"Protection" of Volunteers Under Federal Employment Law: Discouraging Voluntarism

Leda E. Dunn

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"PROTECTION" OF VOLUNTEERS UNDER FEDERAL EMPLOYMENT LAW: DISCOURAGING VOLUNTARIsm?

LEDA E. DUNN

INTRODUCTION

In September 1990, the Department of Labor informed the Salvation Army that the participants in its down-and-out work-therapy program were not "volunteers," but rather "employees" subject to the Fair Labor Standards Act's ("FLSA") minimum wage, overtime pay, and record-keeping provisions. The Salvation Army, an employer of over 40,000 regular employees, commenced a federal lawsuit to enjoin the Labor Department's proposed action—an action that would have required the Salvation Army to pay standard wages to an estimated 70,000 participants who are enrolled in its work-therapy programs. The Labor Department, subjected to political pressure for singling out the reputable charity, abandoned its plan to sue, and consequently the Salvation Army's action was dismissed. The dismissal of the suit, however, left the underlying conflict unresolved, reserving for a future date the ques-

1. The work-therapy participants, many of whom are homeless persons, alcoholics, or drug addicts, help to sort donated items and, in turn, "receive food, shelter, counseling and a weekly stipend of $5 to $20 for personal items." Robert F. Howe, Salvation Army Sues Over Federal Wage Order; Labor Department Says Workers in Therapy Programs Must Be Paid Minimum Rate, Wash. Post, Sept. 20, 1990, at A18 [hereinafter Howe, Salvation Army Sues].
7. See Knight, supra note 6, at G3.
8. See id.; Wash. Post, Lawsuit, supra note 6, at B4; PR Newswire, Lawsuit Dismissed, supra note 6.
9. See DePalma, supra note 6, Metropolitan sec., at 42; N.Y. Times, Low Pay, supra note 6, at B2.
10. See Knight, supra note 6, at G3; Howe, U.S. Does Turnabout, supra note 6, at A9.
11. See PR Newswire, Lawsuit Dismissed, supra note 6.

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tion of what constitutes a "volunteer," as distinguished from an employee, under federal employment law.12

Given the pervasiveness of voluntarism in the United States,13 whether and when federal employment law applies to volunteer workers14 may have far-reaching effects on both the economy15 and the viability of charitable organizations.16 Despite the Reagan and Bush Administrations' emphases on the importance of voluntarism to the nation,17 volunteer workers are accorded no special treatment under the federal employment statutes examined in this Note.18

12. The employment statutes discussed in this Note make no actual mention of a "volunteer." The coverage of volunteer workers therefore depends upon whether courts have interpreted the term "employee" under the statutes to include or exclude persons who perform volunteer work.
13. See, e.g., Voluntarism and the Role of Action: Hearings Before a Subcomm. of the Comm. on Government Operations, 97th Cong., 2d Sess. 164 (1982) [hereinafter Hearings] (report of the National Steering Committee on Voluntarism) (noting that Gallup poll found that some 60 million people perform volunteer work); Jeffrey L. Brudney, Fostering Volunteer Programs in the Public Sector: Planning, Initiating and Managing Volunteer Activities 2 (1990) (citing the number of hours contributed by volunteers as 14.9 billion, equaling the work of 8.8 million full-time employees); Susan J. Ellis & Katherine H. Noyes, By the People, A History of Americans as Volunteers 314-37 (rev. ed. 1990) [hereinafter Ellis & Noyes (rev. ed. 1990)] (listing hundreds of services being performed by volunteers in the 1990s); Susan J. Ellis & Katherine H. Noyes, By the People, A History of Americans as Volunteers 227-28 (1978) (recounting a Census Bureau report stating that more than 24% of Americans engage in some sort of organized volunteer work); Jon Van Til, Mapping the Third Sector: Voluntarism in a Changing Social Economy 3 (1988) (noting that the non-profit or voluntary sector constitutes six percent of the national economy).
14. Because the definition of "volunteer" is unclear under federal employment law, this Note will use the term "volunteer worker" to connote the type of worker most frequently associated with a "volunteer": "[a] person who gives his services without any express or implied promise of remuneration." Black's Law Dictionary 1576 (6th ed. 1990).
15. See Brudney, supra note 13, at 2; Van Til, supra note 13, at 3; see also Hearings, supra note 13, at 165 (noting that the contributions of volunteers has been valued at $35 billion, saving the government from doing work that it "would otherwise have to do").
16. See, e.g., DePalma, supra note 6, Metropolitan sec., at 42 (the survival of the worldwide organization may hinge upon whether FLSA will apply to Salvation Army work-therapy program workers).
17. See Brudney, supra note 13, at 12-14, 78, 170; Ellis & Noyes (rev. ed. 1990), supra note 13, at 285-87, 309; Peter Dobkin Hall, Inventing the Nonprofit Sector and Other Essays on Philanthropy, Voluntarism, and Nonprofit Organizations 80-81 (1992). Ellis and Noyes note that, despite President Reagan's vision of voluntarism as "the cornerstone of his plan to 'give government back to the people,'" Ellis & Noyes (rev. ed. 1990), supra note 13, at 285, "the political reality was that support for volunteer effort was systematically eroded," in part because, when the administration cut social program budgets, it failed to fund any expenses of volunteers who were to fill the gap thereby created. Id. at 286.
18. The lack of a definitive approach toward volunteer workers stems, in part, from ambiguity in the definition of an "employee." The Third Circuit, analyzing various federal statutes' approaches to "employees," noted that one discovers the notable absence of comparable universal qualities that define and identify the status of employee so as to fit its meaning within all common law and statutory definitions. Therein lies the reason for the paradoxical truth that even when the same person performs the same acts at the same time in the
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The present lack of a definition of a volunteer under the statutes engenders inconsistency in the treatment of persons who perform similar volunteer work. For instance, courts have interpreted certain federal statutes to include within the definition of “employee” those individuals who perform what is generally thought of as volunteer work, thus leaving no distinction between an employee and a volunteer. At the same time, courts have interpreted certain other protective federal employment statutes to exclude volunteer workers from basic workplace protections because they are not deemed “employees” under those statutes.

This Note argues that the present disparity in coverage of volunteer workers under federal employment laws discourages voluntarism by excluding from the definition of employee volunteer workers who need protection, while extending coverage to volunteer workers who neither need nor desire such coverage. Part I introduces the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act, addressing each statute’s basic purpose and examining how the issue of volunteer coverage arises under each statute. This Part also discusses the courts’ interpretations of the statutes regarding coverage of volunteer workers. Part II critically evaluates the courts’ rationales in light of the purposes of the statutes. Part III then argues that the present state of employment law requires the adoption of same place under the same conditions conceivably he could not be considered an employee under some common law standards and some federal statutory definitions while he nevertheless could be considered an employee under those of others. This absence of a universality in qualities and definition unavoidably breeds ambiguity and confusion requiring courts to assess a broad spectrum of facts in their quest to clarify and determine who is and who is not an employee.


19. See, e.g., Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 294-95 (1985) (finding workers who volunteered their labor to a non-profit foundation were “employees” under the FLSA); Unification Church v. INS, 762 F.2d 1077, 1092 (D.C. Cir. 1985) (affirming district court’s finding that church’s “core members” are “employees” for purposes of the Equal Access to Justice Act).


24. The three federal statutes discussed in this Note are frequently discussed as a trio due to their similar protective purposes. See, e.g., Wheeler v. Main Hurdman, 825 F.2d 257, 262-63 (10th Cir.) (referring to Title VII, the ADEA, and the FLSA as “antidiscrimination laws” and discussing them collectively—referring, for example, to “their remedial purposes” and “virtually identical” definitions), cert. denied, 484 U.S. 986 (1987); EEOC v. Zippo Mfg. Co., 713 F.2d 32, 38 (3d Cir. 1983) (“The Supreme Court has observed that ADEA is a hybrid of both FLSA and Title VII.” (citing Lorillard v. Pons, 434 U.S. 575, 578 (1978))).
either new judicial standards or Congressional amendments to the statutes in order to prevent undue barriers to volunteering. Finally, this Note concludes that, in recognition of the special functions and needs of volunteers, the judiciary and Congress must act to prevent a harmful decline in voluntarism.

I. THE GOALS OF SELECTED FEDERAL STATUTES AND THE COVERAGE OF VOLUNTEERS

A. The Fair Labor Standards Act

Congress passed the Fair Labor Standards Act during the nation’s devastating Great Depression. Through the statute’s minimum wage and overtime pay provisions, Congress intended to protect workers from the deleterious effects of “wages too low to buy the bare necessities of life and from long hours of work injurious to health.” In addition, Congress sought to protect employers complying with the FLSA’s terms from the “unfair method of competition” that would give a competitive advantage to employers violating the Act.

The FLSA’s provisions apply to an entity when two conditions are met. First, the employer must be an “enterprise engaged in commerce,” which is defined as “the related activities performed ... by any person or persons for a common business purpose.” Generally, an entity will be considered to “engage in commerce” for purposes of the FLSA when its “businesses serve the general public in competition with ordinary commercial enterprises.” This principle applies not only to regular commercial businesses, but also to charitable, non-profit, and religious organizations when they perform commercial functions.

28. S. Rep. No. 884, 75th Cong., 1st Sess.; see also Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947) (“The Act’s purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”).
34. Alamo, 471 U.S. at 299.
35. See, e.g., id. (finding non-profit religious organization that owned and operated several businesses, including service stations and retail clothing and grocery stores, an “enterprise” covered by the FLSA); Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1395 (4th Cir.) (deeming church-operated school an “enterprise” engaged in commerce within the FLSA’s scope), cert. denied, 111 S. Ct. 131 (1990); McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir.) (Salvation Army, a worldwide church, engaged in an “‘industry affecting commerce’”), cert. denied, 409 U.S. 896 (1972). But cf. Brennan v. Harrison County, 505 F.2d 901, 903-04 (5th Cir. 1975) (charitable home for indigents not
Second, the FLSA requires that persons working for an "enterprise" be "employees" within the meaning of the Act. An "employee" is circularly defined under the FLSA as "any individual employed by an employer." The Act's definition of "employ"—"to suffer or permit to work"—adds little to resolving this ambiguity. The Supreme Court has acknowledged that the Act defines "employ" so broadly as to enable coverage of persons whom Congress clearly did not intend to protect.

Although volunteer workers are not typically considered "employees," the question of the FLSA's application to such workers arises when they have performed services for a charitable or non-profit entity that is considered to be an "enterprise engaged in commerce" subject to the FLSA. The Secretary of Labor, who may elect to bring suits in his or her own name to correct a perceived FLSA violation, has taken responsibility for instituting suits against volunteer-based organizations.

When the Labor Department brings an action based upon an FLSA claim, Congress has indicated that courts should broadly interpret "employee" in order to effectuate the remedial goals of the Act. The courts, recognizing Congress's intent, narrowly construe exemptions from the FLSA. The Act itself, however, specifically exempts certain workers from its provisions.

covered by the FLSA); Wagner v. Salvation Army, 660 F. Supp. 466, 468-69 (E.D. Tenn. 1986) ("purely charitable," "non-profit" transient lodge owned by Salvation Army not engaged in commerce because its guests performed only small housekeeping chores and yard work).

39. See Portland Terminal, 330 U.S. at 152. The Court pointed out that the definition, if read literally, would be so broad as to achieve FLSA coverage even of students who would be considered "employees of the school or college they attended, and as such entitled to receive minimum wages." Id.
40. See Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290 (1985); see also DePalma, supra note 6, Metropolitan sec., at 42 (Salvation Army threatened with action to enforce FLSA's provisions regarding work-therapy participants); Howe, Salvation Army Sues, supra note 1, at A18 (same).
42. See Alamo, 471 U.S. at 293; supra text accompanying notes 1-6 and sources cited note 6.
43. See, e.g., United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (Senator Black stated that term "employee" was meant to be given "the broadest definition that has ever been included in any one act") (quoting 81 Cong. Rec. 7657 (1938)).
44. See, e.g., Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207, 211 (1959) (courts must read Act "liberally to apply to the furthest reaches consistent with congressional direction"); Rosenwasser, 323 U.S. at 363 (wording of statute "leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded"); see also Rutherford Food Corp. v. McComb, 331 U.S. 722, 728 (1947) (acknowledging that "[t]he definition of 'employ' is broad").
46. See 29 U.S.C. § 213 (1988). This section exempts over 20 types of workers, including the following:

any employee employed by an establishment which is an amusement or recrea-
When a court is presented with an FLSA claim, it first examines whether the alleged employer is subject to the Act. The label attached to a worker's job does not decide whether that worker is an employee; nor are common-law definitions determinative. Rather, the federal courts have developed an economic reality test. Under this test, if workers are found to "depend upon someone else's business for the opportunity to render service or are in business for themselves," they are deemed employees.

In the leading case on the FLSA's coverage of volunteer workers, "Tony & Susan Alamo Foundation v. Secretary of Labor," the Supreme Court applied the economic reality test to a non-profit religious organization's workers. The Court held that, as a matter of economic reality, the volunteer workers were "employees" under the FLSA because they were "entirely dependent upon the Foundation for long periods, in some cases several years." According to the Court, the Alamo Foundation

47. See supra notes 31-34 and accompanying text.
48. See supra notes 36-38 and accompanying text.
(1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business. Brock v. Superior Care, Inc., 840 F.2d 1054, 1058-59 (2d Cir. 1988) (citing Silk, 331 U.S. at 716).
52. Brock, 840 F.2d at 1059.
53. See id.; see also Bartels v. Birmingham, 332 U.S. 126, 130 (1947) ("[E]mployees are those who as a matter of economic reality are dependent upon the business to which they render service.").
55. The Alamo Foundation uses the help of workers, "most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation" in its commercial businesses. Id. at 292. The Foundation's income is derived mainly from the operation of these businesses, which "include service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy." Id.
56. Id. at 301 (quoting trial court's opinion in same case, Donovan v. Tony & Susan
workers' economic dependence indicated that they "must have expected to receive in-kind benefits—and expected them in exchange for their services." 57

The Court emphasized the economic realities of the Alamo Foundation workers over the intentions of the workers themselves in laboring for the Foundation. 58 Such a focus, however, runs contrary to the Supreme Court's prior decision in Walling v. Portland Terminal Co. 59 In that case, the Court took into consideration a worker's intent as a factor in determining whether workers are employees under the FLSA. 60 Although the Portland Terminal Court acknowledged that Congress intended the FLSA to be read broadly, it found that the Act should still be read to exclude "each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." 61

The Supreme Court, in an attempt to reconcile its holding in Alamo with Portland Terminal's limitations on the FLSA's application, reasoned that while it found that the Alamo workers were subject to the FLSA's provisions, Portland Terminal's limit on applicability would continue to be recognized since the Court instructed that it would not apply the requirements of the Act to mere "ordinary volunteerism." 62 In a footnote, the Court explained that the Department of Labor considers certain factors in determining who constitutes an "ordinary volunteer," including the following:

[T]he receipt of any benefits from those for whom the services are performed, whether the activity is a less than full-time occupation, and whether the services are of the kind typically associated with volunteer

Alamo Found., 567 F. Supp. 556, 562 (W.D. Ark. 1982)). In a significant footnote, the Court revealed other presumably important factors in its decision. The Court noted that former Alamo Foundation workers testified that they had been "fined" heavily for poor job performance, worked on a "commission" basis, and were prohibited from obtaining food from the cafeteria if they were absent from work—even if the absence was due to illness or inclement weather. These former associates also testified that they sometimes worked as long as 10 to 15 hours per day, 6 or 7 days per week. 57

Id. at 301 n.22 (citations omitted).

57. Id. at 301 (footnote omitted).

58. See id. ("[P]rotestations [by workers to FLSA coverage], however sincere, cannot be dispositive. The test of employment under the Act is one of 'economic reality' . . . .").


60. See id. at 152.

61. Id. Some lower courts, prior to Alamo, employed this Portland Terminal language as the sole test for determining whether a volunteer worker was to be considered an employee under the FLSA. See, e.g., Turner v. Unification Church, 473 F. Supp. 367, 377 (D.R.I. 1978) (citing Portland Terminal, court held that woman claiming to have been induced to join Reverend Moon's Unification Church and to being held there against her will was not employee under FLSA because she "perform[ed] services for charitable purposes without expecting any tangible compensation"), aff'd, 602 F.2d 458 (1st Cir. 1979).

work. The Department has recognized as volunteer services those of individuals who help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped, and those who work with retarded or disadvantaged youth.63

The Supreme Court's decision in Alamo was motivated, in part, by its conviction that the FLSA must be applied to every qualifying worker, regardless of that worker's intentions in performing the work.64 The Court cited its valid concern that "[i]f an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."65

While the Court was thus concerned with protecting workers, its holding in Alamo endangers the continuation of volunteer efforts that do not fall within the Court's narrow view of services "of the kind typically associated with volunteer work."66 By effectively vitiating Portland Terminal's instruction to exclude from the FLSA those workers who intend to volunteer their efforts, the Supreme Court has broadened the potential applicability of the FLSA to the vast majority of volunteer workers whose efforts do not fall within the Court's definition of "ordinary volunteerism."67

B. Title VII

Congress enacted Title VII of the Civil Rights Act of 196468 ("Title VII") to eliminate discrimination in the workplace and thereby assure equal employment opportunities.69 Title VII achieves this goal by

63. Id. at 303 n.25.
64. See id. at 302.
65. Id.
66. Id. at 303 n.25.
67. Given the complexity of volunteer work, the Court's exemption from the FLSA for "ordinary volunteerism" is impermissibly narrow; volunteer activity consists of infinitely more than "minister[ing] to the comfort of the sick, elderly, indigent, infirm, or handicapped, and [helping] . . . retarded or disadvantaged youth." Alamo, 471 U.S. at 303 n.25. One source, for example, surveyed volunteer work in the 1990s and listed hundreds of current volunteer activities being performed in fields as diverse as labor and employment, agriculture and food, business and industry, communications, transportation, human services, health care, education, religion, recreation and leisure, cultural arts, environmental quality, justice, public safety, the military, international involvement, and political and social action. See Ellis & Noyes (rev. ed. 1990), supra note 13, at 314-37. While the book comprehensively examines the history and future of voluntarism, the authors admit that the "diversity and quantity [of volunteer work] make it impossible to discuss absolutely everything happening in the field. The complexity of modern society evokes a complexity of volunteering." Id. at 314. The authors also note that certain "activities clearly fitting the definition of volunteer work . . . [are] frequently forgotten or unrecognized." Id. at 315.
69. See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Doug-
prohibiting private employers, employment agencies, and labor organizations from discriminating on the basis of race, color, religion, sex, or national origin. Many aspects of employment are covered, including recruitment, hiring and promotions, discharges, classifications, training, and compensation.

An employer will be subject to Title VII if two conditions are met. First, the employer must be a "person engaged in an industry affecting commerce who has fifteen or more employees." Second, persons seeking protection under Title VII's provisions, as well as workers who are counted toward the jurisdictional minimum of fifteen persons, must be "employees." Like the FLSA, Title VII defines "employee" with "magnificent circularity" as "an individual employed by an employer."

When deciding who constitutes an employee under Title VII, courts have applied three different standards. The most commonly used test is the "hybrid economic realities-common law control test." This test defines an employee as one whose employer "both pays him and controls"

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4. 42 U.S.C. § 2000e(b) (1988). The section provides, in pertinent part that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."

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The minimum jurisdictional number of employees was set at 15, partly to assure that ethnic and small businesses' cultural nature would be preserved. See Patricia Davidson, Comment, The Definition of "Employee" Under Title VII: Distinguishing Between Employees and Independent Contractors, 53 U. Cin. L. Rev. 203, 206 & n.23 (1984) (citing legislative history).

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70. See Knight v. United Farm Bureau Mut. Ins. Co., 950 F.2d 377, 380 (7th Cir. 1991); McClure, 460 F.2d at 557; EEOC v. Pettegrove Truck Serv., Inc., 716 F. Supp. 1430, 1432-34 (S. D. Fla. 1989). In certain cases, those who are not considered "employees" nevertheless are covered by Title VII. Such persons include, for example, applicants for employment. See 1 Fed. Reg. Empl. Serv. (Law. Co-op) § 1:14, at 20 & n.52.
72. 42 U.S.C. § 2000e(f) (1988). The legislative history does not decisively indicate who would be included under this broad definition. See Davidson, supra note 9, at 205 & n.14. The courts, however, have recognized that "[w]orkplace relationships can take on a number of forms, including full-time employee, part-time employee, temporary employee, independent contractor, and volunteer, among others." Norman v. Levy, 767 F. Supp. 1441, 1445 (N.D. Ill. 1991).
73. See Norman, 767 F. Supp. at 1444-45.
his work," but primarily emphasizes the degree of control over the worker.80

A second test is the economic realities test used in FLSA cases.81 Under this test, the courts assess the "economic realities underlying the relationship between the individual and the so-called principal in an effort to determine whether that individual is likely to be susceptible to the discriminatory practices which the act was designed to eliminate."82

The third and less commonly used test is the common-law "right to control" test.83 This test traditionally found employee status where "the alleged employer ha[s] the right to determine not only what work should be done but also how it should be done."84

Several federal district courts have decided the issue of whether a volunteer worker is covered by Title VII.85 In one case, a district court applied the economic realities test to find that unpaid volunteer workers

79. Tadros, 717 F. Supp. at 1004. Other factors considered under this test include the following:

1. the kind of occupation, with reference to whether the work usually is done under the direction of a supervisor or is done by a specialist without supervision; (2) the skill required in the particular operation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time during which the individual has worked; (5) the method of payment, whether by time or by the job; (6) the manner in which the work relationship is terminated; i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates retirement benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.

Spirides, 613 F.2d at 832.

80. See Norman, 767 F. Supp. at 1444; see also Spirides, 613 F.2d at 831 ("extent of the employer's right to control the 'means and manner' of the worker's performance is most important factor" in applying test).

81. See supra notes 51-53 and accompanying text.

82. Armbruster v. Quinn, 711 F.2d 1332, 1340 (6th Cir. 1983).

83. See Smith v. Dutra Trucking Co., 410 F. Supp. 513, 516 (N.D. Cal. 1976), aff'd, 580 F.2d 1054 (9th Cir. 1978). The test has been disfavored since the Supreme Court, in 1947, decided that the common law "right to control" test "was too narrow for use in deciding employee status for the purposes of far reaching social legislation." EEOC v. Zippo Mfg. Co., 713 F.2d 32, 36 (3d Cir. 1983) (citing Bartels v. Birmingham, 332 U.S. 126, 130 (1947)).

84. Zippo, 713 F.2d at 36 (citing United States v. Silk, 331 U.S. 704, 714 n.8 (1947)).

85. See Hall v. Delaware Council on Crime & Justice, 780 F. Supp. 241, 244 (D. Del. 1992) (refusing to consider unpaid volunteers as "employees," despite compensation in form of fringe benefits and reimbursement for expenses), aff'd, No. 92-7066, slip op. (3d Cir. Aug. 24, 1992); Tadros v. Coleman, 717 F. Supp. 996, 1005-06 (S.D.N.Y. 1989) (finding that physician, whose title was "guest lecturer" but who never actually delivered a lecture nor was paid for his work, was actually volunteer and thus not within Title VII's protective coverage), aff'd, 898 F.2d 10 (2d Cir.), cert. denied, 111 S. Ct. 186 (1990); Smith v. Berks Community Television, 657 F. Supp. 794, 796 (E.D. Pa. 1987) (refusing to count volunteers as employees in order for defendant employer to be subject to Title VII's jurisdictional minimum of 15 employees).

Other courts have managed to avoid the issue. See, e.g., Alcena v. Raine, 692 F. Supp. 261, 270 (S.D.N.Y. 1988) (stating in dictum that "it is questionable whether there are any damages available under Title VII for a volunteer, nonpaying position").
were not within Title VII’s scope. The court noted that the primary purpose of Title VII was to eliminate unlawful employment discrimination, but also acknowledged a secondary purpose of "mak[ing] whole those who have been injured by such discrimination." Apparently focusing more upon the secondary than the primary purpose of Title VII, the court reasoned that volunteers were "not susceptible to the discriminatory practices which the Act was designed to eliminate" because, as a matter of economic reality, they were not paid for their work. Thus, the court emphasized that there was no adequate remedy because "back pay would be wholly inappropriate for unpaid workers."

In another Title VII case, a federal district court applied the hybrid economic realities-common law control test. The court found that, although “[v]olunteers usually work under their supervisors’ control,” they are not "economically dependent" upon the business for which they work because "they do not—by definition—get paid." Thus, the district court held that the protections of Title VII were unavailable for volunteer workers.

These two cases reveal that receiving payment for work has been the most important determinant of whether volunteers qualify for the protective coverage of Title VII. While the test for determining employee status under the FLSA includes a limited examination of the intentions of the worker in performing the work, such examination of intent is entirely absent in the analysis of what constitutes an employee under Title VII.

C. The Age Discrimination in Employment Act

The stated purpose of the Age Discrimination in Employment Act ("ADEA") is to improve the position of older persons in the workplace by prohibiting practices that discriminate on the basis of a worker’s age. The ADEA seeks to achieve this goal by protecting workers who

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86. See Berks Community Television, 657 F. Supp. at 795-96.
87. Id. at 795 (citations omitted).
88. Id.
89. Id.
91. See id.
92. See, e.g., McClure v. Salvation Army, 460 F.2d 553, 557 (5th Cir.) (defendant’s claim that plaintiff stated she would regard herself as a volunteer on her application to the Salvation Army irrelevant in determination of whether she was “employee” under Title VII because claim “ignores the fact that employment contracts cannot be used to waive protections granted to employees by an Act of Congress” (citing J.1. Case Co. v. NLRB, 321 U.S. 332 (1944))), cert. denied, 409 U.S. 896 (1972).
94. See 29 U.S.C. § 621(b) (1988), which provides in pertinent part: “It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.”
are at least forty years of age.⁹５

Two conditions must be met for coverage under the ADEA. First, the employer must be involved in a commercial industry with twenty or more "employees."⁹⁶ Second, the person must be an "employee." The ADEA, predictably, defines employee as "an individual employed by any employer."⁹⁷ The Act also authorizes the Equal Employment Opportunity Commission to exempt certain workers.⁹⁸

The issue of volunteer coverage under the ADEA presents itself in two ways. As with Title VII, volunteers seeking to use the ADEA may argue that they should be included within the definition of "employee."⁹⁹ Second, as with Title VII, a regular employee seeking to invoke the protections of the statute, may attempt to have volunteer workers counted toward the jurisdictional minimum of twenty employees.¹⁰⁰

Courts confronting the status of volunteer workers under the ADEA have concluded that such workers are not within the ADEA's protective scope.¹⁰¹ In reaching their decisions, the courts have applied the hybrid test most commonly used in Title VII cases.¹⁰² The determination of the ADEA's application to workers therefore depends upon the facts of each case.

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⁹⁶. See 29 U.S.C. § 630(b) (1988), which provides in pertinent part that an "employer" is "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks." Note that the jurisdictional number of employees under the ADEA (20) is greater than that under Title VII (15). See 42 U.S.C. § 2000e(b) (1988).


¹⁰¹. See, e.g., Monclova Township, 920 F.2d at 362 (noting that the magistrate below found volunteer firefighters not employees under the ADEA); Zimmerman v. North Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983) (unpaid, inactive officers not counted as "employees" for purposes of achieving jurisdictional minimum); Orange County Ctr., 677 F. Supp. at 1039 (citing Title VII case as support for holding that volunteer workers not protected by ADEA).

¹⁰². See EEOC v. Zippo Mfg. Co., 713 F.2d 32, 38 (3rd Cir. 1983); supra notes 49-80 and accompanying text. In Zippo, the Third Circuit decided as a matter of first impression which standard to apply to cases under the ADEA. The court observed that the ADEA is a hybrid of the FLSA and Title VII for purposes of procedure and remedies but, for purposes of substantive prohibitions, Title VII was the model for the ADEA. Therefore, the court reasoned that, because deciding employee status relates to the substantive prohibitions of the ADEA, the hybrid test used in Title VII cases is the appropriate test for determining what persons are "employees" under the ADEA. See Zippo, 713 F.2d at 38.
Using the hybrid standard, courts have deemed payment the determining factor in deciding who qualifies as an employee under the ADEA. The courts have thus found that volunteer workers are not employees because they are not paid. Volunteer workers are therefore excluded from the ADEA's protection, despite the fact that the ADEA was intended to be broadly interpreted in order to effectuate its remedial purpose. Indeed, one court, while indicating its awareness that the decision to exclude volunteer workers would effectively relieve non-profit and charitable entities from the ADEA's anti-discrimination mandate, noted that it could not make an exception "for the special nature of a non-profit corporation . . . which relies primarily on volunteer help.

II. THE PROBLEM WITH PRESENT INTERPRETATIONS

The Supreme Court has instructed that, for purposes of employment statutes, what constitutes an employee must be determined by considering "the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained.' " This principle must therefore guide the status determination of volunteer workers under federal employment law statutes. Present judicial interpretations have strayed from adherence to the spirit of the protective federal employment statutes by ignoring Congressional purposes for passing the FLSA, the ADEA, and Title VII.

A. The Fair Labor Standards Act

Congress, through the Fair Labor Standards Act, intended to protect workers from being forced to sell their labor for a substandard wage or to work long hours without fair compensation. A secondary purpose was to protect the marketplace from the unsavory competitive practice of increasing profits by skimping on workers' salaries.

Given the FLSA's laudable goals, the breadth of its application is little cause for concern when applied to ordinary, paid employees. When ap-

104. See, e.g., Zimmerman v. North Am. Signal Co., 704 F.2d 347, 352 (7th Cir. 1983) (unpaid status of workers apparently determinative factor in finding they were not "employees" under ADEA); Orange County Ctr., 677 F. Supp. at 1039 (trustees, directors, and unpaid volunteers not counted as employees under ADEA).
105. See Zimmerman, 704 F.2d at 353.
106. Orange County Ctr., 677 F. Supp. at 1039.
plied to unpaid volunteer workers, however, the Act has an undeniably detrimental effect. This effect is most severe on non-profit and charitable organizations that often rely primarily upon the help of volunteer workers. Forcing charitable organizations to pay the minimum wage to all of their helpers, including many volunteer workers, will severely strain, if not end, the organizations’ programs. The demise of charitable organizations that provide myriad services and whose volunteers contribute over fourteen billion hours—saving government the nearly $109 billion annually that would otherwise have to be spent on social programs—would likely contribute to increased unemployment, welfare dependence, and crime.

The Supreme Court’s proposed exemption for “[o]rdinary volunteerism”—a definition that the Court indicates includes only “those . . . individuals who help to minister to the comfort of the sick, elderly, indigent, infirm or handicapped, and those who work with retarded or disadvantaged youth”—will not exempt enough charities from the FLSA’s provisions to remedy the problem. The narrow view of what constitutes ordinary voluntarism does not, for example, include Salvation Army workers because they apparently do not perform “services . . . typically associated [by the Labor Department] with volunteer work.” The Labor Department’s threatened suit against the Salvation Army, which arose after the Alamo decision, demonstrates that the Department does not, in fact, view the Salvation Army’s work-therapy program participants as falling within its definition of “volunteer.”

In the case of non-profit organizations, such as the Alamo Foundation,
that engage heavily in commerce and treat their "volunteers" like regular employees, the Court's application of the FLSA is justified and is in keeping with the intent of Congress. When applied to non-profit organizations such as the Salvation Army, however, the concerns motivating application of the FLSA are minimal. For instance, the temporary nature and purpose of the Salvation Army's treatment programs, and the relatively limited competition with other businesses, indicate that the reasons for applying the FLSA are slight and heavily outweighed by the benefits of keeping such organizations functioning.

Furthermore, as the Supreme Court stated in Portland Terminal, the FLSA, despite its broad application, does retain some limits that would exclude volunteer workers from the Act's coverage. The Court pointed out that "there is no indication . . . that Congress intended to outlaw . . . relationships" where a person, "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for . . . pleasure or profit." Under Alamo, however, unpaid volunteer workers may now be covered by the FLSA, despite a subjective intent to donate their efforts. Such an intent would formerly have barred coverage under Portland Terminal.

Therefore, under present interpretation of the FLSA's scope, charitable and non-profit organizations can best escape coverage by seeking a legislative exemption from Congress after being charged with an FLSA violation. This piecemeal approach to the problem, however, will not provide the long-term solution that is required. By applying the eco-

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121. The Supreme Court in Alamo noted the lower court's finding that Foundation operated 38 commercial businesses in four states, including "service stations, retail clothing and grocery outlets, hog farms, roofing and electrical construction companies, a recordkeeping company, a motel, and companies engaged in the production and distribution of candy." Alamo, 471 U.S. at 292 & n.2.

122. See supra note 56 (quoting treatment of volunteer workers).

123. The Salvation Army work-therapy programs continue for 90 to 120 days per participant. See Knight, supra note 6, at G3.

124. The Salvation Army finances its rehabilitation programs "through the sale of salvaged furniture and clothes and through thrift store programs." DePalma, supra note 6, Metropolitan sec., at 42.

125. The Salvation Army's programs help some 70,000 people annually. See supra note 9 and accompanying text.


127. See, e.g., Turner v. Unification Church, 473 F. Supp. 367, 377 (D.R.I. 1978) (citing Portland Terminal as basis for holding that former church member who performed services without expecting or receiving compensation was not "employee" under FLSA), aff'd, 602 F.2d 458 (1st Cir. 1979).

128. See Howe, U.S. Does Turnabout, supra note 6, at A9. Another solution is to utilize a provision in the FLSA that authorizes the Secretary of Labor to allow organizations to pay less than the minimum wage to mentally or physically handicapped workers. See 29 U.S.C. § 214(c) (1988). Goodwill Industries, a large charitable organization, has taken advantage of this provision. See Howe, Salvation Army Sues, supra note 1, at A18. Many volunteer workers, however, would not qualify as handicapped under this provision because of the Labor Department's requirement that they demonstrate problems that impair their ability to work. See id.

129. See, e.g., Howe, U.S. Does Turnabout, supra note 6, at A9 ("New Jersey Rep.
omic realities test and virtually ignoring Portland Terminal,130 the Court has threatened the very survival of charitable organizations such as the Salvation Army.131

B. Title VII and the Age Discrimination in Employment Act

Both Title VII and the ADEA aim to prevent discrimination in the workplace on the basis of each statute's protected category.132 The courts' interpretation of these acts regarding volunteer workers, however, permits employers to discriminate against such workers, even if they fall within the protected classes. Additionally, some employers may escape the statutes' provisions by employing fewer than the jurisdictional number of employees133 and then filling remaining labor needs by using volunteer workers who are not counted toward that jurisdictional minimum.

Present judicial interpretations of Title VII and the ADEA ignore the remedial purpose of the two statutes. Congress specifically intended the courts to broadly construe the term "employee."134 There is no justification for the courts' distinction between paid and unpaid workers. One district court explained its exclusion of volunteer workers from Title VII's protections by stating that "the remedy of back pay would be wholly inappropriate for unpaid workers."135 Yet, the court downplayed the significant remedy that would exist for volunteer workers: injunctive relief requiring, for example, cessation of discriminatory conduct or reinstatement of a volunteer worker previously terminated due to illegal discrimination.136 Title VII and the ADEA may be extraordinarily effective

Marge Roukema, the ranking Republican on the House labor-management subcommittee, said . . . that a legislative solution was not feasible, adding that the wrangling would take too much time and money.

130. The Alamo Court acknowledged that Portland Terminal would dictate excluding from the definition of "employee" those who did not intend payment in return for their services. Yet, despite the Secretary of Labor's "‘fail[ure] to produce any past or present associate of the Foundation who viewed his work . . . as anything other than “volunteering” his services to the Foundation,’” Tony & Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 300 (1985) (quoting the district court decision, Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 556, 562 (W.D. Ark. 1982)), the Court stated that “[n]evertheless, these protestations [of FLSA coverage by the workers], however sincere, cannot be dispositive. The test of employment under the Act is one of ‘economic reality.’” Id. at 301.

131. See, e.g., DePalma, supra note 6, Metropolitan sec., at 42 ("Being forced to pay . . . the Federal minimum wage of $3.80 an hour, the officials say, would effectively end the rehabilitation program, sending the people it helps back out onto the street.").

132. See supra text accompanying notes 70 & 95.

133. See supra text accompanying notes 73 & 96.


136. The Berks court acknowledged that this remedy could be used by volunteer work-
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weapons when used by workplace volunteers to seek injunctive relief. Often, the source of discrimination is an oppressive workplace policy or the conduct of bigoted management. Even though volunteers may have no claim for money damages in the form of lost wages, volunteer workers could easily seek injunctive relief if permitted to do so by the courts.

III. CURRENT COURT INTERPRETATIONS UNJUSTIFIABLY DISFAVOR VOLUNTEER WORKERS

A. The Discrepancy in the Statutes' Coverage of Volunteer Workers

Despite the similar protective purposes of the FLSA, Title VII, and the ADEA, there is an unjustifiable discrepancy between these statutes' coverage of volunteer workers. While the FLSA's definition of "employee" is read expansively enough to include an unpaid volunteer worker, the definitions of "employee" under Title VII and the ADEA are read narrowly to exclude volunteer workers from protection. Courts have explained this difference by showing that the FLSA's legislative history supports a more expansive reading of its provisions. Other courts have suggested that Congress's actual intent was to limit all three statutes to traditional employer-employee relationships.

The suggestion that Congress, not the courts, intentionally excluded volunteer workers from the statutes' scope is erroneous. It was not...
Congress, but the judiciary, that set the statutes' scope by deciding which standards to apply in determining what constitutes an employee under the statutes. For example, by applying the hybrid test under Title VII and the ADEA,\textsuperscript{143} the courts have guaranteed that these statutes will rarely, if ever, apply to volunteer workers who are not financially dependent upon an entity.

Similarly, by applying the economic realities test, which finds employee status where the worker is financially dependent upon an employer, the courts have swept many volunteer workers who should not be considered "employees" within the FLSA's coverage. For example, in work-therapy programs such as the Salvation Army's, a volunteer worker will necessarily be dependent upon the organization for basic needs while undergoing the transformation to independence which is the goal of the program.\textsuperscript{144} In such programs, payment of the volunteer worker is unnecessary—the organization provides for basic needs. Payment is also obviously not contemplated by the workers who seek therapy, not gainful employment, from the programs. Yet the application of the FLSA's economic realities test to such workers would result in the courts' finding that the volunteer workers are financially dependent upon the Salvation Army and are thus employees who must be paid the minimum wage. This example reveals that the wide variety of volunteer situations necessitates some mechanism by which the spirit of the minimum wage law is allowed to protect those workers who truly need help, rather than to hinder charitable organizations and volunteer workers who fall without the FLSA's intended scope.

B. Resolving the Discrepancy

Both Congress and the judiciary have failed to protect volunteer workers. The workers' exclusion from the protective Title VII and ADEA coverage and their contrasting inclusion under the beneficent, but unneeded, FLSA may serve to discourage voluntarism. This result is particularly ironic given the government's hope that voluntarism in the private sector would perform the important function of "bridg[ing] the gap between aid to needy people and reduced [governmental] social programs."\textsuperscript{145} This situation must be remedied to maintain American voluntarism. Therefore, the courts and Congress should reform their approaches toward volunteer workers.

\textsuperscript{143} See supra notes 78 & 102 and accompanying text.

\textsuperscript{144} The Salvation Army provides participants with "food, shelter, counseling and a weekly stipend of $5 to $20 for personal items." Howe, Salvation Army Sues, supra note 1, at A18.

\textsuperscript{145} Hearings, supra note 13, at 3 (opening statement of subcommittee member Paul N. McCloskey).
1. Possible Judicial Solutions

The first possible solution is the adoption of new tests by the courts for determining whether given volunteer workers are employees for the purposes of the FLSA, Title VII, and the ADEA. Specifically, the FLSA's economic realities test is inadequate and requires reformulation to avoid coverage of volunteer workers who were not intended by Congress to be protected. In addition, Title VII and the ADEA's hybrid test's economic reality portion is similarly inappropriate to deciding whether volunteer workers are entitled to protection under those statutes.

a. The Fair Labor Standards Act

Under the FLSA, courts must make the economic realities test flexible enough to deal with non-traditional volunteer programs such as the Salvation Army's work-therapy program. The test should ensure that mere temporary economic dependence will not automatically trigger the FLSA's requirements.

Courts should consider two new factors in addition to the existing economic realities test. First, as noted in *Portland Terminal*, whether a volunteer worker is seeking compensation should play a role in the analysis. In addition, the court should consider the employer's purpose in engaging a volunteer worker's help.

Prior to the *Alamo* decision, the volunteer worker's intentions in performing work were an integral part of determining the scope of the FLSA. The Court in *Portland Terminal* indicated that the FLSA did not extend to a worker who did not seek or desire compensation for his work, regardless of how broadly Congress intended the statute to apply. Because the *Alamo* Court merely distinguished its decision from *Portland Terminal* on factual grounds, the *Alamo* decision should not implicitly overrule the sound reasoning of *Portland Terminal*. Therefore, the volunteer worker's intent should be considered so that his or her desire to perform services for an organization without being compensated may be effectuated.

Consideration of the employer's intent in engaging volunteer help would alleviate certain legitimate concerns. An examination of an employer's intent in using volunteer help, for example, may reveal schemes to disguise regular employees as volunteers. Factoring employer intent into the analysis, then, could allay the Supreme Court's concern that an employer might escape the FLSA's requirements by coercing employees to renounce their intent to seek compensation.

Examination of the employer's intent would also eliminate the concern that commercial enterprises would use volunteer workers simply to avoid hiring paid employees. Thus, sham "non-profits" like the Alamo Foun-

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146. See *supra* notes 51-53 and accompanying text.
dation that extensively engage in commercial businesses and that treat their volunteer workers like regular employees would not escape the coverage appropriate for such workers. Organizations with more legitimate, charitable motives (such as the Salvation Army), however, would avoid FLSA coverage.

The suggested test would still allow legitimate "charitable" organizations to compete at an advantage with respect to other businesses that must pay their employees the minimum wage. Nevertheless, this is one of the sacrifices that will be required for the greater good of allowing the survival of organizations like the Salvation Army. Any deleterious effects of such advantage to ordinary businesses, in any case, will be reduced by only exempting organizations that are deemed truly charitable in nature.

b. Title VII and the Age Discrimination in Employment Act

In the cases of Title VII and the ADEA, courts should simply eliminate the economic reality portion of the hybrid economic reality-common law control test. The economic reality portion of the test serves no legitimate purpose. Where a volunteer worker seeks injunctive relief, the economic dependence of that volunteer is irrelevant to whether an employer's behavior is prohibited by statute and therefore must be enjoined. Given the remedial purposes of both acts, any person who seeks to correct discriminatory behavior should be encouraged, not prohibited for lack of financial dependence. Even absent monetary compensation, a volunteer worker has a personal stake in eliminating discriminatory conduct faced on the job.

The right to control part of the test, however, should remain an important determinant of whether a volunteer can sue under Title VII or the ADEA. An employer's right to control a volunteer's behavior necessarily influences whether discrimination will affect that volunteer. If, for example, the employer has no power to control the means, manner, or any other aspect of the volunteer's work, it would be manifestly unfair to allow the volunteer to benefit by using the statutes. In such a case, the volunteer worker is not sufficiently similar to a regular employee to be included within the scope of the statutes.

2. Legislative Amendments

Another solution to clarify volunteer workers' status is Congressional amendments to the FLSA, Title VII, and the ADEA. Congress has already recognized the value of volunteerism to the national economy,148.

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148. See supra note 121.
149. See supra note 56.
150. The issue of a volunteer worker's economic dependence would, however, be important to eliminating a claim for backpay where the worker was unpaid. Yet, it stands to reason that a volunteer would not seek such an obviously inappropriate remedy.
151. See supra notes 112-116 and accompanying text.
in order to maintain the health of American voluntarism, Congress should amend the FLSA, Title VII, and the ADEA to provide a definition of a "volunteer."

a. The Fair Labor Standards Act

The Fair Labor Standards Act should be amended to exempt a "volunteer." A definition of "volunteer" should take into account the intent of both the volunteer worker and the employer, and might provide that a "volunteer" is "an individual who provides services, without contemplating compensation, on a part-time basis (or, if on a full-time basis, for a temporary, defined period not to exceed four months) for an employer who utilizes such volunteer help for a non-profit purpose."

Such definition would serve to alleviate the same concerns as the suggested changes to the FLSA's "economic realities" test. Examination of the volunteer worker and employer's subjective intent would benefit legitimate charitable and non-profit organizations. In addition, limiting volunteer workers to an exemption of four months of full-time work will provide the flexibility to allow temporary work-therapy programs, such as that run by the Salvation Army, to avoid coverage, while still limiting the opportunity for ill-intentioned employers to take advantage of volunteer help in order to avoid having to hire full-time employees.

b. Title VII and the Age Discrimination in Employment Act

Title VII and the ADEA should both be amended to specifically include a "volunteer" within the definition of "employee." One federal statute, the Federal Employees Compensation Act ("FECA"),152 which expressly includes those providing volunteer services, provides a model.153 The suggested addition to the definitions of "employee" under Title VII and the ADEA could include "an individual under an employer's control who provides personal service to an employer, without pay or for nominal pay."

Such an amendment would allow volunteers who are "subject to" discrimination—because they work, for example, under the control of an employer who violates the statutes—to use Title VII and the ADEA as the weapons against discrimination that the legislature intended. This amendment would be consistent with the remedial purposes of the statutes because it would expand the number of individuals eligible to seek relief from discriminatory workplace practices.

153. In pertinent part, FECA defines an "employee" as an individual rendering personal service to the United States similar to the service of a civil officer or employee of the United States, without pay or for nominal pay, when a statute authorizes the acceptance or use of service, or authorizes payment of travel or other expenses of the individual. 5 U.S.C. § 8101(1)(B) (1988).
CONCLUSION

The inappropriate coverage of volunteers under the FLSA—and their misplaced non-coverage under Title VII and the ADEA—originated from a combination of poor drafting and judicial misinterpretation. In order to protect voluntarism, the courts must strive to interpret “employee” under each statute in a manner that will provide greater protection for volunteers. Alternatively, Congress, by amending the statutes, should take responsibility for the problem it created by so ambiguously defining “employee” that the scope of the statutes is unclear. In short, our nation benefits immeasurably from the many non-profit and charitable organizations that depend upon volunteer help, and changes must be made to formulate definitions of an “employee” that will prevent a destructive effect on voluntarism.