

CORNELL HR REVIEW

PREVENTING EMPLOYER MISCLASSIFICATION OF STUDENT INTERNS AND TRAINEES

Bernice Bird

INTRODUCTION

The legality of unpaid internships has been recently examined in the media with news of *Harper's Bazaar's* former intern Xuedan "Diana" Wang filing suit against the Hearst Corporation on February 1, 2012.¹ Ms. Wang was "head intern," responsible for supervising eight interns in her charge.² As intern to the magazine *Harper's Bazaar*, she worked 40 to 55 hours weekly transporting clothing to public relations firms as an unofficial messenger service.³ Ms. Wang is part of a class action lawsuit against the Hearst Corporation seeking back pay for compensation of five months of unpaid labor.⁴

Nationally, the Department of Labor (DOL) increased its investigations of private workplaces upon reports of employers' exploiting the use of unpaid internships.⁵ As of 2008 the National Association of Colleges and Employers estimated that the rate of graduating students obtaining internships has increased from 17 percent to 50 percent since 1992.⁶ Officials in Oregon and California have instituted investigations, and even fined employers, pursuant to the large increases of unlawful and unpaid internships.⁷ The DOL's acting director of the Wage and Hour Division (WHD), Nancy J. Leppink, issued a statement in the *New York Times* saying, "If you're a for-profit employer or you want to pursue an internship with a for-profit employer, there aren't going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law."⁸

The increased focus of the DOL in regard to investigating the status of interns or trainees is met with a significant challenge given that there currently is no clear law informing employers on the employee status of interns or trainees in the private workplace.⁹ At this point there are three different areas of law governing employment jurisprudence of interns and trainees: (1) the Fair Labor Standards Act (FLSA); (2) United States Supreme Court case law; and (3) the WHD interpretive guidelines.

First, the FLSA only speaks to medical interns.¹⁰ However, courts broadly interpret the FLSA to mean that employee status to interns and trainees is precluded, unless a contract exists.¹¹ Second, while the Supreme Court has not conclusively ruled on intern or trainee employee status,¹² it has, through its analysis issued "factors" in how to determine intern or trainee employee status.¹³ Third, the WHD guidelines, implemented by the DOL, are for private employers to determine the employee status of an unpaid intern or trainee.¹⁴ The WHD guidelines are an adaptation of the Supreme Court's analytical factors set forth in *Walling v. Portland Terminal Co.*¹⁵ An important difference between the WHD

guidelines and the so-called “Walling factors”¹⁶ is the manner in which the federal courts have interpreted each. The WHD guidelines are not binding on the courts as they are not federal regulations and do not carry with them the force and effect of law.¹⁷ Therefore, the WHD guidelines are merely discretionary measures to which the federal courts may adhere.

As a result, the federal courts have created their own tests in determining when an unpaid student intern may be considered an employee.¹⁸ However, none of these tests are uniformly controlling across the nation as common law tests are controlling only in the jurisdiction in which the respective federal court sits. This ambiguity as to intern or trainee employee status may leave employers ignorant of the law when trying to properly classify interns and trainees.

This article examines the current vagaries of employment law in relation to interns and trainees and seeks to provide private employers with information and solutions to avoid a misclassification. Part I discusses the FLSA, Supreme Court case law, and the WHD guidelines in relation to the classification of intern and trainee employee status. Part II explicates the conflicting interpretations among the federal district courts of the accompanying law. Lastly, Part III analyzes the methods in which an employer can avoid misclassification of an intern or trainee in the private sector, given the ambiguity of the law to date.

I. LAWS DICTATING EMPLOYEE STATUS OF STUDENT INTERNS

A) *The Fair Labor Standards Act*

The fundamental purpose of the FLSA is to effectively eliminate oppressive child labor, establish a minimum hourly wage, and create a maximum hourly workweek for employees.¹⁹ However, Congress is silent to the legality of unpaid student internships²⁰ As a result, the determination of intern employment status falls on the DOL.²¹ If the DOL investigates and concludes there were employer violations under the FLSA, it will attempt dispute resolution.²² However, if no resolution is attainable, the affected party must file a claim in a federal district court.²³

B) *The United States Supreme Court*

The United States Supreme Court in *Walling v. Portland Terminal Co.* serves as the landmark case on employer treatment of trainees and interns. *Walling* established the general rule that trainees and student interns are precluded minimum wage and overtime protection, unless they are considered student-employees by contractual obligation²⁴. The *Walling* Court also stated that a student or trainee may be eligible for employee status when viewed in the totality of the “Walling factors”²⁵ and created three classes of trainees or interns: (1) those who must be compensated with minimum wage; (2) those who may be paid subminimum wages; and (3) those who need not be paid at all.²⁶

C) *The WHD Guidelines*

The WHD filled in the statutory gaps by issuing multiple interpretive guidelines applying the six “Walling factors.”²⁷ The WHD guidelines are merely an adaptation of the Walling factors²⁸ and differ from the latter by the manner in which the federal courts apply them. The Court in *Walling* reasoned that all the factors are to be viewed within the totality of the circumstance²⁹ and all factors do not need to be present to meet a claim of an employee status. A totality of the circumstances test weighs “all of the circumstances surrounding [trainee or intern] activities on the premises of the employer”³⁰ in its determination of employee status. Thus, not all the factors must be present to meet a claim of employee status under *Walling*. In contrast, the WHD’s guidelines state that all six factors must be shown in proving that a trainee or intern is *not* an employee.³¹ Deputy Assistant Administrator Daniel F. Sweeney of the WHD signed and issued the opinion letter addressing the employee status of interns (hereinafter “1996 Opinion Letter”), which stated:

If all of the following criteria are met, the trainees or students are not employees within the meaning of the FLSA: (1). The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school. (2). The training is for the benefit of the trainees or students. (3). The trainees or students do not displace regular employees, but work under their close observation. (4). The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded. (5). The trainees or students are not necessarily entitled to a job at the conclusion of the training period. (6). The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.³²

Therefore, under the WHD’s standards a presumption exists that an individual is an employee, unless otherwise proven. The Fact Sheet also offered a detailed explanation of proper analysis of the factors.³³ For example, the fact that training is similar to that given in a vocational school does not necessarily preclude employment status, unless the training is “structured around a classroom or academic experience as opposed to the employer’s actual operations.”³⁴ However, if the intern is receiving educational credit for the internship as part of enrollment in a scholastic program, then intern status will be found.³⁵ If the intern does not shadow the employer, but rather “receives the same level of supervision as the employer’s regular workforce, this would suggest an employment relationship, rather than training.”³⁶

The most difficult criterion is determining who reaps the primary benefit of the site. If the intern is accruing skills utilized for “multiple employment settings,” then intern or trainee

status will be found.³⁷ However, if the intern is conducting tasks solely to the employer's benefit, such as filing, or clerical work, then such acquisition of skills will not necessarily preclude employee status.³⁸

II. FEDERAL DISTRICT COURT INTERPRETATIONS OF ACCOMPANYING LAW

If the DOL determines a violation of the FLSA has occurred and that dispute resolution is unavailable, a claimant may file suit in federal district court so the court can determine which common law test to apply in assessing employment status. The federal courts have not agreed upon a test in determining employment status of a trainee or intern.³⁹ As a result, three "tests" have arisen among the federal district courts: (1) the "immediate" or "primary benefit" test without regard to the WHD guidelines; (2) an "all-or-nothing" test applying the WHD guidelines,⁴⁰ and; (3) a totality of the circumstances analysis evaluating the WHD guidelines.

a. No WHD Guidelines, Only the "Immediate" or "Primary Benefit" Test

The majority of federal courts have generally held that a trainee is not an employee unless there is an "immediate benefit" or "immediate advantage" or "primary benefit" conferred upon the employer, while considering the "Walling factors" in the totality.⁴¹ Those jurisdictions embracing the "primary benefit" test do not evaluate the WHD guidelines and look to *Walling* proper.

The Fourth Circuit embracing West Virginia, Virginia, South Carolina, North Carolina, and Maryland⁴² generally has disavowed the WHD guidelines and considered the "Walling factors" in determining intern or trainee status.⁴³ Notably, the Fourth Circuit in *Wirtz v. Wardlaw* established the *Wardlaw* test in 1964: its own version of the *Walling* factors.⁴⁴ The Court in *Donovan v. American Airlines, Inc.* commented that the *Wardlaw* Court had "formulated three criteria: (1) whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee's work."⁴⁵ The Fourth Circuit's *Wardlaw* is one of the few courts to have a set enumerated test, apart from the "Walling factors." Thus, intern or trainee classifications in the Fourth Circuit may be subject to the *Wardlaw* test.

b. The All-or-Nothing Test

The "all or nothing" test espouses the view that, unless all of the WHD guidelines are met, then the trainee or intern is not an employee under the FLSA.⁴⁶ Essentially, the "all or nothing" test treats the WHD guidelines as though they are elements to a claim. If one guideline is lacking, then the claimant will not prevail and will not be awarded the relief sought. The federal courts of the Fifth Circuit, involving the districts of Louisiana, Mississippi, and Texas⁴⁷ advocate the "all or nothing" approach.

c. *The Totality of Circumstances Test*

The Tenth Circuit, embracing the districts of Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming,⁴⁸ applies the totality of circumstances test. In 1993, the Tenth Circuit Court in *Reich v. Parker Fire Protection District* rejected an “all or nothing” interpretation of the WHD Guidelines and instead employed a totality of circumstances approach in finding that plaintiffs—firefighter trainees were not employees.⁴⁹ After assessing each of the six guidelines in the totality of circumstances, the Court determined that only one—the expectation of employment—yielded any finding of employment status.⁵⁰ The *Reich* Court reasoned that no language in previous Administrator decisions or Wage and Hour opinions had ever denoted that all factors must be met prior to gaining employment status.⁵¹ Rather, the Court asserted that the DOL’s six-factor test and *Walling*’s factors were to be construed in the totality.⁵²

Additionally, the Northern District of California also utilizes the totality of the circumstances test in its decisions. In 2010, the Northern District of California in *Harris v. Vector Marketing Corp.* followed the reasoning of the *Reich* Court⁵³ and analyzed whether the trainee site was to the primary benefit of the employer or to the trainee.⁵⁴ The Court noted that the WHD advised that the trainee benefits from the training site in order to preclude employee status.⁵⁵ However, the Court noted that each of the factors should not be “rigidly applied,” further endorsing its application of the totality of circumstances approach.⁵⁶ Thus, proper classifications in the Tenth Circuit or Northern District of California may be analyzed under the totality of the circumstances.

III. EMPLOYERS: PREVENTING MISCLASSIFICATION OF INTERNS AND TRAINEES

Employers may unknowingly utilize interns as resources and fail to pay wages due to the lack of clarity in the law. Courts have developed individualized tests to their discretion either applying the rationale of the WHD guidelines or the Supreme Court’s *Walling*. Since the federal courts’ rulings are controlling depending on the jurisdiction, employers must carefully comply with either of the tests in properly classifying an unpaid intern or trainee.

Employers should monitor the legal climate of the jurisdiction within which they practice, as the law varies in respect to the geographic location, or jurisdiction. Depending on the jurisdiction in which a private employer resides and practices, a private employer may utilize one of the three applicable legal test in classifying a prospective employee in the work place: (1) the provision of the FLSA exempting medical interns; (2) the federal common law “primary benefit” test; or (3) the federal common law tests that analyze only the WHD guidelines.

A. *Applying the FLSA: Exempting Medical Interns*

The provision of the FLSA exempting medical interns is uniform within all jurisdictions because the FLSA is a federal statute. The wage and overtime protection requirements do

not apply to a medical intern who is in a medical internship or residency and holds the requisite academic degree.⁵⁷ Private employers in the medical profession may consider whether to fully compensate medical interns, while considering the entirety of the “Walling factors” or WHD guidelines, depending on the jurisdiction.

B. Applying the “Primary Benefit” Test

Courts in the Fourth Circuit, including West Virginia, Virginia, South Carolina, North Carolina, and Maryland⁵⁸ or the District of Pennsylvania, will more likely apply a “primary benefits” analysis that weighs the rationale of the “Walling factors,” rather than the WHD guidelines. Essentially, the court in any of these states may determine if the employer or prospective employee reaps the primary benefit from the employment site. If the employer does, then the claimant is an employee.⁵⁹ If the trainee or intern benefits more from the site, then the claimant will probably be considered an intern or trainee.⁶⁰ However, if an employer is in the Fourth Circuit, the *Wardlaw* test may be relevant in classifying employee status of a trainee: (1) “whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee's work.”⁶¹

Thus, employers should monitor the activities delegated to the prospective employees in avoiding misclassification. Overall, if the activity in question is one that could displace other employees, then this factor also weighs heavily in favor of employee status. Moreover, if the prospective employee is functioning independently in the workplace without supervision, then this may be a factor that a WHD investigator may consider as conclusive to employee status. That is, if the prospective employee requires considerable training from an established employee or supervisor to the detriment of the workplace’s functioning, then employee status may be denied.

C. Applying Only the WHD Guidelines

Due to the fact that the WHD guidelines are not controlling federal regulations, the federal courts’ interpretation of the WHD guidelines is what actually instructs employers on proper classification of interns and trainees. In certain jurisdictions, federal courts analyze only the WHD guidelines. Therefore, employers may need to apprise themselves solely on the WHD guidelines. Again, employers should be aware that certain jurisdictions apply only the WHD guidelines in either: (1) the “all or nothing” test or the (2) totality of the circumstances test.

In the Fifth Circuit, which includes the districts of Louisiana, Mississippi, and Texas,⁶² the WHD guidelines are analyzed under the “all or nothing” test. Basically, these states treat the WHD guidelines as though they were elements to a claim. If a claimant does not meet all of the guidelines, then he or she will not prevail in asserting employee status. However, in the Northern District of California and the Tenth Circuit, including Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming,⁶³ courts may analyze the WHD guidelines under the totality of the circumstances of the work place situation.

CONCLUSION

WHD investigator Nancy J. Leppink has admonished for-profit employers that interns would qualify as unpaid volunteers only in very rare circumstances.⁶⁴ Hence, unless employers are certain that their interns or trainees meet the WHD guidelines and interpretations⁶⁵ therein, an hourly wage or stipend is a protective measure to prevent against DOL investigations. To date, the ambiguity of the law regarding interns may result in employers inadvertently violating the FLSA. Therefore, employers should stay abreast of the DOL opinion letters as the DOL revises its policies constantly to meet the needs of the constituency. The DOL website affords employers an opportunity to register for timely updates of new rulings and interpretations by the WHD.⁶⁶ The DOL revises its opinion letters periodically, as the labor and employment area of law is constantly evolving. Thus, a change in law may cause a change in policy, or a change in policy may cause the courts to interpret the guidelines consequent to any amendments. ¶

Bernice Bird is a fourth year, part-time law student at the Barry University School of Law in Orlando, Florida. She served as the Note and Comment Editor on the Barry Law Review. She is anticipated to graduate with a J.D. from Barry University School of Law in May of 2012. Prior to enrolling in law school, Ms. Bird graduated summa cum laude with a Master's in Counseling Psychology from the Florida International University in Miami, Florida, in December of 2007. Ms. Bird earned a provisional license from the State of Florida and practiced as a Registered Mental Health Intern until September of 2009.

¹ Alice Hines, *Fashion Week 2012: Unpaid Internships Questioned After Diana Wang's Harper's Bazaar's Suit*, HUFFINGTON POST, Feb. 14, 2012, http://www.huffingtonpost.com/2012/02/14/fashion-week-2012-unpaid-internships_n_1274181.html (last visited Feb. 27, 2012).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Steven Greenhouse, *The Unpaid Intern, Legal or Not*, available at <http://www.nytimes.com/2010/04/03/business/03intern.html> (last visited Nov. 16, 2011). (hereinafter "*The Unpaid Intern*").

⁶ *Id.*

⁷ *Id.*

⁸ Courtney Rubin, *Watch Out: That Unpaid Intern Could Cost You*, Inc.com, <http://www.inc.com/news/articles/2010/04/what-unpaid-interns-could-cost-you.html> (last visited Nov. 12, 2011).

⁹ *Solis v. Laurelbrook Sanitarium and School Inc.* 642 F. 3d 518, 529 (6th Cir. 2011).

¹⁰ 29 U.S.C. § 541.304(c) 2006.

¹¹ *Id.* § 214, et. seq. (2006); *Solis*, 642 F. 3d at 529 (interpreting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152-53 (1947)). As an aside, case law has ruled that an offer letter is not the same as an employment contract because employers' offer letters do not create a contractual obligation to employees since, generally, offer letters do not limit employers' at-will relationships with employees. See *Hamilton v. Segue Software, Inc.*, 2000 WL 631002, at *5 (N.D. Tex May 11, 2000). At-will employment relationships entitle the employer or employee to terminate the relationship at any time for any reason, because at-will employment relationships are not defined by a specific or defined period of time in a contract. *Hargett v. Metropolitan Transit Authority*, 552 F. Supp. 2d 393, 402 (S.D.N.Y. 2008). To prove otherwise, the prospective employee must show the court that the offer letter intends to limit the employer's at-will

relationship by demonstrating that the offer letter creates a specific duration of time for employment. *Hamilton*, 2000 WL 631002, at *5. Every state, except for Montana, recognizes at-will employment relationships. Employer’s Quick Guide to HR Laws, *Offer Letter Stating Annual Salary Does Not Create Contract*, http://ppspublishers.com/articles/offer_letter_contract.htm#Terminated%20Employee%20Claimed%20Breach%20of%20Contract (last visited Feb. 27, 2012).

¹² See *Walling*, 330 U.S. at 148.

¹³ *Id.*

¹⁴ Opinion Letter Fair Labor Standards Act (FLSA), 1996 WL 1031777, May 8, 1996. (hereinafter “1996 Opinion Letter”); U.S. DEPT. OF LABOR, WAGE & HOUR DIV., *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> (last visited Nov. 15, 2011) (hereinafter “Fact Sheet”).

¹⁵ *Summa v. Hofstra Univ.*, 715 F. Supp. 2d 378, 389 (E.D.N.Y. 2010).

¹⁶ *Id.*

¹⁷ *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

¹⁸ *Summa*, 715 F. Supp. 2d at 389; *Donovan v. Am. Airlines, Inc.*, 686 F. 2d. 267, 272-73 (5th Cir. 1982); *Reich v. Parker Fire Prot. Dist.*, 992 F. 2d 1023, 1027 (10th Cir. 1993).

¹⁹ Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, <http://www.dol.gov/oasam/programs/history/flsa1938.htm>, (last visited Sept. 25, 2011).

²⁰ Jessica L. Curiale, Note, *America’s New Glass Ceiling: Unpaid Internships, The Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1548-49 (2010).

²¹ 1996 Opinion Letter, *supra* note 10.

²² 29 U.S.C § 2617(b)(1) (2006).

²³ *Doe v. U.S.*, 513 F. 3d 1348, 1354 (Fed. Cir. 2008).

²⁴ *Id.*

²⁵ *Summa*, 715 F. Supp. 2d at 389; See also *Reich v. Parker Fire Prot. Dist.*, 992 F. 2d 1023, 1027 (10th Cir. 1993). *Walling* set out its factors in its dicta in a rather unwieldy opinion. *Walling*, 330 U.S. at 152-53. However, the Court in *Summa* clearly listed the “so called ‘Walling factors’” and clarified that the WHD adopted its guidelines from the factors. *Summa*, 715 F. Supp. 2d at 389. Thus, the Walling factors and the WHD Guidelines are nearly identical. *Id.* The factors are as follows:

- (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) the training is for the benefit of the trainees or students;
- (3) the trainees or students do not displace regular employees, but work under their close observation;
- (4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded;
- (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- (6) the employer and the trainees or students understand that the trainees are not entitled to wages for the time spent in training.

Id. See also 1996 Opinion Letter, *supra* note 14.

²⁶ *Id.* at 152.

²⁷ 1996 Opinion Letter, *supra* note 14; Fact Sheet, *supra* note 14.

²⁸ *Summa*, 715 F. Supp. 2d at 389.

²⁹ *Walling*, 333 U.S. at 152.

³¹ 1996 Opinion Letter, *supra* note 14; Fact Sheet, *supra* note 14.

³² 1996 Opinion Letter, *supra* note 14.

³³ Fact Sheet, *supra* note 14.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

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- ³⁷ *Id.*
- ³⁸ Fact Sheet, *supra* note 14.
- ³⁹ *Solis v. Laurelbrook Sanitarium and School Inc.* 642 F. 3d 518, 529 (6th Cir. 2011).
- ⁴⁰ *Donovan v. Am. Airlines, Inc.*, 686 F. 2d 267, 272-73 (5th Cir. 1982).
- ⁴¹ *McLaughlin v. Ensley*, 877 F. 2d 1207, 1209 (4th Cir. 1989); *Wirtz v. Wardlaw*, 339 F. 2d 785, 787-88 (4th Cir. 1964); *Bailey v. Pilot's Ass'n for the Bay & River Delaware*, 406 F. Supp. 1302, 1306 (E.D. Pa. 1976).
- ⁴² U.S. CT. OF APP. FOR THE FOURTH CIR., <http://www.ca4.uscourts.gov/> (last visited Feb. 6, 2012).
- ⁴³ *Wardlaw*, 339 F. 2d at 787; *McLaughlin*, 877 F. 2d at 1210, FN 2 (citing *Wardlaw*, 339 F. 2d at 785).
- ⁴⁶ *Am. Airlines*, 686 F. 2d at 272-73.
- ⁴⁷ U.S. CT. OF APP. FOR THE FIFTH CIR., <http://www.ca5.uscourts.gov/> (last visited Feb. 6, 2012).
- ⁴⁸ THE U.S. CT. OF APP. FOR THE TENTH CIR., <http://www.ca10.uscourts.gov/> (last visited Feb. 6, 2012).
- ⁴⁹ *Reich v. Parker Fire Prot. Dist.*, 992 F. 2d 1023, 1027-28 (10th Cir. 1993).
- ⁵⁰ *Id.* at 1029.
- ⁵¹ *Id.* at 1027.
- ⁵² *Id.*
- ⁵³ 753 F. Supp. 2d 996, 1006 (N.D. Cal. 2010).
- ⁵⁴ *Id.* at 1007.
- ⁵⁵ *Id.*
- ⁵⁶ *Id.*
- ⁵⁷ U.S. DEP'T OF LABOR, WAGE AND HOUR DIV. (WHD), *Fact Sheet #17D: Exemption for Professional Employees Under the Fair Labor Standards Act (FLSA)*, http://www.dol.gov/whd/regs/compliance/fairpay/fs17d_professional.pdf.
- ⁵⁸ U.S. CT. OF APP. FOR THE FOURTH CIR., *supra* note 47.
- ⁵⁹ *Wirtz v. Wardlaw*, 339 F. 2d 785, 787 (4th Cir. 1964).
- ⁶⁰ *Id.*
- ⁶¹ *Id.* at 785.
- ⁶² U.S. CT. OF APP. FOR THE FIFTH CIR., *supra* note 56.
- ⁶³ THE U.S. CT. OF APP. FOR THE TENTH CIR., *supra* note 57.
- ⁶⁴ *Rubin*, *supra* note 8.
- ⁶⁵ Fact Sheet, *supra* note 14.
- ⁶⁵ *Id.*
- ⁶⁶ U.S. DEP'T OF LABOR, WAGE AND HOUR DIV. (WHD), *Final Rulings and Interpretations*, <http://www.dol.gov/WHDOpinion/opinion.htm> (last visited Feb. 7, 2012).