.* at 2677.

The next four units combine classroom instruction with practical instruction at Douglas J's student clinic salons. R. 56-11, PageID: 1644. In the classroom, students learn about Michigan's cosmetology regulations, R. 60-41, PageID: 2708, essential business standards, *id.* at 2709, 2710, and salon-life expectations, *id.* at 2712, 2713. Under the supervision of licensed instructors, students receive practical instruction by providing a range of cosmetic services to clients.

Due to need-work limitations, Douglas J students cannot spend all of their clinic time servicing clients; there are too many students and not enough clients. Douglas J provides its instructors with a list of activities for those students not working with clients, including practical work, styling practice, mannequin competitions, marketing, guest services, and general salon aesthetics. R. 60-37, PageID: 2652.[2] Students choose how to spend their time; Douglas J does not force students to participate in any particular activity. *See, e.g.*, Eberline Dep., R. 60-27, PageID: 2314

[2] The record does not support the majority's assertions that the cleaning tasks—i.e., the general salon aesthetics activities—are unsupervised by Douglas J's instructors. *See e.g.*, Poxson Dep., R. 60-28, PageID: 2403 (affirming that the students' cleaning efforts were "supervised by instructors"); Eberline Dep. 60-27, PageID: 2326 (explaining that students would not receive credit for a service if they had not swept the floor). Indeed, the majority cites Eberline's testimony for the proposition that "students would not be permitted to leave until every station in the studio (not just the station used by the student) was so clean that 'you could eat off of it pretty much.'" Majority Op. at 5 (citing Eberline Dep., R. 60-27, PageID: 2325). If the Douglas J instructors were not assessing the quality of the students' cleaning efforts, who was?

(explaining that students could choose to clean, concentrate on "bookwork" and "homework assignments" or "work[] on a mannequin"). Douglas J applies the hours spent on these activities toward the students' 1,500-hour requirements. A student who refuses to engage in *any* of the activities, however, cannot accrue hours because "sit[ting] around and play[ing] around on Facebook," does not count toward the state's curriculum requirements. Weaver Dep., R. 60-34, PageID: 2571–72.

Douglas J employs daytime support staff to maintain the cleanliness of its schools. The aesthetics personnel are responsible for cleaning the clinic salons; guest-services personnel assist clients and also clean the salons. *See, e.g.*, *id.* at 2564–66; R. 61, PageID: 2808. The daytime staff's cleaning efforts are supported by a nighttime janitorial service, which cleans the facilities six nights each week. Weaver Dep., R. 60-34, PageID: 2566.

II.

Three former Douglas J students—Joy Eberline, Cindy Zimmerman, and Tracy Poxson—brought a putative class and collective action under the Fair Labor Standards Act (FLSA) for their unpaid labor at the clinic salons. They seek compensation for the hours spent restocking products and cleaning the salons, as well as the hours spent providing personal services to paid customers. Douglas J moved for summary judgment on all claims. The students filed a motion for partial summary judgment, arguing that there was no genuine issue of material fact as to whether the students were employees when they conducted general labor and janitorial tasks that "consumed a significant portion of student time, displaced

paid workers, and generated substantial profits for the schools' owners." R. 60, PageID#: 2050.

The district court granted the students' motion. *See Eberline v. Douglas J. Holdings, Inc.*, 339 F. Supp. 3d 634, 636 (E.D. Mich. 2018). The district court recognized that in the educational context, the Sixth Circuit determines whether an employment relationship exists by applying the primary-beneficiary test developed in *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518 (6th Cir. 2011). *Id.* at 641–43. But the district court found that "an all-or-nothing determination of employee status is not appropriate in every learning or training situation." *Id.* at 643 (citing *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1214–15 (11th Cir. 2015)). The district court therefore created a two-part test whereby courts determine if an activity is within the learning situation and if it is, *Laurelbrook's* primary-beneficiary test applies. *Id.* at 643. But the district court said that if an activity is

> well beyond the bounds of what could fairly be expected to be a part of the internship or educational program, then the [c]ourt must look at whether the alleged employer is taking unfair advantage of the student's need to complete the internship or educational program. If so, then the student would qualify as an employee for all hours expended in tasks so far beyond the pale of the contemplated internship that it clearly did not serve to further the goals of the internship.

Id. at 643–44 (internal citations, quotation marks, and editing marks omitted). Finally, the district court explained that the complained-of activity must not be "de minimis" because the FLSA requires payment

only where the "employee is required to give up a substantial measure of his time." *Id.* at 647 (quoting *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 873 (6th Cir. 2012)).

Applying this standard, the district court found that restocking products and cleaning the salons were not educational in nature. *Id.* at 644–46. Douglas J took unfair advantage of the students, the district court said, because it required their students to clean and therefore exploited the "stark power imbalance" between the parties. *Id.* at 646–47. The district court concluded that the amount of time spent on these activities was not de minimis and granted the plaintiffs' motion for partial summary judgment. *Id.* at 647.

Douglas J moved for an interlocutory appeal, arguing that the district court's order was contrary to the overwhelming weight of authority. Pursuant to 28 U.S.C. § 1292(b), the district court certified its order for interlocutory appeal, defining the issue as "whether cleaning, laundering towels, and restocking products are activities that may be extracted from the entire relationship between the parties before examining their overall relationship under the primary benefit test enunciated in [*Laurelbrook*], because those activities are 'beyond the pale of the contemplated [cosmetology education and training].'" R. 105, PageID: 3913 (quoting *Schumann*, 803 F.3d at 1215)

III.

We review the district court's grant of partial summary judgment de novo and will affirm only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805, 811 (6th Cir. 2020) (quoting Fed. R. Civ. P. 56(a)).

The plaintiffs have the burden of showing that no such dispute exists, even with the evidence presented in the light most favorable to Douglas J and with all reasonable inferences drawn in its favor. *See Hickle v. Am. Multi-Cinema, Inc.*, 927 F.3d 945, 951 (6th Cir. 2019).

A.

The FLSA requires an employer to compensate its employees for services performed. 29 U.S.C. §§ 206, 207. Not all working relationships are subject to the FLSA; only "employees" are owed wages for unpaid labor. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 299 (1985) ("An individual may work for a covered enterprise and nevertheless not be an 'employee.'"). To determine whether an employment relationship exists, courts assess the "economic reality" of the relationship. *Id.* at 301 (citation omitted). That determination depends on "the circumstances of the whole activity" and the parties' respective contributions "to the accomplishment of a common objective." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727, 730 (1947) (citation omitted).

Schools conducting vocational-training programs or internships may fall under the FLSA's sweep if the school employs its students. *See Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947). Plaintiffs alleging FLSA violations in the educational context must prove that the school was the primary beneficiary of the working relationship. *Laurelbrook*, 642 F.3d at 529; *see Herman v. Palo Grp. Foster Home, Inc.*, 183 F.3d 468, 472 (6th Cir. 1999) ("A plaintiff generally has the burden of proving that his employer violated the FLSA."). The primary-beneficiary test assesses the "totality of the circumstances" within the school-student relationship. *Laurelbrook*, 642 F.3d at

524. That said, evidence that the school displaced paid employees with free student labor or failed to provide students with educational benefits will support a FLSA claim. *Id.* at 529.

Solis v. Laurelbrook is the leading case in this circuit dealing with employment relationships in the educational context. In *Laurelbrook*, the Secretary of Labor sued a boarding school for Seventh-Day Adventist high-school students, alleging violations of the FLSA's child-labor provisions. *Id.* at 519–20. Students spent four hours of each school day in the classroom and four hours in a vocational-training program. *Id.* at 520. The vocational-training program taught "practical skills" in classes such as Agriculture, Grounds Management, Mechanical Arts, and Plant Services. *Id.* at 520. The vocational-training program also required students to work in the school's sanitarium: a 50-bed intermediate-care nursing home. *Id.* Students were assigned to the sanitarium's kitchen and housekeeping departments; those sixteen years and older could participate in the sanitarium's state-certified nursing assistant program and provide medical assistance to patients. *Id.*

We found that both parties benefitted from the students' work in the vocational-training program. The school benefitted from the students' work in the "practical skills" classes by selling goods produced by the students, including flowers, produce, and wooden pallets. *Id.* at 530. Students also provided services to the paying public, caring for patients at the sanitarium and repairing cars for customers as part of a course on collision repair. *Id.* ("The proceeds from these sales go directly to [the school's] operations."). The students' work also helped the sanitarium satisfy its state-licensing requirements. *Id.* Nonetheless, the

benefits to the school were offset by the burdens of instructing the students, which meant that the school did not displace compensated workers. *Id.* at 530–31; *see also id.* at 520 (finding that the school would not operate the sanitarium if the students did not work there because the sanitarium's "sole purpose is to serve as a training vehicle for its students").

The students accrued several benefits from the vocational program, including hands-on training that allowed students to practice skills and compete in the job market after graduation. *Id.* Students also received a "well-rounded education" that valued "responsibility and the dignity of manual labor." *Id.* at 531 (finding that the program benefitted students by teaching them "a strong work ethic" and "leadership skills"). Ultimately, we held that no employment relationship existed because the students were the primary beneficiaries of the vocational-training program and were therefore not employees under the FLSA. *Id.* at 531.

B.

Both the district court and the majority here erred in their application of *Laurelbrook's* primary-beneficiary test. In *Laurelbrook*, the Secretary of Labor sued the school for exploiting child labor. But we did not analyze each challenged activity—i.e., growing flowers and produce, building wooden pallets, repairing cars, caring for patients, maintaining the school's operations—in isolation from the vocational-training context. Rather, we evaluated how the working relationship benefited each party, accounting for the *entirety* of the school's vocational-training program. The instruction provided in the school's vocational classes—i.e., Agriculture, Grounds Management, Mechanical Arts, and Plant Services—were a crucial

part of our analysis. *See id.* at 531 (finding that students benefitted from "courses of study that have been considered and approved of by the state accrediting agency").

The primary-beneficiary test thus requires us to assess how both parties benefitted from the students' work at Douglas J's clinic salons.[3] We must examine the students' time spent practicing cosmetic services—on customers and in classroom exercises—under the supervision of licensed instructors. And we must consider the fact that but for the hours spent at Douglas J's clinic salons, the students could not have qualified for the licensing exam or obtained a cosmetology license.

That Douglas J benefits from its students' work is not prima facie proof that the school is the primary beneficiary: *Laurelbrook* instructs us to consider how the benefits are offset by the burdens of running a cosmetology school. So, for example, we should consider the fact that Douglas J is in the education business, not the beauty-salon business. *See Hollins*

---

[3] The majority emphasizes that the *Laurelbrook* Court "did not consider the unchallenged parts of the program, such as the parts of the curriculum that included traditional classroom instruction." Majority Op. at 12. It is true that *Laurelbrook* focuses on the students' vocational education, rather than the classroom education. But the *Laurelbrook* Court also found it significant that students received a "well-rounded education" that *included* "hands-on, practical training . . . in an environment consistent with [the students'] beliefs." *Laurelbrook*, 642 F.3d at 531. The classroom-based instruction thus factored into the analysis. Nonetheless, even if we exclude any formal classroom instruction—i.e., any work not involving hands-on instruction—all of the students' work must be accounted for.

v. Regency Corp., 867 F.3d 830, 836 (7th Cir. 2017). Douglas J did not allow licensed cosmetologists to work at the clinic salons; only students provided cosmetic services. *See* Eberline Dep., R. 60-27, PageID: 2320–21. Moreover, we must determine whether the students' work displaced compensated employees at the clinic salons.[4] The economic reality of the parties' *relationship*—the very reason for their affiliation—cannot be appreciated without taking these facts into account.

Instead of applying *Laurelbrook's* totality-of-the-circumstances test, the district court separated the challenged tasks—cleaning and restocking—from the rest of Douglas J's clinic-salon program. This analysis conflicts with *Laurelbrook's* holistic requirements by considering tasks that a judge or a panel of judges deems educationally valueless in isolation from the vocational-training context. It thereby enables judges to make wholly subjective judgments about whether certain activities are "'well beyond the bounds of what could fairly be expected to be a part of the internship' or educational program." *See Eberline*, 339 F. Supp. at 543 (quoting *Schumann*, 803 F.3d at 1214–15).[5]

---

[4] The plaintiffs claim that they proved that the students' work displaced paid staff. *See* Appellee Br. at 9. But no one disputes that Douglas J employs support staff and a nighttime janitorial service to maintain the cleanliness of the schools. *See, e.g.*, *Eberline*, 339 F. Supp. 3d at 637. The district court should therefore determine the extent to which paid workers were displaced by the students work.

[5] In creating this new test for FLSA claims, the district court relied on dicta from *Schumann*, 803 F.3d at 1199, a case in which the Eleventh Circuit clarified the standard for determining whether an employment relationship exists in the internship

There is no meaningful distinction between the district court's approach and the majority's "segmentation" approach—both analyze the challenged activities in isolation from the educational context.[6]

---

context. In remanding the case, the *Schumann* Court cautioned that "the proper resolution of a case may not necessarily be an all-or-nothing determination" because it could "envision a scenario where a portion of the student's efforts constitute a *bona fide* internship that primarily benefits the student, but the employer also takes unfair advantage of the student's need to complete the internship." *Id.* at 1214. The *Schumann* Court imagined

> an employer who requires an intern to paint the employer's house in order for the student to complete a [medical] internship of which the student was otherwise the primary beneficiary. Under those circumstances, the student would not constitute an "employee" for work performed within the legitimate confines of the internship but could qualify as an "employee" for all hours expended in painting the house, a task so far beyond the pale of the contemplated internship that it clearly did not serve to further the goals of the internship.

Id. at 1215. The district court's application of the *Schumann* hypothetical is unpersuasive. In the *Schumann* hypothetical, the two relationships—one educational relationship and one employment relationship—are clearly demarcated by both time and place. Here, the challenged activities cannot be so easily extracted from the rest of the vocational-school setting because those activities were part and parcel of all the activities occurring under the broad sweep of Douglas J's curriculum. *Cf.* Majority Op. at 10–11 (concluding "that the janitorial work took place within the educational context").

[6] The majority refers to its approach as a "targeted" approach because it targets specific segments of the work at issue. Majority Op. 12–13. But even under a so-called targeted approach, the result is the same: it instructs courts to analyze only the work

But by evaluating only some activities conducted at the clinic salons, the majority fails to consider the entire working relationship between the parties and therefore contravenes our binding precedent in *Laurelbrook*. The majority says that in *Laurelbrook*, "we considered whether the students were primary beneficiaries of the *activities for which compensation was in dispute*." Majority Op. at 12 (emphasis added). That is not true. *Laurelbrook* does not isolate the challenged activities (i.e., the students' provision of goods and services to the paying public) from the rest of the vocational program (i.e., the vocational classes and practical instruction). *Laurelbrook* considers whether the students were primary beneficiaries of the school's *entire* vocational program—not whether the students were primary beneficiaries when they engaged in certain activities.

C.

The majority opinion creates a circuit split; the Second, Seventh, and Ninth Circuits have held that cosmetology students who work at for-profit cosmetology schools are not employees under the FLSA. *See Velarde v. GW GJ, Inc.*, 914 F.3d 779 (2d Cir. 2019); *Benjamin v. B&H Educ., Inc.*, 877 F.3d 1139 (9th Cir. 2017); *Hollins*, 867 F.3d at 830. And contrary to the majority's assertion, *see* Majority Op. at 13–14, no other federal court has applied its novel "segmentation" approach to determine whether the FLSA applies in the cosmetology-school context.[7]

---

activities in its crosshairs without regard to the target's surroundings.

[7] District courts in the Third, Fourth, and Tenth Circuits have also eschewed a "segmentation" approach, considering the

The Second and Ninth Circuits considered seven factors (the *Glatt* factors) to hold that cosmetology schools did not owe their students wages for hours worked at their clinic salons. *See Velarde*, 914 at 785 n.7 (citing *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2016)); *Benjamin*, 877 F.3d at 1146–47.[8] The *Glatt* factors evaluate the *entirety* of the working relationship—not mere segments of it—between a cosmetology school and its students, assessing (1) the students' expectation of compensation, (2) the school's provision of clinical and hands-on training, (3) the students' receipt of academic credit, (4) the extent to which the work accommodates the students' academic commitments by corresponding to an academic calendar, (5) the duration of the program, (6) the displacement of paid workers, and (7) the students' expectation of employment with the school after the program. *Velarde*, 914 F.3d at 785 n.7; *Benjamin*, 877 F.3d at 1146–47; *see also Hollins v. Regency Corp.*, 144 F. Supp. 3d 990, 998–1007 (N.D. Ill. 2015), *aff'd*, 867 F.3d 830 (7th Cir. 2017) (applying the *Glatt* factors to hold that cosmetology students were the primary beneficiaries).

---

totality of the circumstances at the schools' clinic salons. *See Jochim v. Jean Madeline Educ. Ctr. Of Cosmetology, Inc.*, 98 F. Supp.3d 750, 757–60 (E.D. Penn. 2015); *Ortega v. Denver Inst. LLC*, No. 14-cv-01351, 2015 WL 4576976, *13–17 (D. Colo. July 30, 2015); *Atkins v. Capri Training Ctr., Inc.*, No. 2:13-cv-06820, 2014 WL 4930906, at *8–10 (D.N.J. Oct. 1, 2014); *Lane v. Carolina Beauty Sys., Inc.*, No. 6:90CV00108, 1992 WL 228868, *3–4 (M.D.N.C. July 2, 1992).

[8] In *Hollins*, 867 F.3d at 837, the Seventh Circuit affirmed the district court's use of the *Glatt* factors but declined to "make[] a one-size-fits-all decision about programs that include practical training, or internships, or tasks that appear to go beyond the boundaries of a program."

In *Velarde* and *Benjamin*, the Second and Ninth Circuits applied the *Glatt* factors to find that cosmetology students were not employees under the FLSA. In both cases, the courts found that the students primarily benefitted from the vocational training because the students willfully enrolled in the programs knowing they would receive neither compensation for their services nor employment with the school. Moreover, the schools' curricula required students to work no more than the number of hours mandated by the state-licensing laws. Finally, the schools provided hands-on training related to classroom instruction, gave students opportunities to perform services under the supervision of instructors, and did not displace paid employees. *See Velarde*, 914 F.3d at 786–88; *Benjamin*, 877 F.3d at 1139. The Second and Ninth Circuits thus evaluated cosmetology students' work in the context of the schools' entire clinic-salon programs, measuring whether students served *primarily* as employees of the schools' training programs or acted *primarily* as students. *Velarde*, 914 F.3d at 785.

Nor does the Department of Labor (DOL) interpret the FLSA to cover "segments" of work conducted by students in vocational-training programs or internships. Rather, the DOL instructs investigators to apply the seven *Glatt* factors to determine whether students working at for-profit businesses are employees under the FLSA. U.S. Dep't of Labor, Wage & Hour Div., Field Assistance Bull. No. 2018-2, *Determining Whether Interns at For-Profit Employers Are Employees Under the FLSA* (2018). The DOL recognizes that the "[student]-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the [student] enters into the relationship with the expectation of receiving educational or vocational benefits

that are not necessarily expected with all forms of employment." *Id.* (citing *Glatt*, 811 F.3d at 536).

The majority opinion ignores this distinction, thereby confusing the issue of whether a student is an employee with the issue of whether an employee is owed compensation. *See* Majority Op. at 13, 15–16 (citing cases concerning FLSA claims brought by *employees).* The latter question—the compensable-time question—is not focused on the nature of the relationship between the parties; the employer-employee relationship is a given. Rather, the question is narrowly focused on whether the employee is *working* during a particular time period. *See, e.g.*, *Hill v. United States*, 751 F.2d 810, 812 (6th Cir. 1984) (holding that an employee was not working during a lunch period because the employee "had no substantial duties . . . that would inhibit his ability adequately and comfortably to pursue interests of a private nature"). The primary-beneficiary analysis makes a broader inquiry, focusing on the benefits accrued to each party by virtue of the educational and working relationship.

The majority eradicates any distinction between these distinct legal issues. The "segmentation" approach sidesteps the primary-beneficiary analysis by ignoring the context of the relationship. This approach is inconsistent with the purposes of FLSA, which "was obviously 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." *See Portland Terminal Co.*, 330 U.S. at 151.

D.

Finally, the majority's analysis is premised on the assumption that restocking shelves and cleaning salons are activities that confer little (if any) educational benefit to aspiring cosmetologists. *See* Majority Op. 6; *id.* at 5 (finding that the salon aesthetics activities are "less related to the school's purpose" of training students for a career in cosmetology); *id.* at 11 ("[T]he janitorial tasks assigned to the plaintiffs were not part of Douglas J's written curriculum, not required by the state regulations governing cosmetology education, and not supervised by instructors."); *id.* at 15–16 (explaining that the challenged activities fail to provide a "curriculum-based benefit" and are "unrelated to the educational purpose of the relationship"). Having made this subjective judgment, the majority holds that that the activities "[did] not actually provide a benefit to students that exceed[ed] the benefit of free labor received by the school." *Id.* at 15.[9]

But the plaintiffs failed to provide sufficient evidence to support the majority's assumption. Start

---

[9] At the same time, the majority faulted the district court for failing to recognize that the challenged activities "spring from the students' [educational] relationship with Douglas J." Majority Op. at 11. In rejecting the district court's analysis, the majority concedes that "[t]he students were in the salons as part of the educational program, were assigned the tasks at issue by the same instructors who oversaw their practical training, received academic credit for the time spent on the tasks, and were told that they would be sent home—potentially delaying their graduation from the school—if they failed to complete the assigned tasks." *Id.* But if it is true that the challenged activities are "unrelated to the educational purpose of the program," *see id.* at 14, why would we apply the primary-beneficiary analysis to these activities?

with the curriculum requirements.[10] Douglas J's written curriculum includes classroom and practical instruction on cleanliness, infection control, and maintaining a professional salon image. *See* R. 60-41; R. 60-37 (giving instructors examples of salon-aesthetics activities, including cleaning, laundry, and restocking). One of Douglas J's owners testified that the school requires students to clean and do laundry because the LARA requires cosmetologists to keep their businesses "clean, safe, and sanitary at all times," Mich. Admin. Code R. 338.2171, .2173, and cosmetology schools to teach sanitation, patron protection, personal hygiene, and salon management, *id.* § 338.2161; *see* Weaver Dep., R. 60-34, PageID: 2571.

That the LARA prescribes cosmetology-specific measures to prevent infections and contagious disease in salons, requires schools to provide instruction on sanitation and salon management, and tests students on these topics, speaks to the educational value of the challenged activities. There is therefore a reasonable connection between Douglas J's cleaning and restocking requirements and the LARA's curriculum requirements regarding sanitation, patron protection, and salon management. The plaintiffs failed to rebut that connection with evidence that the challenged activities are somehow unrelated to the educational purpose of the relationship. *See, e.g.*, *Velarde*, 914 F.3d at 787 (finding that "clerical and janitorial work" allowed students to "gain[] familiarity with an industry by day to day professional experience") (citation

---

[10] Although the majority states that Douglas J asserts that the activities "may" be included in the curriculum, *see* Majority Op. at 6 n.1 (emphasis added), Douglas J explicitly asserts that the "general salon aesthetics" are a required component of its clinic-salon program, *see* Appellant Br. at 14.

omitted); *Hollins*, 867 F.3d at 836–37 (explaining that schools reasonably regarded activities like cleaning and restocking shelves as "part of the job of the cosmetologist," especially since "Salon Safety and Sanitation" is a "heavily tested subject area on the [state] licensing exam").

IV.

For the foregoing reasons, I concur in the judgment to reverse and remand for the district court to correctly apply *Laurelbrook's* primary-beneficiary test. But I respectfully dissent from the majority opinion's rendition of that test because it directly conflicts with our precedent and creates an unjustifiable split from our sister circuits.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-1781

JOY EBERLINE; TRACY POXSON; CINDY ZIMMERMANN,

Plaintiffs - Appellees,

v.

DOUGLAS J. HOLDINGS, INC.; DOUGLAS J. AIC, INC.; DOUGLAS J. EXCHANGE, INC.; DOUGLAS J. INSTITUTE, INC.; SCOTT A. WEAVER; TJ WEAVER,

Defendants - Appellants.

FILED

Dec 17, 2020

DEBORAH S. HUNT, Clerk

Before: COLE, Chief Judge; BATCHELDER and STRANCH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Ann Arbor.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's partial grant of summary judgment in favor of the plaintiffs is REVERSED and REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joy Eberline, *et al.*,

Plaintiffs,

v.

Douglas J. Holdings, Inc., *et al.*,

Defendants.

_____/

Case No. 14-cv-10887

Judith E. Levy
United States
District Judge

OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [60] AND GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [56]

Three former students at defendants' cosmetology schools brought this putative class and collective action under the Fair Labor Standards Act ("FLSA") and state law. They allege that when they clean, do laundry, and restock products during the clinical training portion of defendants' curriculum, they are employees entitled to compensation. The key issues in this case are whether the plaintiff students or the defendant schools are the primary beneficiary of their relationship with one another, and whether certain tasks the students are required to complete—such as cleaning the clinic, classrooms, and breakroom; doing the laundry; and restocking the products—are so far beyond the scope of their education that the tasks cannot fairly be considered a part of the training.

The Court is now presented with cross-motions for summary judgment. Plaintiffs bring a motion for partial summary judgment, seeking a determination that they are employees when they perform the aforementioned tasks. Defendants bring a motion for summary judgment, arguing that all of the students' claims must fail because they are students and not employees within the meaning of the FLSA.

For the reasons set forth below, plaintiffs' motion for partial summary judgment is granted, and defendants' motion for summary judgment is denied in part. In light of the fact that plaintiffs clarified during oral argument that they are only seeking employee status for time spent on cleaning, doing laundry, and restocking products, there is no dispute on the remainder of the time spent in the clinic. Therefore, defendant's motion for summary judgment as to the remaining time and the other portions of the parties' relationship is granted in part.

I. Background

Plaintiffs are three former cosmetology students at defendants' schools. Joy Eberline attended defendants' Ann Arbor school and graduated in 2012. Cindy Zimmermann attended defendants' Grand Rapids institute part-time and also graduated in 2012. Tracy Poxson graduated from defendants' East Lansing school in 2013. Each passed the state cosmetology licensing exam after graduating.

Defendants are four companies owned and operated by individual defendants Scott Weaver, T.J. Weaver, and Kristi Bernhardt. Scott and T.J. Weaver are the only directors of the defendant companies. Scott Weaver is the defendant with primary decision-making authority over the companies. (Dkt. 60-4 at

14-16.) He also serves on the Michigan Board of Cosmetology. (Dkt. 60-4 at 8.) Kristi Berhnhardt was the Chief Financial Officer of the corporate defendants during the time period at issue in this litigation.

The four corporate defendants are Douglas J. Institute, Douglas J. AIC, Douglas J. Exchange, and Douglas J. Holdings, Inc. Douglas J. Institute, Inc. operates cosmetology schools in Ann Arbor, East Lansing, Grand Rapids, and Royal Oak, Michigan, as well as Knoxville, Tennessee. (Dkt. 60-3 at 2.) Douglas J. AIC, Inc. operates an additional cosmetology school in Chicago, Illinois. (Dkt. 60-4 at 14.) Douglas J. Exchange, Inc. operates salons in Ann Arbor and Rochester Hills, Michigan. (*Id.* at 31.) Douglas J. Holdings, Inc. owns each of the other defendant companies. (Dkt. 60-5.) Defendants Scott and T.J. Weaver each own half of Douglas J. Holdings, Inc. (Dkt. 60-6.)

Defendants' businesses are for-profit companies from which the Weaver defendants earn a considerable amount of money. For example, Douglas J. Institute earned a net profit of over $1.5 million each year between 2010 and 2014. (Dkt. 69-1.) The revenue driving this profit comes from tuition, kit sales,[1] beauty product sales, and salon services sales to the public. (Dkt. 69-2 at 2; Dkt. 69-3 at 2.) Students are charged $17,850 for the full-time program and $17,000 for the part-time program, inclusive of the kit fee. (Dkt. 60-23; Dkt. 60-26.) The companies are set up such that the net profit flowed through Douglas J.

[1] Kit sales refer to the schools' requirement that students purchase certain equipment and beauty products from the school as part of their training. Students are charged $1,700 for the kit. (Dkt. 60-23 at 2.)

Holdings to Scott and T.J. Weaver as income. (Dkt. 60-15 at 6.)

At the time, defendants employed various types of workers as part of their business model. One type of worker defendants employed was support staff. The support staff were broken into two positions: aesthetics and guest services. Defendants employed aesthetics personnel "to consistently ensure the Institute is kept clean and materials including towels and products are always available." (Dkt. 61 at 2.) These employees were primarily responsible for "keeping the place clean throughout the course of the day, [and] helping keep up with things such as laundry, any dishes, [and] cleaning." (Dkt. 60-4 at 19.) The printed job description for aesthetics personnel informed potential new hires that the role required "sweeping, dusting, polishing, window cleaning[,] shelf cleaning[,] . . . load[ing] and unload[ing] [the] dishwasher[,] . . . ensur[ing] [the] back-bar and stock areas are clean and tidy[,] [and] other general cleaning tasks as assigned." (Dkt. 61.)

The other support staff role in defendants' operations was guest services personnel. The guest services team primarily staffed the front desk to greet and assist clients when they came in the door. (Dkt. 60-34 at 5.) They were also responsible for keeping the waiting area "clean and tidy." (Dkt. 60-4 at 23.) The guest services training manual instructed staffers to "come out from behind the desk and hold doors, dust shelves, vacuum rugs, [and] clean windows" when they have down time. (Dkt. 60-47 at 4.) They were also expected to perform hourly "aesthetic checks," in which they would tend to guests and "vacuum all rugs (including elevator) and clean the glass at all sets of doors." (*Id.* at 5.)

The work of the support staff was bolstered by a nighttime janitorial service. Defendants hired Daenzer Building Services to clean the facilities six nights each week. (Dkt. 60-34 at 19.)

In addition to support staff, defendants employed licensed cosmetology instructors. (Dkt. 60-4 at 19.) These individuals had both a state-issued cosmetology license and a state-issued cosmetology instructor's license (Dkt. 60-34 at 8), and they oversaw the cosmetology students' time in the clinic and in the classroom. (*Id.* at 9.) Each time a student saw a client in the clinic, the appointment would begin with a consultation between the student, the instructor, and the client to ensure the student provided the client with all of the services the client sought. (*Id.)* When the student finished, the instructor would review the student's performance to ensure it was adequate. (*Id.)*

The instructors also oversaw the work of student instructors. Student instructors are licensed cosmetologists who have returned to school to obtain an additional license to teach cosmetology. (*Id.* at 11.) They were not paid for their time on the floor[2] and were expected to work hand-in-hand with the instructors to oversee the cosmetology students in the clinic. (*Id.* at 12.) Occasionally, a student instructor supervised the cosmetology students in lieu of a licensed instructor. (Dkt. 60-27 at 42.)

The instructors and student instructors supervised the cosmetology students' time in the clinic according to defendants' curriculum, which was based on Michigan state requirements for licensing cosmetologists. The state requires students to spend 1,500 hours in cosmetology school, in both a clinical and

[2] None of the plaintiffs are student instructors.

classroom setting, to become eligible to take a state-administered licensing exam. (Dkt. 60-20.) The student must then pass that exam to obtain a license to practice cosmetology. (*Id.)* As an accredited and licensed cosmetology school (Dkt. 60-18 at 6), defendants were obligated by law to conform their curriculum to the subject matter tested on the state licensing exam. Mich. Comp. Laws § 339.1205(2)(a).

The state-mandated curriculum requires cosmetology students to spend much of their time practicing their skills on clients under instructors' supervision. (Dkt. 60-20.) Students worked in the clinic throughout their enrollment, and they were required to spend certain amounts of time on different skills and treatments. For example, the state curriculum required eighty practical hours of facials, fifty-five practical hours of manicures, 400 practical hours of hairdressing, 170 practical hours of hair coloring, and 180 practical hours of chemical hair restructuring, among other categories of skills. (*Id.)* It also mandated forty clinical hours on "Sanitation/Patron Protection, Laws & Rules, Personal Hygiene, Salon Management, [and] Mechanical & Electrical Equipment Safety." (*Id.)* Neither the state-mandated clinical curriculum nor defendants' application of that curriculum include any time in the clinic for learning the salon business. (*Id. See also* Dkt. 60-46.)

Defendants implemented Michigan's cosmetology curriculum, using their own grading criteria and course outlines, in five units: Cosmetology Introduction, Alpha, Beta, Gamma, and Salon Life. (Dkt. 60-44.) Over the course of the units, which included both classroom and clinical time, students learned a wide range of necessary cosmetology skills, such as how to cut hair in various styles, color hair, apply makeup,

perform a facial, perform a manicure, chemically treat hair, and many others. (*See generally* Dkt. 60-41.) The curriculum called for students to spend multiple hours over multiple weeks learning these skills in the classroom and clinic, but called for just three hours of classroom training in the "Salon Business." (*Id.)* Students were also taught lessons in patient protection and tool sanitation, but the curriculum included no lessons on how to do laundry, restock products, or perform other basic cleaning tasks in a salon. (*See Id.)*

The Michigan state-administered cosmetology exam mirrors what is set forth in the curriculum and tests students' competency in various areas related to the profession. It tests both theory and clinical ability. (Dkt. 60-40.) On the clinical portion of the exam, students are asked to perform a manicure, a facial, chemical services, haircutting services, and more. (*Id.)* Applicants are tested on sanitation/patient protection during the clinical exam, including whether they use sanitized tools; wash their hands; dispose of waste in the trash; and "[e]nsure[ ] [the] workstation remains sanitary by changing towels when soiled, cleaning spills, and maintaining sanitary implements/ materials throughout service." (*Id.* at 10.)

Students are not permitted to sit for the exam unless they "have successfully completed a course of study of at least 1,500 hours." (Dkt. 60-40 at 14.) The students tracked their qualifying hours on a log. Each time a student completed a task, the instructor would affirm its completion on that log. (Dkt. 60-27 at 46; Dkt. 60-46.) The students tracked their hours by type of service performed so that they could ensure they spent the requisite number of hours on each type of service. (Dkt. 60-46.)

In addition to completing the required treatments and services found on the hours log and in the curriculum, plaintiffs spent a significant amount of time on tasks outside the curriculum, such as cleaning. Eberline explained:

> there was always the laundry to be done so [students would] have to do load after load of towels, of course, washing them, drying them, folding them, putting them in the cabinets where they belong, et cetera; of course, emptying the dirty ones out and putting those in the laundry. But aside from that, there was the continuous sweeping of the floors, the entire floor, not just the area where [a student was], the whole salon floor. If somebody at the end of the day didn't wipe down their own stuff and they're already gone, which happened daily, [students] would not be allowed to leave until every station was like you could eat off of it pretty much. Dusting of the shelfs [sic] in the guest services area, dusting of all the products that were sitting on the shelves, Windexing or whatever glass cleaner they prefer to use.

(Dkt. 60-27 at 30-31.)

Poxson had a similar experience, noting that they "would have to do laundry, [ ] would fold the towels, wash the towels, [and] clean the color station out . . . ." (Dkt. 60-28 at 43.) There was "a break room downstairs that [students] had to clean" (*Id.* at 43), as well as a requirement to "stock the shelves and wipe them down" in the reception area. (*Id.* at 37.) Students were instructed to maintain the shampooing station, which required them to "take all the shampoo bottles and wipe them all down, wipe the bowls down, chairs

down, [and] fill the shampoo back up from . . . stock bottles that were under the sink." (*Id.* at 44.) They also cleaned the wax area and color station. (*Id.)*

The same was true for Cynthia Zimmermann. She testified that students were asked to "clean the back bar where the shampoo bowls and stuff are, clean where the color station was, do the laundry, take it from the washer to the dryer, fold when it came out of the dryer, empty the trash, and then when we had classroom, we had to do the boards, wipe those down, clean off the tables, clean the floor, sweep the floor." (Dkt. 60-29 at 33.)

The plaintiffs each testified that they would spend multiple hours cleaning on a slow day and at least half an hour cleaning every day. (Dkt. 60-27 at 44, 48; Dkt. 60-28 at 44; Dkt. 60-29 at 35.) Spending this amount of time cleaning was not voluntary, but rather something instructors were encouraged to have the students do. (*See* Dkt. 60-39. *See, e.g.*, Dkt. 60-27 at 30-31, 42-44; Dkt. 60-28 at 25-26, 44-45; Dkt. 60-29 at 33-34.) Defendants provided their instructors with multiple documents that directed them to have the students clean, do laundry, and restock products when there was "down time" (Dkt. 60-39) or when there were "not enough external guests or models scheduled to keep the students busy with guests throughout the shift." (Dkt. 60-37.) When an instructor followed this guidance and asked a student to clean, it was mandatory because, as Scott Weaver testified, "if a student is refusing to participate in any activity, then they would be sent home for the day . . . ." (Dkt. 60-34 at 22.) Being sent home for the day would prevent a student from accumulating training hours that day, and would force the student to make up the hours at a later date.

In addition, there were some days where "it was strictly cleaning." (Dkt. 60-28 at 25.) Those days were Mondays, when the clinic was closed to clients during the day. Students who had fallen behind on their hours or wanted to get ahead were able to come in and participate in a "deep cleaning" of both "the clinic and the classrooms." (Dkt. 60-28 at 25.)

Plaintiffs spent a substantial amount of time on these cleaning tasks. Eberline testified that on a slow day in the clinic she spent about "four hours of the day" on cleaning and other work outside the curriculum (Dkt. 60-27 at 44) and a "half hour to forty-five minutes out of the day" on a busy day. (*Id.* at 48.) She estimated that she spent 348 of her 1,075 clinical and unassigned hours on cleaning,[3] representing 32% of her time spent in the clinic. (Dkt. 71 at 23.) Poxson testified that on a slow day, she spent "between two and three hours" cleaning and the last half hour of her day cleaning on a busy day. (Dkt. 60-28 at 44.) She estimated that she spent 304 of her 1,075 clinical hours on cleaning, representing 28% of her time spent in the clinic. (Dkt. 71 at 23.) Zimmermann testified that she spent "about a half hour" cleaning each day, but acknowledged the amount of time fluctuated depending on how much there was to do. (Dkt. 60-29 at 34.) She estimated that she spent 150 of her 1,075 clinical hours on cleaning, representing 14% of her

[3] Of the 1,500 educational hours cosmetology students are required to complete, 965 must be in the clinic. (Dkt. 60-20.) The curriculum also contains 110 unassigned hours. (*Id.)* Because the record does not set forth how the unassigned hours are typically spent, the Court assumes that all of the 110 unassigned hours are completed in the clinic. This is a favorable view of the facts for defendants, as required by Fed. R. Civ. P. 56, because the greater number of overall clinical hours students have subsequently reduces the percentage of clinical time spent cleaning.

time in the clinic. (Dkt. 71 at 23.) Taken together, plaintiffs on average spent 267 of their 1,075 required hours cleaning. This accounted for an average of 25% of their time in the clinic. (*Id.)*

Cleaning was not the only work students did outside the curriculum. On some days the students would be assigned to guest services. (Dkt. 60-27 at 46.) When they were assigned to guest services, students would "greet guests when they would come in . . . run the tickets for the guest services employees, get the guests their preferred coffee, tea, whatever, and then . . . sweeping or dusting or whatnot." (*Id.)*

Students were also expected to encourage clients to purchase the products used in the clinic. Though not part of the state-mandated curriculum, making sales pitches was part of defendants' curriculum. (Dkt. 60-34 at 28.) Students were evaluated on whether they engaged in certain "behavior" that is "intended to motivate guests to purchase product." (*Id.)* Defendants also "track[ed] the student's per guest numbers of retail sales of the product" and provided incentives to the students who sold the most product. (*Id.* at 29.)

Because these tasks were outside the scope of the state-mandated curriculum, the hours log form had no designated space to credit the students for these hours. In order to credit the students for hours actually spent in the clinic—even if those hours were not spent on tasks within the curriculum—instructors told students to "just put down what [they] needed hours in. It didn't matter if we really didn't do that that day . . . ." (Dkt. 60-28 at 25.) It was mandatory that the students spent 1,500 total hours in school, and toward the end of the program students were "instructed to magically make those numbers work, so

[students were] to take whatever hours that [they] haven't actually done, whatever these things up here say, and [students would] have to fill in blanks and rework the numbers to make it all work out." (Dkt. 60-27 at 46.)

Even though defendants had students perform tasks outside of the curriculum and record their hours improperly, students graduating from defendants' schools still passed the state cosmetology licensing exam at a high rate. As of 2012, 85% of defendants' students obtained a cosmetology license. (Dkt. 56-21.)

II. Summary Judgment Standard

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may not grant summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002)).

III. Legal Analysis

The dispositive question on these cross motions is whether plaintiffs were defendants' employees while they were students at defendants' cosmetology schools. Because the parties disagree which primary beneficiary factor test this court should apply to determine whether plaintiffs were employees and how the test functions in situations where a student may be a

student and an employee at different times, it is necessary to discuss the context of the Sixth Circuit's primary beneficiary test and arrive at a framework for this analysis. Then, the framework is applied to the plaintiffs' motion for partial summary judgment. Finally, the defendants' motion for summary judgment is analyzed under that framework.

a. *The* Laurelbrook *Framework*

The FLSA, "[w]ithout doubt . . . covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947). But for that coverage to attach, the "trainees, beginners, apprentices, or learners" must be "employees" as defined by the Act. Id. The FLSA does not cover "[a]n individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, work[s] in activities carried on by other persons either for their pleasure or profit . . . .'" *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) (quoting Tony *&* *Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985)). "Whether a particular situation is an employment relationship is a question of law" for the Court to decide. *Fegley v. Higgins*, 19 F.3d 1126, 1132 (6th Cir. 1994).

The FLSA defines an employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1). This definition of an employee is unhelpful as a starting point for the analysis of whether an individual is an employee of another, and "labels that parties may attach to their relationship" do not control. *Laurelbrook*, 642 F.3d at 522 (quoting *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (1950)). Instead, "it is the 'economic reality' of the relationship between parties that determines whether their relationship is one of

employment or something else." *Id.* That economic reality is evaluated on "a case-by-case basis upon the circumstances of the whole business activity." *Id.* (quoting *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984)). But to "state that economic realities govern is no more helpful than attempting to determine employment status by reference directly to the FLSA's definitions themselves." *Id.* "There must be some ultimate question to answer, factors to balance, or some combination of the two." *Id.*

In order to render an "economic realities test" into something useful for courts to apply, the Sixth Circuit has instructed that "the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship." *Id.* at 529. Other circuits have similarly concluded that determining the primary beneficiary of the relationship is the proper approach for evaluating whether a student, trainee, or intern is an employee under the FLSA. *E.g.*, *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2015); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015); *Benjamin v. B&H Educ., Inc.*, 877 F.3d 1139 (9th Cir. 2017); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993); *see also Hollins v. Regency Corp.*, 867 F.3d. 830 (7th Cir. 2017) (acknowledging the Second Circuit's *Glatt* decision and the Eleventh Circuit's *Schumann* decision as persuasive, but not explicitly applying the primary beneficiary analysis). Indeed, this notion that employment status turns on who is the primary beneficiary of the relationship was first articulated by the Supreme Court nearly seventy years ago. *See Walling*, 330 U.S. at 153 (holding trainees were not employees because they

received training "in a manner which would most greatly benefit the trainees").

Though the courts of appeal generally agree that the primary beneficiary test is the correct analysis in this context, they have each applied the test in slightly different ways. For example, in *Glatt*, a case where the court was asked to decide if interns working for a film production company were employees, the Second Circuit established a seven-factor balancing test that looks at the relationship between the intern's education and the work performed at the internship. *Glatt*, 811 F.3d at 536-37; *see also Schumann*, 803 F.3d at 1212-13 (adopting the *Glatt* factors); *Benjamin*, 877 F.3d at 1147 (same). In contrast, in *Reich*, a case brought by firefighters alleging they should be paid for time spent training at a fire-fighting academy, the Tenth Circuit took a different approach and adopted a balancing test using the Department of Labor Wage and Hour Division's proposed six-factor analysis derived from *Walling*. *Reich*, 992 F.2d at 1027.

The Sixth Circuit's application of the primary beneficiary test, which binds this Court, is different still from *Glatt* and *Reich*. *See Benjamin*, 877 F.3d at 1146 (contrasting *Schumann* and *Laurelbrook* when observing "[o]ther courts have adopted either *Glatt's* primary beneficiary test or have established a similar test in cases involving interns or trainees"). In fact, the *Laurelbrook* court explicitly rejected the formulation of the primary beneficiary test used in *Reich*. *Laurelbrook*, 642 F.3d at 525 ("We find the [Wage and Hour Division]'s test to be a poor method for determining employee status in a training or educational setting."). Instead, the court identified "[f]actors such as whether the relationship displaces paid employees and whether there is educational value derived from

the relationship" as relevant, but not exclusive, "considerations to guide the inquiry." *Id.* at 529. It went on to weigh those factors and others in four categories: benefits to the institution, considerations unique to the educational context that offset the benefits to the institution, tangible benefits to the students, and intangible benefits to the students. *Id.* at 530-33.

However, because the primary beneficiary test is the "framework for discerning employee status in learning or training situations," it is not applicable to everything a student or intern may do over the course of her education or internship. *See Laurelbrook*, 642 F.3d at 529. As the Eleventh Circuit recognized in *Schumann*, an all-or-nothing determination of employee status is not appropriate in every learning or training situation. *See Schumann*, 803 F.3d at 1214-15. In some such contexts, the employer "takes unfair advantage of the student's need to complete the internship by making continuation of the internship implicitly or explicitly contingent on the student's performance of tasks or his working of hours well beyond the bounds of what could fairly be expected to be a part of the internship." *Id.* at 1214-15. Where this is the case, "the student would not constitute an 'employee' for work performed within the legitimate confines of the internship but could qualify as an 'employee' for all hours expended in . . . tasks so far beyond the pale of the contemplated internship that it clearly did not serve to further the goals of the internship." *Id.* at 1215.

The Eleventh Circuit is explicit about what the court in *Laurelbrook* assumes: the primary benefit test only applies to activities within the "learning or training situation." Though the *Schumann* court refers to the plaintiffs as "students" or "interns" and

their program with the defendant as an "internship," the "training or learning situation" terminology from *Laurelbrook* is analogous. *Schumann* recognizes that not all activity a student may do is part of the learning or training situation. Activity beyond the confines of the learning situation falls within the protection of the FLSA when the employer takes unfair advantage of the student's need to complete the education to require the student to perform those tasks.

In this case, the *Schumann* inquiry is directly on point because this case is nearly identical to *Schumann*. In *Schumann*, the plaintiffs were college students training to become nurse anesthetists. 803 F.3d at 1203. They were required "to participate in a minimum of 550 clinical cases" as part of obtaining their degree and license, and they sued the anesthesiology practice that hosted their clinical training. Thus, even though the *Schumann* court referred to the relationship between the plaintiffs and the defendant as an "internship," they, like plaintiffs here, were students completing the clinical training required to earn their degree and professional license.

Given the Sixth Circuit *Laurelbrook* test and the threshold matter of whether an activity is within the training or learning situation from *Schumann*, courts must make several inquiries when presented with a possible hybrid situation like that in *Schumann*. First, the Court must first determine if the complained of activity is within the learning situation. If the activity is within the learning situation, then the primary beneficiary test as articulated in *Laurelbrook* applies. But if the activity is outside the training or learning situation, meaning it is "well beyond the bounds of what could fairly be expected to be a part of the internship" or educational program, then the

Court must look at whether the employer is taking unfair advantage of the student's need to complete the internship or educational program. *Schumann*, 803 F.3d at 1214-15. If so, then the student would "qualify as an 'employee' for all hours expended in . . . tasks so far beyond the pale of the contemplated internship that it clearly did not serve to further the goals of the internship." *Id.* at 1215.

b. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs bring a motion for partial summary judgment seeking a determination that they are employees with respect to cleaning, laundry, and restocking tasks.[4] As set forth above, the Court applies the following framework. First, the Court addresses the threshold question of whether these activities are within the training or learning situation. If these activities are within the training or learning situation, then the *Laurelbrook* primary beneficiary test is applied. But if these activities are not, then the inquiry moves on to whether the defendants took unfair advantage of plaintiffs' need to complete their education by requiring them to complete those tasks outside of the training or learning situation. Finally, if the defendants did take unfair advantage, then the Court must ask if the time spent on the tasks was *de minimus*.

---

[4] At oral argument, plaintiffs clarified that the current motion did not seek to have all of the time they spent in the clinic declared work under the FLSA. Rather, they explained that the motion is limited to the time spent cleaning, doing laundry, and restocking products as described in plaintiffs' brief. (Dkt. 60 at 14.)

i. Whether the Activities are within the Training or Learning Situation

Though the Sixth Circuit has not yet considered a case where it was required to determine if activity was within the training or learning situation, prior cases on whether a program as a whole was educationally valid is instructive. For example, in *Laurelbrook* students performed manual labor, which was considered a core part of the students' education because "receiving a well-rounded education—one that includes hands-on, practical training—is a tenet of the Seventh–day Adventist Church," and Laurelbrook was a Seventh-day Adventist school. 642 F.3d at 531.

Conversely, the district court in *Marshall v. Baptist Hospital, Inc.* found students were performing manual tasks that were not related to their education and training, so much so that the whole program was so deficient it could not constitute an education. 473 F. Supp. 468, 474-77 (M.D. Tenn. 1979), *rev'd on other grounds*, *Marshall v. Baptist Hospital, Inc.*, 668 F.2d 234 (6th Cir. 1981). There, X-ray technician "trainees" were required to have forty hours a week in "classroom and practicum training" by spending mornings in clinical training at a hospital and afternoons in the classroom in order to complete the program, receive a certificate, and then sit for a licensing examination. *Id.* at 470-71. The court found that the trainees were employees because they either received no instruction when they performed X-rays or they performed tasks that were "at best only of peripheral value" to their educational goals. *Id.* at 475. On tasks related to the subject matter of education, the court specifically looked at the fact that students did not keep any records of their time spent as required by the training program and that students were unsupervised when

they performed X-rays. *Id.* On the tasks unrelated to the subject matter of their education, the court looked at whether other staff was hired to complete the work. *Id.*

Plaintiffs show that the specific manual activities of cleaning, doing the laundry, and restocking products were outside of the training and learning situation based on the state mandated curriculum requirements, the defendants' curriculum, the lack of supervision during these activities, the lackadaisical recordkeeping, and the fact that support staff was also hired to complete these tasks.

The state curriculum demonstrates the activities were outside of the training or learning situation. Though the state mandated curriculum includes education about sanitation of tools and the cosmetologist's work space, Zimmermann explained that sanitation is "cleaning of your tools so they are sanitized." (Dkt. 60-29 at 33.) Zimmerman's observation is consistent with the requirements set by the Michigan Board of Cosmetology. It tests sanitation and patron protection in the practical portion of the licensing exam by ensuring that the applicant uses sanitized tools, washes her hands, disposes of waste in the trash, and "[e]nsures [the] workstation remains sanitary by changing towels when soiled, cleaning spills, and maintaining sanitary implements/materials throughout service." (Dkt. 60-40.) Students are not tested on their ability to do laundry, restock products, or complete deep cleaning tasks outside their workstation.

Moreover, defendants' printed curriculum aligns with the state's testing criteria and does not purport to instruct students on these extra-curricular tasks. Nor were these tasks were part of a general education regarding the salon business. Defendants' curriculum

included three classroom hours on the "Salon Business" and no clinic time on the subject. Those three classroom hours were the extent of plaintiffs' education in the salon business. Plaintiffs were not taught key salon business skills such as how to permit and license a salon, develop a business plan, hire and train employees, keep required records, pass regulatory inspections, or general principles of business operations. (Dkt. 60-27 at 40-41.).

Other evidence demonstrates that these tasks were not within the training or learning situation. As in *Marshall*, defendants provide no evidence that students received instruction on cleaning, doing the laundry, or restocking the shelves. Furthermore, similar to the students in *Marshall* who did not keep records consistent with the training program, the students here were instructed to place the time they spent cleaning wherever they needed time. And again as in *Marshall*, defendants employed staff to complete the tasks at issue. Here, aesthetics staff were responsible for the same cleaning and laundry tasks as student.

As the *Schumann* court warned, there may be cases where the activities are "so far beyond the pale of the contemplated [training] that it clearly did not serve to further the goals of the [training]." *Schumann*, 803 F.3d at 1215. This case is one of them. Cleaning, doing laundry, and restocking products is outside of the training and learning situation because those activities are beyond the pale of the contemplated educational goals of the cosmetology program as shown by the state mandated curriculum, the defendants' curriculum, the lack of supervision given students while completing these tasks, the lack of proper recordkeeping, and the fact that staff was

hired to do the same tasks. Unlike *Laurelbrook* where the manual labor was a key part of the education, these tasks are beyond the pale of the contemplated cosmetology education and training the plaintiffs sought with defendants.

Defendants rely on three cases cited in *Laurelbrook* for the proposition that manual labor—like what defendants required of plaintiffs—was part of their education. The first two are distinguishable along the lines of *Laurelbrook*. In *Blair v. Wills*, a student sued a Baptist boarding school alleging he was an employee when completing manual labor and the Eleventh Circuit held that the students' labor was "an integral part of the educational curriculum," and he was thus not an employee. 420 F.3d 823, 829 (8th Cir. 2005). In *Woods v. Wills*, the district court relied on *Blair* to find that labor was part of a curriculum designed to "develop Christian values of respect for authority, for Biblical self-image, and self-discipline, and to foster academic development." 400 F. Supp. 2d 1145, 1166 (E.D. Mo. 2005), which relies on *Blair*. However, the labor at issue in those cases was deeply intertwined with the schools' educational mission and curriculum, and reflected the religious values that were a fundamental part of each institution as in *Laurelbrook*. Defendants still present no evidence showing that the manual labor here, cleaning, doing laundry, and restocking products, is similarly so crucial and steeped into their educational mission and curriculum.

Defendants then turn to *Bobilin v. Board of Education, State of Hawaii*, where the district court determined that students working in the school cafeteria were not employees by deferring to the local school district's determination of what activities had

educational value. 403 F. Supp. 1095, 1109 (D. Haw. 1975). However, *Bobilin* is simply consistent with this Court's findings because the court deferred to state and local education officials to determine what type of labor had educational value. Here, the Michigan Board of Cosmetology indicates through the content tested on its licensing exam and its hours requirements that the type of manual labor these plaintiffs engaged in is not part of an education in cosmetology.

ii. Whether the Possible Employer Took Unfair Advantage of Students' Need to Complete Their Educational Program

Once the Court has determined that an activity is not within the training or learning situation, the inquiry moves to whether the employer took "unfair advantage" of the students by making "continuation of [the educational program] implicitly or explicitly contingent on the student's performance of [those] tasks." *See Schumann*, 803 F.3d at 1214. Such is the case here because defendants explicitly and implicitly required plaintiffs to clean, do laundry, and restock products.

Defendants have not disputed that students were explicitly required to complete these tasks. Defendants provided instructors with a document called "Student Down Time Ideas" that directed instructors to assign cleaning tasks when students were not working with a client. (Dkt. 60-39.) Another document detailing "clinic management procedure" also urged instructors to assign cleaning tasks when students were not working with a client. (Dkt. 60-37.) Furthermore, students were unable to decline to perform these tasks because, as defendant Scott Weaver testified, that "if a student is refusing to participate in any activity, then they would be sent home for the

day" and would be unable to accumulate practical hours towards graduation. (Dkt. 60-34 at 22.)

Particularly important is that the requirement was also implicit due to the stark power imbalance between defendants and plaintiffs. Plaintiffs had no alternatives to completing the cleaning, laundry, and restocking tasks. They have little incentive to be sent home for refusing to clean due to the cost of the program, about $17,850 (Dkt. 60-25), and the accompanying student loans. (Dkt. 60-27 at 4; Dkt. 60-28 at 19; Dkt. 60-29 at 24.) Defendant Scott Weaver made it very clear that uncooperative students were unsuccessful in the defendants' program. Furthermore, plaintiffs needed to complete the program and obtain a license to practice cosmetology in order work in their chosen profession and pay off their loans. Accordingly, they had little ability or incentive to say no when defendants' instructors told them to complete tasks that were otherwise part of the job description of defendants' paid aesthetics and guest services staff.

iii. Whether the Tasks Completed Were De Minimus

Even after a court has concluded that an activity is outside the training or learning situation and that the employer has taken unfair advantage of the student or intern, the activity must also not be *de minimus*. The FLSA includes an important limitation in that it only requires payment for tasks where the "employee is required to give up a substantial measure of his time." *White v. Baptist Mem'l Health Care Corp.*, 699 F.3d 869, 873 (6th Cir. 2012) (quoting *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984)). Employers need not pay for *de minimis* work, such as when "the matter in issue concerns only a few seconds or minutes of work." *Id.*

Here, plaintiffs spent a substantial amount of time on these non-curricular tasks. They testified they spent as much as "four hours of the day" cleaning on some days (Dkt. 60-27 at 44), and spent at least "a half hour" cleaning each day. (Dkt. 60-29 at 34.) Plaintiffs' counsel estimated Eberline spent 32% of her clinic time cleaning, Poxson spent 28% of her clinic time cleaning, and Zimmermann estimated 14% of her clinic time cleaning, which averages out to one quarter of clinic time spent cleaning. (Dkt. 71 at 23.) This amount of time is more than a few seconds or minutes, and thus the complained of tasks were not *de minimis*.

There is no genuine issue of material fact as to the nature and extent of plaintiffs' cleaning, restocking, and laundry tasks because defendants offer no competing figures. Accordingly, they were employees as a matter of law with respect to those tasks. Because they were employees, the FLSA entitles them to compensation for the time spent on those tasks.

IV. Conclusion

In conclusion, even though plaintiffs were the primary beneficiaries of their relationship with defendants within the confines of a training or learning situation, *see Laurelbrook*, 642 F.3d at 529, defendants required plaintiffs to engage in certain tasks "so far beyond the pale of the contemplated internship [clinical program] that it clearly did not serve to further the goals of the internship [clinical program]." *See Schumann*, 803 F.3d at 1215. Thus, plaintiffs were employees with respect to those tasks—cleaning, laundry, and restocking products—which accounted for more than a *de minimis* portion of their time, but not with respect to any other activities performed in the clinic or in the classroom.

Accordingly, plaintiffs' motion for partial summary judgment (Dkt. 60) is GRANTED, and defendants' motion for summary judgment is DENIED with respect to the cleaning, laundry, and restocking tasks, but GRANTED as to all other tasks. (Dkt. 56.)

IT IS SO ORDERED.

Dated: October 1, 2018
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on October 1, 2018.

s/Shawna Burns
SHAWNA BURNS
Case Manager

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Joy Eberline, *et al.*, Plaintiffs,	Case No. 14-cv-10887
v.	
Douglas J. Holdings, Inc., *et al.*, Defendants.	Judith E. Levy United States District Judge

_____/

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO AMEND AND CERTIFY ORDER FOR INTERLOCUTORY APPEAL [81], DENYING MOTIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF [90, 91], AND STAYING CASE

On October 1, 2018, the Court issued an opinion and order granting plaintiffs' motion for partial summary judgment and granting in part and denying in part defendants' motion for summary judgment. *Eberline v. Douglas J. Holdings, Inc.*, 339 F. Supp. 3d 634 (E.D. Mich. 2018). The Court held that plaintiffs, former students in defendants' cosmetology schools, were employees entitled to compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 203, when they clean, do laundry, and restock products during the clinical training portion of the defendants' curriculum. (*Id.* at 34.) However, the Court found that plaintiffs were not employees at all other times in the clinical training program, in part because the Court believed that plaintiffs no longer dispute this as a

result of comments made at oral argument. (*Id.* at 2.) Thus, the cross-motions for summary judgment on the cleaning, laundering, and restocking activities were decided in plaintiffs' favor, while summary judgment was granted on the remaining part of defendants' motion related to all other aspects of the parties' relationship.

The parties filed several motions in response to that order. Plaintiffs filed a motion for reconsideration, arguing that during oral argument they did not intend to limit their FLSA claims to time spent cleaning, laundering towels, and restocking products. (Dkt. 78 at 3.) Defendants filed a motion to amend and certify the order for interlocutory appeal and stay the case. (Dkt. 81.) Several would-be amici curiae sought to file briefs in support of the motion to certify the Court's order for interlocutory appeal (Dkts. 90, 91), which plaintiffs oppose. (Dkts. 97, 98.)

I. Analysis

A. Certification of Order for Interlocutory Appeal

A district court shall permit a party to appeal a non-final order when the court is "of the opinion that such order involves [1] a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . ." 28 U.S.C. § 1292(b); *see also In re Trump*, 874 F.3d 948, 950–51 (6th Cir. 2017); *cf.* 28 U.S.C. 1291 (stating that courts of appeals usually have jurisdiction over final orders from district courts). The burden is on the moving party to show that each requirement of § 1292(b) is satisfied, *see In re Miedzianowski*, 735 F.3d 383, 384

(6th Cir. 2012), and the district court must "expressly find in writing that all three § 1292(b) requirements are met," *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010); § 1292(b). Such appeals are the exception, however, not the rule. *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002) (stressing that "[r]eview under § 1292(b) is granted sparingly and only in exceptional cases"). Here, all three conditions of § 1292(b) are met and this is the exceptional case that warrants an interlocutory appeal.

1. Controlling Question of Law

First, the order turns on a controlling question of law. "A legal issue is controlling if it could materially affect the outcome of the case." *Memphis*, 874 F.3d at 351 (citing *In re Baker & Getty Fin. Servs., Inc. v. Nat'l Union Fire Ins. Co.*, 954 F.2d 1169, 1172 n.8 (6th Cir. 1992)). In this case, the issue is whether cleaning, laundering towels, and restocking products are activities that may be extracted from the entire relationship between the parties before examining their overall relationship under the primary benefit test enunciated in *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518 (6th Cir. 2011), because those activities are "beyond the pale of the contemplated [cosmetology education and training]." *Eberline*, 339 F. Supp. 3d at 644–45 (citing *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1215 (11th Cir. 2015)). This issue may materially affect the outcome of the case because considering these activities alone led the Court to grant plaintiffs' motion for partial summary judgment. Moreover, should the Court of Appeals disagree with the Court's analysis, the Court would need to consider those activities as a part of the entire relationship between

the parties. This would affect the Court's earlier analysis, and therefore could affect the outcome of the case. Therefore, the order granting plaintiffs' motion for partial summary judgment turns on a controlling question of law.

2. Substantial Ground for Difference of Opinion

Second, there is substantial ground for difference of opinion on the controlling legal issue. Substantial grounds for difference of opinion exist "when 'the question is difficult, novel and either a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions.'" *Miedzianowski*, 735 F.3d at 384 (citing *City of Dearborn v. Comcast of Mich. III, Inc.*, No. 08-10156, 2008 U.S. Dist. LEXIS 107527, at *7 (E.D. Mich. Nov. 24, 2008)). An issue is novel "where reasonable jurists might disagree on an issue's resolution." *Trump*, 874 F.3d at 952 (quoting *Reese v. BP Expl., Inc.*, 643 F.3d 681, 688 (6th Cir. 2011)). The controlling legal issue in the order is novel and its resolution is not substantially guided by previous decisions.

It is novel because the Sixth Circuit has not yet had an occasion to consider whether activities or tasks that are entirely unrelated to the training or learning situation, and that appear to take unfair advantage of a student's need to complete certain requirements, fit within the *Laurelbrook* framework. In fact, the Sixth Circuit has not considered an FLSA case in the context of an externship, internship, or other sort of

vocational training program as other circuits have.[1] *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015); *Benjamin v. B&H Educ., Inc.*, 877 F.3d 1139 (9th Cir. 2017); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993). Nor has it considered whether cosmetology students can be employees under FLSA as other circuits have. *Velarde v. GW GJ, Inc.*, 914 F.3d 779 (2d Cir. 2019); *Benjamin v. B &H Educ. Inc.*, 877 F.3d 1139 (9th Cir. 2017); *Hollins v. Regency Corp.*, 867 F.3d 830 (7th Cir. 2017).

Relatedly, the issue is not substantially guided by Sixth Circuit precedent. *Laurelbrook* had no occasion to consider separating the non-de minimis tasks that bore no relation to the training or educational program; there, the plaintiffs chose a Seventh-Day Adventist education, which "include[d] hands-on, practical training." 642 F.3d at 531. The question in *Laurelbrook* was whether students were entitled to compensation when they participated in the vocational training portion of their education. *Id.* Nor did *Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981), consider a limited number of tasks that were beyond the pale of the expected training program. The entire x-ray trainee program in *Marshall* was so deficient that there was no educational value, leading the court to find the hospital was the primary beneficiary. *See* 473 F. Supp. at 476–77. Therefore, there was no reason for the

[1] It has, however, adopted a primary benefit test like the circuits that have addressed such contexts. *See Eberline*, 339 F. Supp. 3d at 642.

court to consider extracting those tasks that were entirely unrelated to the educational goal from the relationship. And although *Marshall* is cited with approval by *Laurelbrook*, *id.* at 526–28, it is not binding precedent. Thus, there is no precedent that speaks to whether tasks beyond the pale of the contemplated training or learning situation must be evaluated with the rest of the rest of the relationship under *Laurelbrook's* primary benefit test.[2]

---

[2] The Court disagrees with defendants' characterization of the Court's analysis as a "task-by-task determination of a primary benefit." (*e.g.*, Dkt. 81 at 25). The Court identified a "threshold question": whether tasks are within the training or learning situation. *Eberline*, 339 F. Supp. 3d at 642–44. A task is only extracted from the relationship if it is "so far beyond the pale of the contemplated [training or learning situation] that it clearly [does] not serve to further the goals of the [training or learning situation]." *See id.* at 643. And furthermore, plaintiffs must show that the time spent on those tasks is more than de minimis. *See id.* Every other aspect of the relationship is considered within the entire relationship and evaluated under the primary benefit test. *See id.* at 643.

Schumann's "beyond the pale" language permits an individual to be both a student and employee under FLSA, *Axel v. Fields Motorcars of Fla.*, 711 F. App'x 942, 946 (11th Cir. 2017) (citing *Schumann*, 803 F.3d at 1214), creating a pressure-release valve within the primary benefit test framework. It prevents the odd case of an institution abusing the holistic nature of the primary benefit test to avoid compensating students for their labor carrying out tasks that are entirely unrelated to the training or educational program by offering an otherwise bona fide training or educational program, but conditioning the students' completion of the program upon the fulfillment of those unrelated tasks, along with other legitimate tasks. Nothing in the Court's order suggests that if the tasks were within the training or learning situation, it would not apply *Laurelbrook* to "determin[e] whether employment relationship exists *in the*

Admittedly, other courts disagree with this Court.[3] *See Velarde v. GW GJ, Inc.*, 914 F.3d 779 (2d Cir. 2019); *Benjamin v. B &H Educ. Inc.*, 877 F.3d 1139 (9th Cir. 2017); *Hollins v. Regency Corp.*, 867 F.3d 830 (7th Cir. 2017). And the Eleventh Circuit has not yet had an opportunity to apply *Schumann* to find that an individual is an employee when he or she completes tasks beyond the pale of the contemplated training or educational program, but is a student in all other legitimate respects, though it has reaffirmed *Schumann*. *See Axel*, 711 F. App'x at 946 (citing *Schumann*, 803 F.3d at 1214) (applying the *Glatt* primary benefit test). Substantial ground for disagreement exists.

---

context of a training or learning situation." Eberline, 339 F Supp. 3d at 641 (emphasis added) (quoting *Laurelbrook*, 642 F.3d at 529).

[3] Defendants cite *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), for the proposition that "students in professional, occupational, or vocational schools are not employees." (Dkt. 81 at 16.) However, this assumes the question in this case—are plaintiffs students or employees under FLSA? And two cases defendants offer as examples of disagreement with the Court did not consider administrative, clerical, janitorial, or menial tasks done by cosmetology students as is the case here. *See Winfield v. Babylon Beauty Sch. of Smithtown, Inc.*, No. 13-cv-06289, 2018 WL 5298748, at *3 (E.D.N.Y. Mar. 14, 2018) ("Although the plaintiff was responsible for keeping her workstation clean (another skill tested on the licensing test), *she was never required to do janitorial work or administrative tasks."* (emphasis added)); *Lane v. Carolina Beauty Sys., Inc.*, No. 6:90CV00108, 1992 U.S. Dist. LEXIS 15338, at *3 (M.D.N.C. July 2, 1992) (noting that a *teacher trainee's* responsibilities included "attending to administrative duties regarding the students and the school," which were "part of the *required curriculum* established by the Board [of Cosmetic Art Examiners]." (emphasis added)).

3. Materially Advance Ultimate Termination of Litigation

Third, an interlocutory appeal may materially advance the termination of litigation. To determine whether "[a]n interlocutory appeal will materially advance the litigation," courts consider "if it will 'save substantial judicial resources and litigant expense.'" *U.S. ex rel. Elliott v. Brickman Grp. Ltd., LLC*, 845 F. Supp. 2d 858, 871 (S.D. Ohio 2012) (quoting *In re Regions Morgan Keegan ERISA Litig.*, 741 F.Supp.2d 844, 849 (W.D. Tenn. 2010)). This includes "sav[ing] the parties and the judicial system substantial resources and expense by avoiding extensive discovery, motion practice, and potentially a trial." *Newsome v. Young Supply Co.*, 873 F. Supp. 2d 872, 879 (E.D. Mich. 2012). This requirement "is closely tied" to whether the interlocutory order involves a controlling question of law. *Id.* at 878 (quoting *Comcast*, 2008 U.S. Dist. LEXIS 107527, at *7).

An interlocutory appeal may save the Court and parties expense here. Following the Court's ruling, the parties must engage in additional discovery to determine how much time was spent cleaning, laundering towels, and restocking products. Plaintiffs must also engage in class-related discovery and seek class certification, as they represent plaintiffs across several states. This will add significantly to this expense. Moreover, if the appeal results in reversal, it would remove the need to address plaintiffs' motion for reconsideration on the Court's grant of the rest of defendants' motion for summary judgment (Dkt. 78) because all tasks must be considered part of the parties' relationship. And a reevaluation of the motions for summary judgment could lead to the avoidance of trial—a significant savings for all

involved. This is all the more so because the interlocutory appeal would address a controlling matter of law. Finally, because there is room for substantial disagreement, the appeal is not an effort to unduly protract litigation. Thus, the appeal may materially advance the ultimate termination of litigation.

B. Appropriateness of Stay

An order granting defendants permission to file an interlocutory appeal will not automatically stay the case; the district court must explicitly stay the case. § 1292(b). The decision to stay a case "ordinarily rests within the sound discretion of the District Court" as "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes in its docket with economy of time and effort for itself, for counsel and for litigants." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 626–27 (6th Cir. 2014) (citing *Ohio Envtl. Council v. U.S. Dist. Court, S. Dist. of Ohio, E. Div.*, 565 F.2d 393, 396 (6th Cir. 1977)). The Court exercises its discretion to stay this case.

It is appropriate to grant the stay because if the Court is reversed, the Court's and the parties' time and resources spent continuing the litigation will have been wasted. Additionally, a reversal would render plaintiffs' motion for reconsideration on the Court's grant of defendants' motion for summary judgment on the parties' relationship (Dkt. 78) moot because cleaning, laundering, and restocking products would have to be considered within the whole relationship. Thus, a stay is appropriate.

II. Conclusion

For the reasons set forth above, defendants have met the three conditions for under § 1292(b). Accordingly,

Defendants' motion (Dkt. 81) is **GRANTED**, and so the motions to file amicus briefs (Dkts. 90, 91) are **DENIED AS MOOT.**

The Court's Opinion and Order (Dkt. 77) is **AMENDED,** as Federal Rule of Appellate Procedure 5(a)(3) requires, to include a statement that the Court believes the Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation under § 1292(b).

Furthermore, the case is **STAYED** pending the United States Court of Appeals for the Sixth Circuit's disposition of any timely petition by defendants according to § 1292(b), and that stay shall continue until any appellate proceedings relating to that petition have been finally concluded. This includes a decision by this Court on plaintiffs' pending motion for reconsideration. (Dkt. 78.)

IT IS SO ORDERED.

Dated: March 1, 2019 s/Judith E. Levy
Ann Arbor, Michigan JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail

addresses disclosed on the Notice of Electronic Filing on.

s/Shawna Burns
SHAWNA BURNS
Case Manager

Appendix E

No. 19-0104

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: DOUGLAS J. HOLDINGS, INC., et al., Petitioners.	)	**FILED** Jul 17, 2019 DEBORAH S. HUNT, Clerk
	)	O R D E R

Before: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

Douglas J. Holdings, Douglas J. AIC, Douglas J. Exchange, Douglas J. Institute, Scott A. Weaver, and TJ Weaver ("DJH")—corporations and individuals operating cosmetology schools—petition for permission to appeal the grant of partial summary judgment to Plaintiffs Joy Eberline, Tracy Poxson, and Cindy Zimmermann—graduates of DJH's schools—in their class and collective action under the Fair Labor Standards Act ("FLSA"). The American Association of Cosmetology Schools moves for leave to file an amicus brief. Plaintiffs oppose both the petition and the motion.

We may, in our discretion, permit an appeal to be taken from an order certified for interlocutory appeal by the district court if: (1) the order involves a controlling question of law; (2) a substantial difference of opinion exists regarding the correctness of the decision; and (3) an immediate appeal may materially

advance the ultimate conclusion of the litigation. 28 U.S.C. § 1292(b).

In this case, graduates of DJH's cosmetology schools seek compensation for hours spent as students on certain tasks that they say were unrelated to their educational program. Employees covered under the FLSA must be paid a minimum wage. *See* 29 U.S.C. § 206(a)(1). The FLSA broadly defines "employee" and "employer." *See* 29 U.S.C. § 203(d), (e). Whether an employment relationship exists is not fixed by the parties' labels. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011). Thus, students in accredited vocational schools are not categorically excluded from being classified as employees. *Id.* at 523–24. Rather, the "economic reality" of the relationship determines whether it is an employment relationship or something else. *Id.* at 522. "[T]he proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship." *Id.* at 529. Here, before it applied the primary beneficiary test, the district court extracted certain tasks that it determined were wholly unrelated to the parties' educational relationship. It granted summary judgment to the plaintiffs with respect to those tasks. DJH contends that review under § 1292 should be granted to examine this determination. We agree that this determination meets the requirements of § 1292(b).

The petition for permission to appeal is **GRANTED**. The motion for leave to file an amicus brief in support of the petition is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix F

No. 19-1781

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOY EBERLINE; TRACY POXSON; CINDY ZIMMERMANN, Plaintiffs-Appellees, v. DOUGLAS J. HOLDINGS, INC.; DOUGLAS J. AIC, INC.; DOUGLAS J. EXCHANGE, INC.; DOUGLAS J. INSTITUTE, INC.; SCOTT A. WEAVER; TJ WEAVER, Defendants-Appellants.	)	**FILED** Feb 9, 2021 DEBORAH S. HUNT, Clerk O R D E R

BEFORE: COLE, Chief Judge; BATCHELDER and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix G

29 U.S. Code § 203. Definitions

As used in this chapter—

(a) "Person" means an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons.

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(c) "State" means any State of the United States or the District of Columbia or any Territory or possession of the United States.

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)

(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.

(2) In the case of an individual employed by a public agency, such term means—

(A) any individual employed by the Government of the United States—

(i) as a civilian in the military departments (as defined in section 102 of title 5),

(ii) in any executive agency (as defined in section 105 of such title),

(iii) in any unit of the judicial branch of the Government which has positions in the competitive service,

(iv) in a nonappropriated fund instrumentality under the jurisdiction of the Armed Forces,

(v) in the Library of Congress, or

(vi) the [1] Government Publishing Office;

(B) any individual employed by the United States Postal Service or the Postal Regulatory Commission; and

(C) any individual employed by a State, political subdivision of a State, or an interstate governmental agency, other than such an individual—

(i) who is not subject to the civil service laws of the State, political subdivision, or agency which employs him; and

(ii) who—

(I) holds a public elective office of that State, political subdivision, or agency,

(II) is selected by the holder of such an office to be a member of his personal staff,

(III) is appointed by such an officeholder to serve on a policy-making level,

(IV) is an immediate adviser to such an officeholder with respect to the constitutional or legal powers of his office, or

(V) is an employee in the legislative branch or legislative body of that State, political subdivision, or agency and is not employed by the legislative library of such State, political subdivision, or agency.

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.

(4)

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

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

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

(B) An employee of a public agency which is a State, political subdivision of a State, or

an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) [2] of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(g) "Employ" includes to suffer or permit to work.

(h) "Industry" means a trade, business, industry, or other activity, or branch or group thereof, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but

does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

(k) "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(l) "Oppressive child labor" means a condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor

shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age. The Secretary of Labor shall provide by regulation or by order that the employment of employees between the ages of fourteen and sixteen years in occupations other than manufacturing and mining shall not be deemed to constitute oppressive child labor if and to the extent that the Secretary of Labor determines that such employment is confined to periods which will not interfere with their schooling and to conditions which will not interfere with their health and well-being.

(m)

(1) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging or other facilities are customarily furnished by such employer to his employees: Provided, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: Provided further, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where

applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee.

(2)

(A) In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(i) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(ii) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in clause (i) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

(B) An employer may not keep tips received by its employees for any purposes,

including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.

(n) "Resale" shall not include the sale of goods to be used in residential or farm building construction, repair, or maintenance: Provided, That the sale is recognized as a bona fide retail sale in the industry.

(o) Hours Worked.—

In determining for the purposes of sections 206 and 207 of this title the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.

(p) "American vessel" includes any vessel which is documented or numbered under the laws of the United States.

(q) "Secretary" means the Secretary of Labor.

(r)

(1) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent

contractor. Within the meaning of this subsection, a retail or service establishment which is under independent ownership shall not be deemed to be so operated or controlled as to be other than a separate and distinct enterprise by reason of any arrangement, which includes, but is not necessarily limited to, an agreement, (A) that it will sell, or sell only, certain goods specified by a particular manufacturer, distributor, or advertiser, or (B) that it will join with other such establishments in the same industry for the purpose of collective purchasing, or (C) that it will have the exclusive right to sell the goods or use the brand name of a manufacturer, distributor, or advertiser within a specified area, or by reason of the fact that it occupies premises leased to it by a person who also leases premises to other retail or service establishments.

(2) For purposes of paragraph (1), the activities performed by any person or persons—

(A) in connection with the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is operated for profit or not for profit), or

(B) in connection with the operation of a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier

are subject to regulation by a State or local agency (regardless of whether or not such railway or carrier is public or private or operated for profit or not for profit), or

(C) in connection with the activities of a public agency, shall be deemed to be activities performed for a business purpose.

(s)

(1) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that—

(A)

(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and

(ii) is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level that are separately stated);

(B) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or

school is public or private or operated for profit or not for profit); or

(C) is an activity of a public agency.

(2) Any establishment that has as its only regular employees the owner thereof or the parent, spouse, child, or other member of the immediate family of such owner shall not be considered to be an enterprise engaged in commerce or in the production of goods for commerce or a part of such an enterprise. The sales of such an establishment shall not be included for the purpose of determining the annual gross volume of sales of any enterprise for the purpose of this subsection.

(t) "Tipped employee" means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

(u) "Man-day" means any day during which an employee performs any agricultural labor for not less than one hour.

(v) "Elementary school" means a day or residential school which provides elementary education, as determined under State law.

(w) "Secondary school" means a day or residential school which provides secondary education, as determined under State law.

(x) "Public agency" means the Government of the United States; the government of a State or political subdivision thereof; any agency of the United States (including the United States Postal Service and Postal Regulatory Commission), a State, or a political subdivision of a State; or any interstate governmental agency.

(y) "Employee in fire protection activities" means an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—

(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and

(2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

29 U.S. Code § 206. Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than—

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

(2) if such employee is a home worker in Puerto Rico or the Virgin Islands, not less than the minimum piece rate prescribed by regulation or order; or, if no such minimum piece rate is in effect, any piece rate adopted by such employer which shall yield, to the proportion or class of employees prescribed by regulation or order, not less than the applicable minimum hourly wage rate. Such minimum piece rates or employer piece rates shall be commensurate with, and shall be paid in lieu of, the minimum hourly wage rate applicable under the provisions of this section. The Administrator, or his authorized representative, shall have power to make such regulations or orders as are necessary or appropriate to carry out any of the provisions of this paragraph, including

the power without limiting the generality of the foregoing, to define any operation or occupation which is performed by such home work employees in Puerto Rico or the Virgin Islands; to establish minimum piece rates for any operation or occupation so defined; to prescribe the method and procedure for ascertaining and promulgating minimum piece rates; to prescribe standards for employer piece rates, including the proportion or class of employees who shall receive not less than the minimum hourly wage rate; to define the term "home worker"; and to prescribe the conditions under which employers, agents, contractors, and subcontractors shall cause goods to be produced by home workers;

(3) if such employee is employed as a seaman on an American vessel, not less than the rate which will provide to the employee, for the period covered by the wage payment, wages equal to compensation at the hourly rate prescribed by paragraph (1) of this subsection for all hours during such period when he was actually on duty (including periods aboard ship when the employee was on watch or was, at the direction of a superior officer, performing work or standing by, but not including off-duty periods which are provided pursuant to the employment agreement); or

(4) if such employee is employed in agriculture, not less than the minimum wage rate in effect under paragraph (1) after December 31, 1977.

(b) Additional applicability to employees pursuant to subsequent amendatory provisions

Every employer shall pay to each of his employees (other than an employee to whom subsection (a)(5) [1]

applies) who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this section by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966, title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], or the Fair Labor Standards Amendments of 1974, wages at the following rate: Effective after December 31, 1977, not less than the minimum wage rate in effect under subsection (a)(1).

(c) Repealed. Pub. L. 104–188, [title II], § 2104(c), Aug. 20, 1996, 110 Stat. 1929

(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(e) Employees of employers providing contract services to United States

(1) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by chapter 67 of title 41 or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section.

(2) Notwithstanding the provisions of section 213 of this title (except subsections (a)(1) and (f) thereof) and the provisions of chapter 67 of title 41, every employer in an establishment providing linen supply services to the United States under a contract with the United States or any subcontract thereunder shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (b), except that if more than 50 per centum of the gross annual dollar volume of sales made or business done by such establishment is derived from providing such linen supply services under any such contracts or subcontracts, such employer shall pay to each of his employees in such establishment wages at rates not less than those prescribed in subsection (a)(1) of this section.

(f) Employees in domestic service Any employee—

(1) who in any workweek is employed in domestic service in a household shall be paid wages at a rate not less than the wage rate in effect under subsection (b) unless such employee's compensation for such service would not because of section 209(a)(6) of the Social Security Act [42 U.S.C. 409(a)(6)] constitute wages for the purposes of title II of such Act [42 U.S.C. 401 et seq.], or

(2) who in any workweek—

(A) is employed in domestic service in one or more households, and

(B) is so employed for more than 8 hours in the aggregate, shall be paid wages for such employment in such workweek at a rate not

less than the wage rate in effect under subsection (b).

(g) Newly hired employees who are less than 20 years old

(1) In lieu of the rate prescribed by subsection (a)(1), any employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour.

(2) In lieu of the rate prescribed by subsection (a)(1), the Governor of Puerto Rico, subject to the approval of the Financial Oversight and Management Board established pursuant to section 2121 of title 48, may designate a time period not to exceed four years during which employers in Puerto Rico may pay employees who are initially employed after June 30, 2016, a wage which is not less than the wage described in paragraph (1). Notwithstanding the time period designated, such wage shall not continue in effect after such Board terminates in accordance with section 2149 of title 48.

(3) No employer may take any action to displace employees (including partial displacements such as reduction in hours, wages, or employment benefits) for purposes of hiring individuals at the wage authorized in paragraph (1) or (2).

(4) Any employer who violates this subsection shall be considered to have violated section 215(a)(3) of this title.

(5) This subsection shall only apply to an employee who has not attained the age of 20 years, except in the case of the wage applicable in Puerto

Rico, 25 years, until such time as the Board described in paragraph (2) terminates in accordance with section 2149 of title 48.

29 U.S. Code § 207. Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966—

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives

compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(b) Employment pursuant to collective bargaining agreement; employment by independently owned and controlled local enterprise engaged in distribution of petroleum products

No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of that specified in such subsection without paying the compensation for overtime employment prescribed therein if such employee is so employed—

(1) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand and forty hours during any period of twenty-six consecutive weeks; or

(2) in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that during a specified period of fifty-two consecutive weeks the employee shall be employed not more than two thousand two hundred and forty hours and shall be guaranteed not less than one thousand eight hundred and forty-hours (or not less than forty-six weeks at the normal number of hours worked per week, but not less than thirty hours per week) and not more than two thousand and eighty hours of employment for which he shall receive compensation for all hours guaranteed or

worked at rates not less than those applicable under the agreement to the work performed and for all hours in excess of the guaranty which are also in excess of the maximum workweek applicable to such employee under subsection (a) or two thousand and eighty in such period at rates not less than one and one-half times the regular rate at which he is employed; or

(3) by an independently owned and controlled local enterprise (including an enterprise with more than one bulk storage establishment) engaged in the wholesale or bulk distribution of petroleum products if—

(A) the annual gross volume of sales of such enterprise is less than $1,000,000 exclusive of excise taxes,

(B) more than 75 per centum of such enterprise's annual dollar volume of sales is made within the State in which such enterprise is located, and

(C) not more than 25 per centum of the annual dollar volume of sales of such enterprise is to customers who are engaged in the bulk distribution of such products for resale, and such employee receives compensation for employment in excess of forty hours in any workweek at a rate not less than one and one-half times the minimum wage rate applicable to him under section 206 of this title, and if such employee receives compensation for employment in excess of twelve hours in any workday, or for employment in excess of fifty-six hours in any workweek, as the case may be, at a rate not less than one and one-half

times the regular rate at which he is employed.

(c), (d) Repealed. Pub. L. 93–259, § 19(e), Apr. 8, 1974, 88 Stat. 66

(e) "Regular rate" defined As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

(1) sums paid as gifts; payments in the nature of gifts made at Christmas time or on other special occasions, as a reward for service, the amounts of which are not measured by or dependent on hours worked, production, or efficiency;

(2) payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee which are not made as compensation for his hours of employment;

(3) Sums [1] paid in recognition of services performed during a given period if either, (a) both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period and not pursuant to any prior contract, agreement, or promise causing the employee to expect such payments regularly; or (b) the payments are made pursuant to a bona fide profit-sharing plan or trust or bona fide thrift or savings plan,

meeting the requirements of the Administrator set forth in appropriate regulations which he shall issue, having due regard among other relevant factors, to the extent to which the amounts paid to the employee are determined without regard to hours of work, production, or efficiency; or (c) the payments are talent fees (as such talent fees are defined and delimited by regulations of the Administrator) paid to performers, including announcers, on radio and television programs;

(4) contributions irrevocably made by an employer to a trustee or third person pursuant to a bona fide plan for providing old-age, retirement, life, accident, or health insurance or similar benefits for employees;

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or in excess of the maximum workweek applicable to such employee under subsection (a) or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days;

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-

bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding the maximum workweek applicable to such employee under subsection (a),[2] where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek; or

(8) any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (1) through (7) if—

(A) grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(B) in the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(C) exercise of any grant or right is voluntary; and

(D) any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(i) made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(ii) made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(f) Employment necessitating irregular hours of work No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employee necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2)

provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.

(g) Employment at piece rates No employer shall be deemed to have violated subsection (a) by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under such subsection if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, the amount paid to the employee for the number of hours worked by him in such workweek in excess of the maximum workweek applicable to such employee under such subsection—

(1) in the case of an employee employed at piece rates, is computed at piece rates not less than one and one-half times the bona fide piece rates applicable to the same work when performed during nonovertime hours; or

(2) in the case of an employee performing two or more kinds of work for which different hourly or piece rates have been established, is computed at rates not less than one and one-half times such bona fide rates applicable to the same work when performed during nonovertime hours; or

(3) is computed at a rate not less than one and one-half times the rate established by such agreement or understanding as the basic rate to be used in computing overtime compensation thereunder: Provided, That the rate so established shall be authorized by regulation by the Administrator as being substantially equivalent to the average hourly earnings of the employee, exclusive of overtime premiums, in the particular work over a representative period of time; and if

(i) the employee's average hourly earnings for the workweek exclusive of payments described in paragraphs (1) through (7) of subsection (e) are not less than the minimum hourly rate required by applicable law, and (ii) extra overtime compensation is properly computed and paid on other forms of additional pay required to be included in computing the regular rate.

(h) Credit toward minimum wage or overtime compensation of amounts excluded from regular rate

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 206 of this title or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) shall be creditable toward overtime compensation payable pursuant to this section.

(i) Employment by retail or service establishment

No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings

resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

(j) Employment in hospital or establishment engaged in care of sick, aged, or mentally ill

No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(k) Employment by public agency engaged in fire protection or law enforcement activities
No public agency shall be deemed to have violated subsection (a) with respect to the employment of any employee in fire protection activities or any employee in law enforcement activities (including security personnel in correctional institutions) if—

> **(1)** in a work period of 28 consecutive days the employee receives for tours of duty which in the aggregate exceed the lesser of (A) 216 hours, or (B) the average number of hours (as determined by the Secretary pursuant to section 6(c)(3) of the

Fair Labor Standards Amendments of 1974) in tours of duty of employees engaged in such activities in work periods of 28 consecutive days in calendar year 1975; or

(2) in the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours (or if lower, the number of hours referred to in clause (B) of paragraph (1)) bears to 28 days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(l) Employment in domestic service in one or more households

No employer shall employ any employee in domestic service in one or more households for a workweek longer than forty hours unless such employee receives compensation for such employment in accordance with subsection (a).

(m) Employment in tobacco industry For a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, any employer may employ any employee for a workweek in excess of that specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if such employee—

(1) is employed by such employer—

(A) to provide services (including stripping and grading) necessary and incidental to the sale at auction of green leaf tobacco of type 11, 12, 13, 14, 21, 22, 23, 24, 31, 35, 36, or 37

(as such types are defined by the Secretary of Agriculture), or in auction sale, buying, handling, stemming, redrying, packing, and storing of such tobacco,

(B) in auction sale, buying, handling, sorting, grading, packing, or storing green leaf tobacco of type 32 (as such type is defined by the Secretary of Agriculture), or

(C) in auction sale, buying, handling, stripping, sorting, grading, sizing, packing, or stemming prior to packing, of perishable cigar leaf tobacco of type 41, 42, 43, 44, 45, 46, 51, 52, 53, 54, 55, 61, or 62 (as such types are defined by the Secretary of Agriculture); and

(2) receives for—

(A) such employment by such employer which is in excess of ten hours in any workday, and

(B) such employment by such employer which is in excess of forty-eight hours in any workweek, compensation at a rate not less than one and one-half times the regular rate at which he is employed.

An employer who receives an exemption under this subsection shall not be eligible for any other exemption under this section.

(n) Employment by street, suburban, or interurban electric railway, or local trolley or motorbus carrier

In the case of an employee of an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier (regardless of whether or not such railway

or carrier is public or private or operated for profit or not for profit), in determining the hours of employment of such an employee to which the rate prescribed by subsection (a) applies there shall be excluded the hours such employee was employed in charter activities by such employer if (1) the employee's employment in such activities was pursuant to an agreement or understanding with his employer arrived at before engaging in such employment, and (2) if employment in such activities is not part of such employee's regular employment.

(o) Compensatory time

(1) Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.

(2) A public agency may provide compensatory time under paragraph (1) only—

(A) pursuant to—

(i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or

(ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; and

(B) if the employee has not accrued compensatory time in excess of the limit applicable to the employee prescribed by paragraph (3).

In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). Except as provided in the previous sentence, the provision of compensatory time off to such employees for hours worked after April 14, 1986, shall be in accordance with this subsection.

(3)

(A) If the work of an employee for which compensatory time may be provided included work in a public safety activity, an emergency response activity, or a seasonal activity, the employee engaged in such work may accrue not more than 480 hours of compensatory time for hours worked after April 15, 1986. If such work was any other work, the employee engaged in such work may accrue not more than 240 hours of compensatory time for hours worked after April 15, 1986. Any such employee who, after April 15, 1986, has accrued 480 or 240 hours, as the case may be, of compensatory time off shall, for additional overtime hours of work, be paid overtime compensation.

(B) If compensation is paid to an employee for accrued compensatory time off, such compensation shall be paid at the regular rate earned by the employee at the time the employee receives such payment.

(4) An employee who has accrued compensatory time off authorized to be provided under paragraph (1) shall, upon termination of employment, be paid for the unused compensatory time at a rate of compensation not less than—

(A) the average regular rate received by such employee during the last 3 years of the employee's employment, or

(B) the final regular rate received by such employee, whichever is higher [3]

(5) An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and

(B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

(6) The hours an employee of a public agency performs court reporting transcript preparation duties shall not be considered as hours worked for the purposes of subsection (a) if—

(A) such employee is paid at a per-page rate which is not less than—

(i) the maximum rate established by State law or local ordinance for the jurisdiction of such public agency,

(ii) the maximum rate otherwise established by a judicial or administrative officer and in effect on July 1, 1995, or

(iii) the rate freely negotiated between the employee and the party requesting the transcript, other than the judge who presided over the proceedings being transcribed, and

(B) the hours spent performing such duties are outside of the hours such employee performs other work (including hours for which the agency requires the employee's attendance) pursuant to the employment relationship with such public agency.

For purposes of this section, the amount paid such employee in accordance with subparagraph (A) for the performance of court reporting transcript preparation duties, shall not be considered in the calculation of the regular rate at which such employee is employed.

(7) For purposes of this subsection—

(A) the term "overtime compensation" means the compensation required by subsection (a), and

(B) the terms "compensatory time" and "compensatory time off" mean hours during which an employee is not working, which are not counted as hours worked during the

applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate.

(p) Special detail work for fire protection and law enforcement employees; occasional or sporadic employment; substitution

(1) If an individual who is employed by a State, political subdivision of a State, or an interstate governmental agency in fire protection or law enforcement activities (including activities of security personnel in correctional institutions) and who, solely at such individual's option, agrees to be employed on a special detail by a separate or independent employer in fire protection, law enforcement, or related activities, the hours such individual was employed by such separate and independent employer shall be excluded by the public agency employing such individual in the calculation of the hours for which the employee is entitled to overtime compensation under this section if the public agency—

(A) requires that its employees engaged in fire protection, law enforcement, or security activities be hired by a separate and independent employer to perform the special detail,

(B) facilitates the employment of such employees by a separate and independent employer, or

(C) otherwise affects the condition of employment of such employees by a separate and independent employer.

(2) If an employee of a public agency which is a State, political subdivision of a State, or an

interstate governmental agency undertakes, on an occasional or sporadic basis and solely at the employee's option, part-time employment for the public agency which is in a different capacity from any capacity in which the employee is regularly employed with the public agency, the hours such employee was employed in performing the different employment shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(3) If an individual who is employed in any capacity by a public agency which is a State, political subdivision of a State, or an interstate governmental agency, agrees, with the approval of the public agency and solely at the option of such individual, to substitute during scheduled work hours for another individual who is employed by such agency in the same capacity, the hours such employee worked as a substitute shall be excluded by the public agency in the calculation of the hours for which the employee is entitled to overtime compensation under this section.

(q) Maximum hour exemption for employees receiving remedial education Any employer may employ any employee for a period or periods of not more than 10 hours in the aggregate in any workweek in excess of the maximum workweek specified in subsection (a) without paying the compensation for overtime employment prescribed in such subsection, if during such period or periods the employee is receiving remedial education that is—

(1) provided to employees who lack a high school diploma or educational attainment at the eighth grade level;

(2) designed to provide reading and other basic skills at an eighth grade level or below; and

(3) does not include job specific training.

(r) Reasonable break time for nursing mothers

(1) An employer shall provide—

(A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

(B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.

(3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.

(4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.