Employee Status Preconditions: A Critical Assessment

Pnina Alon-Shenker and Guy Davidov*

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Much has been written about the legal tests that exclude independent contractors from employment and labor law coverage. Less attention has been devoted to courts' use of classification processes that invoke some preliminary requirements (i.e. preconditions for employee status) and result in the exclusion of various categories of workers from potential coverage. Those workers include volunteers, prisoners, persons with disabilities, interns, trainees and apprentices, business owners, corporate directors and officeholders. This Article brings these preconditions together into a coherent framework by critically examining their different variations in the U.S. as well as the UK, Canada, and the EU. Further, this Article proposes a narrower set of preconditions which will better advance the purpose of employment and labor laws and increase consistency and predictability in its application. The three proposed preconditions are: (1) performing work or providing services that benefit an employer (regardless of whether there is also a personal benefit for the worker) unless such benefits are negligible; (2) the work should be remunerated (regardless of whether wages are paid in practice or have been promised or not); and (3) the work is substantially performed personally.

* Pnina Alon-Shenker is an Associate Professor at the Ted Rogers School of Management and the Lincoln Alexander School of Law, Toronto Metropolitan University, Canada (<pnina.alon@torontomu.ca>). Guy Davidov is the Elias Lieberman Professor of Labor Law at the Hebrew University of Jerusalem, Israel (<guy.davidov@mail.huji.ac.il>). We would like to thank Noah Zatz and Katie Bales for their insightful comments on previous drafts.

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INTRODUCTION

Patrick Velarde was enrolled in the Salon Professional Academy of Buffalo preparing to take a cosmetologist licensure examination. He sued the Academy for unpaid wages under the Fair Labor Standards Act of 1938 (FLSA),[1] alleging that as part of the training requirements, he worked under the Academy's supervision 34 hours a week for 22 weeks performing services to customers including barbering and hair styling, skin and body treatments. The Second Circuit Court dismissed his claim holding that he was not an employee but rather a trainee as he was the primary beneficiary of the relationship.[2] Donald Henthorn sued for unpaid wages under the FLSA for janitorial and maintenance work he performed at the U.S. Naval Air Station while incarcerated in the Federal Prison Camp for which he was paid 12 cents per hour. The District of Columbia Circuit Court dismissed his claim holding that he was not an employee because he was engaged in a penological work assignment and did not freely contract to sell his labor.[3] Rachel Juino sued Livingston Parish Fire District No. 5 under Title VII of the Civil Rights Act of 1964, alleging that a fellow firefighter sexually harassed her. She responded to 39 calls over the span of five months, receiving $2 per call, a life insurance policy, a uniform and badge, and first

1 29 U.S.C. § 213.
2 Velarde v. GW GJ, Inc., 914 F.3d 779 (2d Cir. 2019).
3 Henthorn v. Department of Navy, 29 F.3d 682 (D.C. Cir. 1994).

responders' training. The Fifth Circuit Court dismissed her claim, holding that she was not an employee but rather a volunteer, as she did not receive remuneration.[4] In each case, the courts applied a different test to determine whether the person preforming the work was an employee. But the three do share important similarities: all three claimants were denied access to employment and labor laws even though they performed services for others and did not operate a business of their own.

The question "who is an employee?" is of great significance as employment status is the "gateway" to many rights and obligations under employment and labor laws. If a worker (that is, a person performing work) is an employee, they are entitled to important rights and protections, including minimum wage, working time limitations, the right to join a union, and much more. Their employer owes them significant corresponding duties. If this person is *not* an employee, employment and labor laws will not apply. There is voluminous case law and literature on the identification of "employee" through the lens of the distinction between employees and independent contractors.[5] Primarily, a multi-factor test is used to determine if a worker is engaged in an employment relationship or rather a client-independent contractor relationship. U.S. courts often use the "common law control test," which examines the right of the hiring party to control the manner and means by which the work is accomplished and other factors such as ownership of tools, the duration of the relationship, payment method, and ability to hire helpers.[6] For the purpose of the FLSA, another test – the "economic realities test" – considers a shorter and slightly different list of factors predominantly assessing the existence of economic dependency, alongside control.[7] A third test – the ABC test – entails a presumption of employment unless the hiring entity can rebut that presumption by satisfying three conditions. These three conditions are quite similar to ones used in multi-factor tests: lack of control over the performance of the work; the work performed is irregular to the course of business; and that the

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4 Juino v. Livingston Parish Fire District No. 5, 717 F.3d 431 (5th Cir. 2013).

5 Most countries do not define employment status in their legislation, and when they do, the statutory definitions are often circular and vague. *See, e.g.*, FLSA, § 203(e)(1) which defines an employee as an "individual employed by an employer"; the UK Employment Rights Act, 1996, c. 18, sections 230(1)-(2); the French Code Du Travail Art. L. 1211-1; the Indian Industrial Disputes Act, 1947, section 2(s); and the Japanese Labor Standards Law, Article 9. A notable exception can be found in California, where the ABC test for employee determination has been codified in the legislation. *See* Assembly Bill No 2257, Chapter 38, Statutes of 2020, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB2257.

6 The version adopted by the U.S. Supreme Court entails 12 factors. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989): "the skills required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party", *id.* at 751-52. The IRS version lists 20 factors. *See* IRS, Revenue Ruling 87-41, 1987-1 C.B. 296, 298-299; IRS, INDEPENDENT CONTRACTOR (SELF-EMPLOYED) OR EMPLOYEE?, https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee.

7 The case law interprets the "suffer or permit to work" definition of "employ" in the FLSA § 203(g) and usually lists 5-6 factors. *See, e.g.*, Zheng v. Liberty Apparel Co., 355 F.3d 61, 67 (2d Cir. 2003): "(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." *See also* Acosta v. Off Duty Police Services, Inc., 915 F.3d 1050, 1055 (6th Cir. 2019) and Dynamex Operations W., Inc. v. Superior Court, 4 Cal.5th 903, 950 n.20 (2018).

worker performs the work on behalf of an independent business (e.g. a freelancer or a contractor).[8]

A multi-factor test—like the ones used in the U.S. to distinguish between employees and independent contractors—exists in many other countries.[9] Using a multi-factor test, courts look beyond the intention of the parties and the language of the contract to assess the actual nature of the relationship based on a list of factors. None of the factors in the list is dispositive in determining the status of the relationship. Thus, courts using the multi-factor test reach a conclusion regarding the existence of an employment relationship on a case-by-case analysis and by considering the totality of the circumstances.[10] While variation exists across jurisdictions, courts often consider factors such as the level of control the employer has over the worker's activities, whether the worker provides their own equipment, the degree of financial risk taken by the worker, and the worker's opportunity for profit in the performance of their tasks.[11] Generally the tests (and related indicia) look at whether the relationship is characterized by control/subordination[12] and dependency.[13]

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8 This test was adopted by the California Supreme Court in *Dynamex*, 4 Cal.5th at 913 & 954-55. A variation was first adopted by Maine in 1935. In the last two decades it was adopted with some variation by 27 U.S. states – often limited to a specific purpose (e.g., unemployment insurance) or sector (e.g., construction). *See* Anna Deknatel & Lauren Hoff-Downing, *ABC on the Books and in the Courts: An Analysis of Recent Independent Contractor and Misclassification Statutes*, 18 U. PENN. J.L. & SOC. CHANGE 53 (2015); Tanya Goldman & David Weil, *Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace*, 42 BERKELEY J. EMP. & LAB. L. 55, 107 (2021); Guy Davidov & Pnina Alon-Shenker, *The ABC Test: A New Model for Employment Status Determination?*, 51 INDUS. L.J. 235 (2022).

9 *See* Guy Davidov, Mark Freedland & Nicola Kountouris, *The Subjects of Labor Law: 'Employees' and Other Workers*, *in* RESEARCH HANDBOOK IN COMPARATIVE LABOR LAW 115 (Matthew Finkin & Guy Mundlak eds., 2015); Guy Davidov, *The Three Axes of Employment Relationships: A Characterization of Workers in Need of Protection*, 52 U. TORONTO L.J. 357, 365ff (2002). Sometimes an intermediate category of dependent contractors is also recognized and considered in the case law. *See, e.g.*, Harry Arthurs, *The Dependent Contractor: A Study of the Legal Problems of Countervailing Power*, 16 U. TORONTO L.J. 89 (1965); Brian Langille & Guy Davidov, *Beyond Employees and Independent Contractors: A View from Canada*, 21 COMP. LAB. L. & POL'Y J. 7, 22-29 (1999).

10 In the UK, *see* Autoclenz Limited v. Belcher and others, [2011] UKSC 41 at para. 35; Uber v. Aslam, [2021] UKSC 5 at paras. 62-63, 76-78. In Canada, *see* Modern Cleaning Concept Inc v. Comité paritaire de l'entretien d'édifices publics de la région de Québec, 2019 SCC 28 at para. 38. In Europe, *see* Bernd Waas, *Comparative Overview*, *in* RESTATEMENT OF LABOUR LAW IN EUROPE – VOL I: THE CONCEPT OF EMPLOYEE at xxvii & li (Bernd Waas & Guus Heerma van Voss eds., 2017). In Latin America, *see* SERGIO GAMONAL & CÉSAR ROSADO MARZÁN, PRINCIPLED LABOR LAW: U.S. LABOR LAW THROUGH A LATIN AMERICAN METHOD ch. 3 (2019).

11 In the UK, *see* ZOE ADAMS ET AL, DEAKIN AND MORRIS' LABOUR LAW 2.17 (7th ed. 2021); Montreal v. Montreal Locomotive Works, [1947] 1 DLR 161, 169; HUGH COLLINS, K.D. EWING & AILEEN MCCOLGAN, LABOUR LAW 198-207 (2d ed. 2019). In Europe, *see* Waas, *supra* note 10, at xlvii. In Canada, *see* 671122 Ontario Ltd v. Sagaz Industries Canada Inc., 2001 SCC 59.

12 In the U.S., *see Community for Creative Non-Violence*, 490 U.S. 730. In other common law countries, *see* Ready Mixed Concrete (South East) Ltd v. Minister of Pensions and National Insurance, [1967] EWHC QB 3 [1968] 2 QB 497; *Montreal Locomotive Works*, [1947] 1 DLR 161; Stevens v. Brodribb Sawmilling Co Pty Ltd, (1968) 160 CLR 16. In civil law systems, *see* Waas, *supra* note 10.

13 In the U.S., *see* Zheng, *supra* note 7. In the UK, *see* DEAKIN AND MORRIS' LABOUR LAW, *supra* note 11, at 2.15, and *Uber v. Aslam*, [2021] UKSC 5. In Europe, *see* Waas, *supra* note 10, at xlix. In Canada, *see* McCormick v. Fasken Martineau DuMoulin LLP [2014] 2 SCR 108. *See also* Adalberto Perulli, *The Legal and Jurisprudential Evolution of the Notion of Employee*, 11 EUROPEAN LAB. L.J. 117 (2020); NICOLA COUNTOURIS & VALERIO DE STEFANO, NEW TRADE UNION STRATEGIES FOR NEW FORMS OF EMPLOYMENT (2019).

Much has been written on how to distinguish independent contractors from employees. Much less has been written about the classification of people who perform work but are excluded *prior* to the consideration of the multi-factor test despite not operating an independent business. This is the situation in the case of interns, trainees, apprentices, volunteers, prisoners working during incarceration, and persons with disabilities participating in vocational rehabilitation programs. While rarely discussed, this is also the case for corporate shareholders and directors, individuals in business partnerships, judges, and officeholders. Throughout the Article, these aforementioned workers will be referred to as "pre-excluded workers." These workers sometimes contest their exclusion from protection by employment and labor laws. Courts tend to decide such cases by invoking some preliminary requirements for employee status, rather than applying the tests normally used to distinguish between employees and independent contractors. For example, courts ask whether the relationship between the person performing the work and the person receiving the work is "economic," whether the recipient of the work is the "primary beneficiary," or whether the work was remunerated. Sometimes explicitly—but more often implicitly—courts seem to add *preconditions* for employee status, applying additional tests that set out preliminary requirements.

This Article is dedicated to analyzing employee status preconditions both descriptively and normatively.[14] The preconditions (or tests) are often different for different groups, and in any case, did not attract a lot of scholarly attention.[15] The first goal of this Article is descriptive; we aim to bring these tests together into one coherent framework. We do this by examining different tests used in the U.S. as well as other legal systems (the UK, Canada, and the EU) for different types of work. Then, we show how they can fit into three general preconditions: the first examining who benefits from the work, the second looking at the existence of a contract or some elements of the contract (including, in particular, remuneration), and the third asking whether the worker must personally perform the work. The second goal of the Article is normative; under each of these headings, we critically discuss different tests adopted in different legal systems and suggest a variation which we argue will best advance the purpose of employment and labor laws and increase consistency and predictability in its application. While we support the use of all three preconditions, we show that only a limited version can be justified. We also advocate for a more explicit use of these tests and applying the same preconditions for all types of work.

The narrow set of preconditions which we support is the following: (1) performing work or providing services that benefit an employer (regardless of whether there is also a personal benefit for the worker) unless such benefit is negligible; (2) the work *should* be remunerated (regardless of whether wages are paid in practice or have been promised or not); and (3) the work is substantially performed by the person to which it is assigned (performed "personally"). For the second precondition, we suggest adding a presumption that work for the benefit of an employer should be remunerated. We provide three reasons that can refute this presumption:

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[14] While outside the scope of this Article, clearly the development of the law (including the preconditions) is not neutral but rather plays a central role in the functioning of neoliberal capitalist economies providing a means for capital to exercise power over wide categories of workers who are excluded from protection. *See, e.g.*, Simon Deakin et al, *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMP. ECONOMICS 188 (2017); Katie Bales & Lucy Mayblin, *Unfree Labour in Immigration Detention: Exploitation and Coercion of a Captive Immigrant Workforce*, 47 ECONOMY AND SOCIETY 191 (2018).

[15] There are a few notable exceptions, which will be mentioned below.

work that was imposed on the employer without being requested, lack of mutual intention to create a legally binding relationship, and authentic volunteering. All three preconditions must be met to proceed to the next stage of examination. If one is not met, the person is not an employee. If all three are met, the next stage will be to examine whether that person is an employee or an independent contractor using the more conventional tests such as the multi-factor test. We explain the three preconditions below.

The Article proceeds as follows. Part I explains the relationship between the multi-factor test used to distinguish employees from independent contractors and the preconditions which are the focus of the current contribution. It also sets out the theoretical framework to the normative assessment of the different preconditions, drawing on existing literature on a purposive approach to labor law. Part II then describes the three distinct preconditions which we identify in the case law. For each one, we consider different variations found in the case law of different legal systems as well as in the academic literature. After a critical analysis of existing laws, we consider the normative justifications for each precondition (using a purposive approach) and conclude with our own proposal. Part III applies these proposals to the various groups of workers who are often being excluded based on the preconditions. For each of these groups, we briefly describe the current laws in several jurisdictions before explaining how our own proposal helps to draw the line, in each of these situations, between those who require the protection of employment and labor law and those who do not.

I. BEYOND CONVENTIONAL EMPLOYEE STATUS TESTS: ASSESSING PRECONDITIONS PURPOSIVELY

Two stages of employee status determination can often be identified in the case law. One in which courts examine whether preliminary requirements of employment status have been met, and a second stage in which courts move to an assessment of whether the person was an employee or an independent contractor. For example, if the person was not paid, the court may determine that they were not an employee but rather an intern or a volunteer. If they were paid, the court will then examine whether they were an employee or an independent contractor. Although often the analysis of the two stages is blended, the first stage – the preliminary assessment of the employee status preconditions – is quite distinct from the second stage – the assessment of the more conventional multi-factor test to distinguish between employees and independent contractors. The distinction between the two stages is often not explicitly stated by the courts, but we argue that the first stage should not collapse into the second one, for three main reasons.

First, while the second stage entails a multi-factor test which weighs and considers a list of non-dispositive factors, the first stage involves preconditions which operate as prerequisites for employment status. Each precondition must be satisfied, or else the worker is not an employee. They apply as part of a preliminary assessment prior to the application of the multi-factor test. If the preconditions are met, the court should proceed to examine the multi-factor test to determine whether the person is an employee or an independent contractor. If they are not met, it can be determined that the person is not an employee, and there is no need to continue to the examination of the multi-factor test. This is significant because the preliminary assessment of

preconditions usually results in the exclusion of wide groups of workers from coverage and protection of employment and labor laws. This pre-exclusion can also raise serious human rights concerns, such as in the case of prisoners.[16] It is therefore important to carefully investigate its various components and ensure it applies appropriately. Keeping the two stages distinct in decision making can also help explain why exactly a worker is excluded from application of the multi-factor tests in the second stage.

Second, the multi-factor test essentially examines whether the person performing the work or providing the service has a business of their own. This test is not relevant to the determination of employment status of most groups of pre-excluded workers. Most groups of pre-excluded workers would have passed the multi-factor test, but they are not protected under employment and labor laws because they fail the preliminary stage of the preconditions. Having such a wide range of preconditions to pre-exclude groups of workers from consideration under the multi-factor test therefore artificially restricts the scope of workers who could potentially gain protection of employment and labor laws. While the fundamental question at both stages is similar—i.e., what types of activities should be protected under employment and labor law—the preconditions consider factors quite distinct from employee/independent contractor issues. For example, volunteers are usually controlled by the organization at least to some extent (e.g., they must attend training, adhere to a code of conduct, and be available at certain times) and do not own tools or bear financial risks. Yet, they will often be excluded from protection because they fail to meet a precondition as their work is not remunerated. Another example is prisoners who are controlled by the prison or the outside private employer and do not own a business of their own. They will be excluded from coverage under the precondition that the purpose of their work is rehabilitative rather than economic. It is therefore imperative to be clear, in such cases, about what precondition the exclusion is based on, and to critically inquire whether this precondition is justified. We argue that in a narrow set of cases it is justified to exclude some activities at the preliminary stage even though they may pass the second stage (e.g. volunteering). At the same time, there are situations in which the person performing the work or providing the services passes the preliminary stage but will not pass the second stage. For example, a director may meet the preconditions but may be classified as an independent contractor under the multi-factor test. Each test serves a purpose in the analysis. The preconditions are important to screen out those involved in an activity which is not work. The multi-factor test is important to determine whether a person is an employee or not based on control/subordination and dependency which form the main justifications for employment and labor law coverage and protection. It is therefore important to maintain a distinction between the two stages.

Third, while the case law on the multi-factor test is well developed and is the focus of academic and public debate, judicial consideration and analysis of the preconditions is not well structured or well-reasoned. Additionally, or perhaps as a result of scant judicial consideration of the preconditions, the general operation of preconditions for employment status also receives little attention in academic literature. The case law tends to examine each excluded category of workers under a seemingly distinct set of preconditions. Courts are using a "two-step inquiry," or

[16] For a discussion of the human rights issues associated with the exclusion of prison labor from employment and labor law protection, *see* VIRGINIA MANTOUVALOU, STRUCTURAL INJUSTICE AND WORKERS' RIGHTS 135ff (2023); Colin Fenwick, *Private Use of Prisoners' Labor: Paradoxes of International Human Rights Law*, 27 HUM. RTS. Q. 249 (2005).

a "threshold-remuneration" test, in some contexts (e.g. volunteers) and an economic/market test in other contexts (e.g. prisoners). The literature is also often limited to critiquing each category alone, and rarely engages in a discussion of how the preconditions operate as a whole across different categories. But while variation exists, similar preconditions are in fact used in different contexts, for different types of pre-excluded workers. There are also interesting similarities across legal systems. Our aim in Part II is to bring them all together into one coherent and justifiable framework.

Surveying different legal systems and different groups of pre-excluded workers, we identify similarities in the function of each precondition and at the same time critically examine these preconditions through a normative lens. To evaluate whether the existing tests are justified, we employ a purposive approach as our theoretical framework. We ask how the preconditions should be devised in light of the purpose of employment and labor laws. There is a broad agreement in academia, and among many courts, that the legal term "employee" should be interpreted purposively, in light of the goals of employment and labor laws and in an attempt to fulfil these goals.[17] While the U.S. Supreme Court rejected a purposive approach to employment status determination in *Darden*,[18] various U.S. courts, including the more progressive courts such as the California Supreme Court,[19] adopted a purposive approach in the context of the FLSA.[20] Still, there is less agreement on what the goals of employment and labor laws are and whether the means – the laws – align with these goals. Clearly, employment and labor laws promote different and sometimes conflicting goals, and general as well as specific goals undergird legislation in this area. For the purpose of this Article, the most useful level of abstraction is that the purpose of employment and labor laws is to address inherent vulnerabilities associated with the unique characteristics of the employment relationship—subordination and dependency.[21] First, the employment relationship is characterized by democratic deficits, whereby the employee is controlled, even if indirectly, by the employer (subordination) and is often not free to make decisions about how, when, and where they perform their work. Second, the employment relationship is characterized by dependency. Employees depend on the employment relationship to fulfill their economic as well as their social and psychological needs and have minimal ability

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17 In the UK, *see Autoclenz*, [2011] UKSC 41 at para. 35; *Uber v. Aslam*, [2021] UKSC 5. In Canada, *see McCormick*, [2014] 2 SCR 108. In Australia, *see* Konrad v. Victoria Police, 165 ALR 23 (1999) (Federal Court of Australia). In Israel, *see* Sarusi v. National Labor Court, (1998) 52(4) PD 817. And *see* GUY DAVIDOV, A PURPOSIVE APPROACH TO LABOUR LAW 16-19, 115 (2016) for a review of some of the scholarship supporting this approach.

18 Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992). For a strong critique see Marc Linder, Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness, 21 COMP. LAB. L. & POL'Y J. 187 (1999).

19 *See, e.g.*, S. G. Borello & Sons, Inc. v. Department of Industrial Relations, 48 Cal.3d 341, 356-59 (1989), where the California Supreme Court adopted a variation of the common law control test in 1989. Although it similarly considers control to be the dominant factor, the approach of the Court was decidedly purposive, *id.* at 353-54. This version of the test implicitly gives at least some weight to economic dependency and considers different forms of control, including ones that are less direct, *id.* at 357.

20 *See* the case law on the "economic realities test", *supra* note 7.

21 See Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OJLS 353, 354 (1990). *See also* Davidov, *supra* note 9, and DAVIDOV, *supra* note 17, ch. 3 for a full exploration of these vulnerabilities. This work was cited with approval by the Supreme Court of Canada (*McCormick*, [2014] 2 SCR 108 at paras. 23, 25) and the UK Supreme Court (*Uber v. Aslam*, [2021] UKSC 5 at paras. 75, 87).

to mitigate risks to their employment, such as being laid off.[22] Both characteristics place workers in a position of vulnerability and risk of exploitation and therefore justify legal protection of the type provided by employment and labor laws.

Despite rapid and constant changes to the nature of work, the workplace, and the organization of work, driven by increased mobility of capital and global competition, technological advances, and new modes of production,[23] these fundamental characteristics of employment relationship remain the same. In fact, vulnerability has grown and workers are in greater need of protection than ever before. The process of fissuring and vertical disintegration has amplified the use of non-standard and precarious working arrangements and limited the efficacy of existing regulations against work violations.[24] Indeed, there are increasing calls to apply some basic workplace protections to all workers regardless of their employment status, since so many workers are being funneled into "non-employee" roles.[25] In recent years, in various jurisdictions, specific employment and labor laws have been extended to provide protection to non-employees. For example, independent contractors are often protected under occupational health and safety legislation,[26] and anti-discrimination laws have been extended to workers who are not employees, such as volunteers.[27] But the starting point is critical. If a worker is an employee, all employment and labor laws will apply to them (with the possibility of some exceptions), whereas if a worker is not an employee, the default is that all laws will not apply to them, unless the legislature explicitly decided to make an exception, which is rarely the case. It follows that when critically assessing or devising a test or a precondition for employment status, one should consider whether the test promotes the purpose of employment and labor laws as a whole, by identifying whether it addresses the vulnerabilities associated with the employment relationship. The next Part therefore considers three preconditions that we identify in the case law, which often result in the exclusion of many groups of workers. It then critically examines whether these preconditions are justified from a purposive perspective.

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22 *See also* DEAKIN AND MORRIS' LABOUR LAW, *supra* note 11, at 2.21; Simon Deakin, *The Changing Concept of the "Employer" in British Labour Law*, 30 INDUS. L.J. 72 (2001).

23 *See, e.g.*, OECD, OECD EMPLOYMENT OUTLOOK 2019: THE FUTURE OF WORK (2019), https://www.oecd-ilibrary.org/employment/oecd-employment-outlook-2019_9ee00155-en; WORLD BANK, WORLD DEVELOPMENT REPORT 2019: THE CHANGING NATURE OF WORK (2019), https://www.worldbank.org/en/publication/wdr2019.

24 *See, e.g.*, David Weil, The Fissured Workplace: Why Work Became So Bad for So Many and What Can be Done to Improve It (2014); C. Michael Mitchell & John C. Murray, The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report (2017), ch. 3-4.

25 See, e.g., Orly Lobel, We are all Gig Workers Now: Online Platforms, Freelancers and the Battles over Employment Status and Rights during the COVID-19 Pandemic, 57 SAN DIEGO L. REV. 919 (2020); Tanya Goldman & David Weil, Who's Responsible Here? Establishing Legal Responsibility in the Fissured Workplace, 42 BERKELEY J. EMP. & LAB. L. 55 (2021).

26 In Canada, *see, e.g.*, the Occupational Health and Safety Act, R.S.O. 1990, c. O.1 (Ontario) which applies to all "workers" and self-employed people.

27 In the UK, *see, e.g.*, Equality Act 2010, s 83(2) (extending protection to all contracts 'personally to do work'). For a review of additional protections extended beyond the employment relationship in the UK, *see* DEAKIN AND MORRIS' LABOUR LAW, *supra* note 11, at 2.18. In Canada, *see* Nixon v. Vancouver Rape Relief Society, 2002 BCHRT 1, reversed on other grounds 2005 BCCA 601, leave to appeal to SCC refused [2006] SCCA No 365; Rocha v. Pardons and Waivers of Canada, 2012 HRTO 2234 (extending human rights protection to volunteers).

II. THE THREE PRECONDITIONS FOR EMPLOYMENT STATUS

A. Introduction: The Economic/Market Dimension of Work

Courts often put strong emphasis on the economic dimension of work, which has led to the development of several tests (preconditions) when determining employment status. Reviewing the U.S. case law in the context of prison labor, Noah Zatz concludes that to determine whether employment relationship exists, courts examine whether the relationship is of economic nature. To answer this question, the case law employs two distinct and alternative approaches: (1) the "exclusive market" approach; and (2) the "productive work" approach.[28] The first approach, which is more common,[29] examines whether the relationship was exclusively for a market purpose. On this approach, economic and nonpecuniary purposes are mutually exclusive. Within the realm of incarcerated workers, for example, if there are nonmarket dimensions to the work, such as rehabilitative, educational, or penological, the relationship is not of an economic nature, and the prisoner is not an employee.[30] As Zatz explains, the penological nature of work performed by prisoners negates, in the eyes of judges, the "bargained-for exchange of labor for consideration" which is viewed as an essential employment element. U.S. courts thus identify economic relationships with contractual relationships, and view work performed by incarcerated people as incompatible with contractual relationships because: (1) there is no "free contract," as prison labor is involuntary; (2) there is no exchange between the parties, because prison labor is considered rehabilitative and educative; and (3) if there is an exchange, it is not "a form of discrete bargain."[31] The second approach, which is less common but adopted by some courts, examines whether the work performed economically benefits the employer.[32]

Other jurisdictions rely on similar tests, albeit with some difference in emphasis. The Court of Justice of the European Union (CJEU) considered in various cases the motivation for entering the relationship. Specifically, it considered whether the work was in pursuit of an economic activity. In the case of *Bettray*, the Court held that a former drug addict, who performed work under a social employment program for rehabilitation or reintegration purposes was not a "worker" for the purpose of the European Economic Community Treaty.[33] The

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28 Noah D. Zatz, Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships, 61 VAND. L. REV. 857, 882-84 (2008).

29 Specifically, it applies in the context of prison labor to classify inmate work as noneconomic, *id*. at 882. But the "exclusive market" approach applies in other contexts as well. For example, the National Labor Relations Board held that the work performed by individuals with severe disabilities was "primarily rehabilitative" and that work performed by graduate student teaching and research assistants "primarily educational", *id.* at 901.

30 For a review of the case law, *see id.* at 884-92. Similarly, in Canada the Federal Court of Appeal held that prisoners are not employees as the "true purpose" of the programs offered by the Correctional Service of Canada is rehabilitation and not employment. *See* Guérin v. Canada (Attorney General), 2019 FCA 272 (CanLII), https://canlii.ca/t/jfztz.

31 Zatz, *supra* note 28, at 885-89.

32 For a review of the case law, *see id.* at 892-97. As Zatz explains, the "exclusive market" approach is more common because it reflects a capitalist view that "the market economy is asocial" and since prison work has a social dimension (being rehabilitative) it is therefore noneconomic (*id*. at 863-64).

33 CJEU C-344/87 Bettray v. Staatssecretaris van Justitie, (1989) ECR 1621. *See also* Martin Risak, *The Position of Volunteers in EU Working Time Law*, 10 EUROPEAN LAB. L.J. 362, 366 (2019); MARTIN RISAK & THOMAS DULLINGER, THE CONCEPT OF 'WORKER' IN EU LAW: STATUS QUO AND POTENTIAL FOR CHANGE

requirement originated from the EU rules that guarantee freedom of movement only for persons pursuing or wishing to pursue an economic activity.[34] In the case of *Lawrie-Blum*, a worker was defined as any person who performs services *for* and under the direction of *another person*; in return for which they receive remuneration, and who is engaged in *effective and genuine activities*.[35] Subsequent case law put emphasis on the economic nature of the activity performed, excluding "small scale" and "purely marginal and ancillary" activities.[36] In the case of *Trojani*, the genuine economic activities requirement was understood as "forming part of the normal labour market."[37] Despite the focus on economic purpose, various activities were recognized in the case law as employment, including casual work, traineeship, and community-based activities. This made *Bettray* one of the few cases in which non-economic activity was not recognized as employment.[38] The same test – economic activities in exchange for some kind of remuneration – was also adopted in other contexts.[39] In the case of *Fenoll*, for example, the Court held that a person with severe disabilities admitted to a work rehabilitation center who engaged in various medical, social, and educational activities, was a worker entitled to paid annual leave. The Court came to this conclusion because he also carried out occupational activities, which formed "a normal part of the employment market" and benefited the center.[40]

As the review above reveals, courts often ask if the relationship is "economic" or if the work is performed on the "market." However, these concepts are contested and do not lead to clear answers, especially in hard cases, such as those where the relationship serves different functions across multiple dimensions. The courts' focus excludes relationships which are "non-economic" or "non-market" from the protection of employment and labor laws.[41] Yet, there is no clear division between economic/market and noneconomic/nonmarket spheres.[42] Indeed, many relationships are not one-dimensional or purely economic. Quite often, with regard to the pre-excluded workers, there is a mixture between economic and non-economic aspects. It is also

30ff (2018), https://www.etui.org/sites/default/files/18%20Concept%20of%20worker%20Risak%20Dullinger%20R140%20web%20version.pdf.

34 *See* Article 45 of the Treaty on Functioning of the European Union (TFEU).

35 CJEU C-66/85 Lawrie-Blum v. Land Baden-Württemberg, [1986] ECR 2121. *See also* Emanuele Menegatti, *Taking EU Labour Law beyond the Employment Contract: The Role Played by the European Court of Justice*, 11 EUROPEAN LAB. L.J. 26, 29 (2020).

36 Menegatti, *supra* note 35, at 29.

37 CJEU C-456/02 Trojani v. Centre public d'aide sociale de Bruxelles, ECLI: EU:C:2004:488 at para. 24. *See also* Adam Sagan, *The Classification as 'Worker' under EU Law*, 10 EUROPEAN LAB. L.J. 353, 355 (2019).

38 Menegatti, *supra* note 35, at 29-30.

39 For example, equal pay for men and women under Article 141 of the EC Treaty. *See* CJEU, C-256/01 Allonby v. Accrington & Rossendale College, ECLI:EU:C:2004:18. *See also* Menegatti, *supra* note 35, at 30.

40 CJEU C-316/13 Fenoll v. Centre d'aide par le travail "La Jouvene" and Association de parents et d'amis de personnes handcipées mentales (APEI) d'Avignon, ECLI:EU:C:2014:1753 at paras. 42 and 45. *See also* Menegatti, *supra* note 35, at 35.

41 In a similar vein, the feminist literature critiques the exclusion of domestic work performed almost exclusively by women (in their own homes) from any protection and coverage. *See, e.g.*, Sandra Fredman & Judy Fudge, *The Legal Construction of Personal Work Relations and Gender*, 7 JERUSALEM REV. LEG. STUD. 112 (2013); Judy Fudge, *Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction, and Jurisdiction*, 22 FEMINIST LEGAL STUDIES 1 (2014).

42 Zatz, *supra* note 28, at 904-05.

difficult to define what "economic" or "market" activity is. These terms are vague and might be too restrictive.[43]

Courts have therefore developed more specific tests to assist them in deciding whether there is an economic/market relationship. As demonstrated by the U.S. and the EU examples above, and will be further explored below, there are two main tests, each with some variations or sub-tests: the first asks whether the work creates a benefit to the employer; the second whether the relationship is contractual, or includes some elements of a contract. We discuss each of them in turn and propose a variation that we argue is normatively justified based on the purpose of employment and labor laws. We then add a third precondition concerning the personal performance of the work, which is implicit in existing case law, and also, in our view, justified.

B. Precondition 1: Working for the Benefit of the Employer

To examine whether there is an economic/market relationship, courts sometimes ask whether the employer benefited from the work. In some situations, a person performs work under the direction of someone else without creating any benefit to the alleged employer. Imagine, for example a person with severe disabilities participating in a rehabilitation program in some factory, where the person needs constant help and direction and as a result does not technically produce significant economic value. Without significant economic benefits to the alleged employer, there is no justification to impose on the latter a duty to pay a minimum wage or the many other duties of employment and labor laws (with some possible specific exceptions).[44] Another example is when the owner of the business is the person performing the work or providing the services. The work is not provided for the benefit of another person and is therefore excluded from employment and labor law protection.[45]

However, more often the work benefits both parties. Some courts apply a test of "primary beneficiary," which asks whether the worker or the employer benefits the most from the activity. In the U.S., this test applies largely in the context of unpaid interns and trainees and has gained popularity.[46] Note, however, that this test was preceded by a different and more inclusive one. The previous approach emerged from a 1947 U.S. Supreme Court decision holding that the petitioners, who received a practical training course for 7-8 days before they could be offered full time positions as yard brakemen with a railroad company, were not employees for the purpose of FLSA because the company received "no immediate advantage" from the work done during their training period.[47] While the trainees were permitted to gradually do work under close scrutiny, their work did not displace regular employees or expedite business operations. Rather, the work sometimes impeded the business.[48] Following this decision, the U.S. Department of Labor (DOL) issued a recommendation setting out a test which assumes as a default that a trainee or an

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43 *Id.* at 904-07.

44 Exceptions may include working time, workplace health and safety, and human rights regulations.

45 As we will see in Part III, this has often resulted in the exclusion of shareholders, partners and corporate directors from coverage even though they sometimes do not possess controlling ownership.

46 *See, e.g.*, James J. Brudney, *Square Pegs and Round Holes: Shrinking Protections for Unpaid Interns under the Fair Labor Standards Act*, *in* INTERNSHIPS, EMPLOYABILITY AND THE SEARCH FOR DECENT WORK EXPERIENCE 163 (Andrew Stewart et al eds., 2021).

47 Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947).

48 *Id.* at 149-50.

intern is an "employee" under the FLSA, unless all of the following criteria are met: (1) the training, even though it includes actual operation of the facilities of the employer, is similar to training that 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 close supervision; (4) the employer that provides the training receives no immediate advantage from the activities of the trainees or students and, on occasion, its operations may even 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 or students are not entitled to wages for the time spent in training.[49]

While the application of this test yielded varying results, many trainees and interns were considered employees because this stringent test required all six conditions to be satisfied to exclude a person from the FLSA.[50] In recent years, however, some appellate courts rejected the DOL's recommendation as inappropriate for modern internships that are required as part of academic degree programs or professional certification and licensure programs. In its place, the courts adopted a more relaxed test, which examines who is the "primary beneficiary" of the relationship – the employer or the trainee/intern.[51] While some factors are similar to those under the previous conjunctive test, the primary beneficiary test explicitly refers to academic and educational programs and shifts analysis to a list of non-determinative factors. Importantly, the new test removes the critical requirement that the employer derives "no immediate advantage" from the work of the trainee/intern. The leading case expressing this approach was *Glatt v. Fox Searchlight Pictures, Inc.* in 2015, in which unpaid interns who worked for a production company in two movies alleged they should be deemed employees under the *FLSA.* The Second Circuit Court held that the proper question was whether the interns or the employer were the primary beneficiaries of the relationship.[52] The Court held that this test focuses on what the intern receives in exchange for their work, allows flexibility to examine the "economic reality" between the parties, and points attention to the intern's expectation of educational or vocational benefits.[53] To determine the primary beneficiary, a non-exhaustive list of seven non-dispositive factors must be weighed and balanced: (1) the extent to which the intern and the employer clearly understand that there is no expectation of compensation; (2) the extent to which the internship provides training that would be similar to that which would be given in an educational environment; (3) the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit; (4) the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar; (5) the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning; (6) the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the interns; and (7) the extent to which the intern and the employer

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49 On how the test has been applied by the Department of Labor to both trainees and interns *see* Brudney, *supra* note 46, at 168-71 and David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 NE. U. L. REV. 357, 361-62 (2016).

50 See Michael Pardoe, Glatt v. Fox Searchlight Pictures, Inc.: Moving towards a More Flexible Approach to the Classification of Unpaid Interns under the Fair Labor Standards Act, 75 MARYLAND L. REV. 1159 (2016); Yamada, supra note 49.

51 *See* case law cited in Brudney, *supra* note 46, at 173.

52 811 F.3d 528, 536 (2d Cir. 2015). The Court remanded for further proceedings before the district court.

53 *Id.*

understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[54] Following this development, the DOL replaced the conjunctive six-element test with the "primary beneficiary" test in 2018 to determine whether interns at for-profit employers are employees under the FLSA.[55] The DOL further noted that the FLSA exempts volunteers who perform services in public agencies and non-profit organizations, and that "unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible".[56] Thus, the "primary beneficiary" test has led to the exclusion of many trainees and interns.[57]

A similar test asking what the "primary purpose" of the relationship is has been used for other pre-excluded groups of workers. As noted above, it has been applied in the U.S. in the context of incarcerated people (as part of the exclusive market approach), and also in the context of persons with disabilities and students working as teaching and research assistants.[58] Julia Tomassetti found that graduate student research assistants and teaching assistants, medical school graduates in residency programs, and persons with disabilities working while enrolled in rehabilitation programs were all excluded from the National Labor Relations Act (NLRA) because a Republican-controlled Board did not view the relationships as "primarily economic."[59] A similar test is also applied in the UK in the context of apprentices, trainees, and interns.[60] For example, Lord Denning held in *Wiltshire Police Authority v. Wynn* that "[i]f the primary purpose was work for the master – and teaching the trade was only a secondary purpose – it was a contract of service. But if teaching the trade was the primary purpose – and work for the master was only secondary – then it was a contract of apprenticeship."[61] The "primary purpose" test can also be found in Canadian and EU law in different contexts.[62]

In contrast, some courts apply the alternative test of "productive work" which appears to focus on the existence of *some* benefit to the employer. This approach can be found in a smaller number of U.S. cases involving work by incarcerated people, where courts examine whether the employer benefited economically from the work in question. This test usually leads to classifying incarcerated workers as employees because the employer benefits from the sale of goods and services produced by them and can avoid hiring other workers, who undoubtedly would require higher wages or protections.[63] It can also be found in the UK case law on apprenticeship. For example, in the case of *Rinaldi-Tranter* the Employment Appeal Tribunal had to determine

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54 *Id.* at 536-37.

55 *See* U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FIELD ASSISTANCE BULLETIN NO 2018-2 (January 5, 2018), https://www.dol.gov/agencies/whd/field-assistance-bulletins/2018-2.

56 U.S. DEP'T OF LABOR, WAGE AND HOUR DIVISION, FIELD ASSISTANCE BULLETIN NO 2018-2, *supra* note 55, at note 1.

57 *See infra* note 70.

58 Zatz, *supra* note 28, at 901.

59 Julia Tomassetti, Who is a Worker: Partisanship, the National Labor Relations Board, and the Social Content of Employment, 37 LAW & SOCIAL INQUIRY 815 (2012).

60 *See, e.g.*, Amir Paz-Fuchs, *Trainees – The New Army of Cheap Labour: Lessons from Workfare*, *in* INTERNSHIPS, EMPLOYABILITY AND THE SEARCH FOR DECENT WORK EXPERIENCE 255, 262-63 (Andrew Stewart et al eds., 2021) on the primary or dominant purpose test which distinguishes between a contract of employment and a contract for training.

61 Wiltshire Police Authority v. Wynn, [1980] ICR 649 at 656.

62 *See supra* notes 30 & 33.

63 Zatz, *supra* note 28, at 883, 892-97.

whether a trainee hairdresser was entitled to payment of the national minimum wage. The Tribunal explained that "the question [of entitlement] is whether work was performed for the business."[64] The hairdresser observed the staff and learned from the observations but also performed tasks such as sweeping, washing hair, and making coffee, which saved the more experienced staff some time.[65] The Tribunal therefore held that she was a worker entitled to minimum wage.[66]

We argue that the primary beneficiary (or the primary purpose) test raises several difficulties. First, it is possible that the parties would have different purposes for their arrangement. In fact, each party can have more than one purpose, and each purpose can be equally important.[67] It is also quite plausible that, despite conferring benefits to the worker, the employer would still gain benefits from the work performed.[68] That is, even when the relationship benefits the worker, it may also benefit the employer and be characterized by vulnerabilities flowing from democratic deficits and dependency. For example, in the case of an internship, the long-term goal of an intern is to gain experience, get trained, or obtain a license to practice. This could even be the primary purpose of the internship. But why should this justify the exclusion from employment rights and protections if the employer also benefits from the arrangement? Even if some workers agree to work for free or low pay to get exposure, it is not justifiable to allow employers to take advantage of workers' vulnerability. Lower productivity as compared to full-time employees may justify a reduced minimum wage but not a complete denial of any employment and labor laws protection.

Similarly, when the work provides benefits to the worker alongside broader social purposes, such as rehabilitation or education, it might be justified to consider some special arrangements (such as government subsidies) to incentivize employers to hire trainees or apprentices or persons with severe disabilities.[69] However, there is no justification to deny the workers of all rights by excluding them from employment status. The purpose of employment and labor laws is to protect employees who are vulnerable in the relationship with their employers. In the case of trainees and apprentices, workers with disabilities, and interns, this vulnerability is particularly significant and the need for protection increases. Indeed, despite its popularity, the primary beneficiary (or the primary purpose) test has been widely criticized for making it substantially easier for employers to expand the practice of unpaid internships and exploit workers.[70] As David Yamada argues, "[b]y simply pasting 'intern' on what otherwise

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64 Her Majesty's Commissioners for Revenue & Customs v. Rinaldi-Tranter, [2007] UKEAT 0486/06, at para. 18.

65 *Id.* at para. 16.

66 *Id.* at para. 18.

67 In the context of the NLRA application to graduate students and the primary purpose test, see Sara Witt, The Status of Graduate Students and that of medical Residents under the National Labor Relations Act as a Starting Point for Crafting a Statutory Definition of "Employee", 59 CASE W. RES. L. REV. 1221, 1232 (2009).

68 *See* Paz-Fuchs, *supra* note 60, at 258-61, who argues that empirically it is incorrect to assume that internships mainly benefit the interns, where in fact the benefits to interns are often questionable and the benefits to employers are significant.

69 As for example in the UK. *See* DEAKIN AND MORRIS' LABOUR LAW, *supra* note 11, at 2.23.

70 *See, e.g.*, Brudney, *supra* note 46, at 164, 174-79; Zatz, *supra* note 28, at 913; Charlotte Garden & Joseph E. Slater, *Comments on Restatement of Employment Law (Third), Chapter 1*, 21 EMPLOYEE RIGHTS AND EMPL.

might be considered a part-time, summer, or post-graduate entry-level job, an employer now can take its chances and make the position unpaid, claiming that the training, experience, and networking opportunities provided to the intern exceed the benefits provided to the employer by the intern's labor. The intern, in turn, is left in the unenviable position of either accepting what are likely to be unilaterally imposed terms or challenging the unpaid status and this jeopardizing her future career."[71] While some workers who have the financial means and other resources to support themselves may truly agree to an arrangement (such as unpaid internship), these arrangements create a downward labor market pressure and negatively affect other more vulnerable workers, by allowing the displacement of paid employment.[72] It is therefore justifiable from a purposive perspective to provide coverage and protection of employment and labor laws for these types of arrangements.

Second, from a purposive perspective, the stated intentions of the parties when they entered the relationship (which reflect their purposes) should not be accorded significant weight. What matters is the substance – whether the actual relationship is such that one party requires protection under employment and labor laws, and the other party should bear responsibility to act in accordance with those laws.[73] Third, the burden of proving which purpose was the primary one or who benefited primarily is too heavy. Take for example a situation in which a worker is employed for nine hours a day; for five hours they are under close supervision and instruction, and for the other four hours they work independently. Theoretically, the primary part of the day is spent under training. However, it would be plainly unfair to conclude that no employment relationship exists even when they were working independently.[74] Furthermore, it would be difficult for parties to predict at the outset who would benefit more from the arrangement, as the primary beneficiary test relies (among others factors) on how independent the worker becomes with some training.[75]

The focus of the precondition should therefore be on whether the employer benefits from the work, regardless of whether the worker benefits too. This should be sufficient, from a purposive point of view, to place employer responsibility on that party. That is, we propose that the precondition should be satisfied when work is performed for the benefit of the employer, regardless of whether there is also a personal benefit for the worker. This proposal is similar to the less popular test of "productive work" described above. It is also more in line with the Restatement of Employment Law, which lists several "conditions for existence of employment relationship,"[76] including that "an individual renders services as an employee of an employer if: (1) the individual acts, *at least in part, to serve the interests of the employer*."[77] However, we

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POL'Y J. 265, 286-88 (2017); Note, *Second Circuit Crafts 'Primary Beneficiary' Test for Unpaid Interns*, 129 HARV. L. REV. 1136, 1140 (2016).

71 Yamada, *supra* note 49, at 372. *See also* David C. Yamada, *Mass Exploitation Hidden in Plain Sight: Unpaid Internships and the Culture of Uncompensated Work*, 52 IDAHO L. REV. 937 (2016).

72 *See, e.g.*, Brudney, *supra* note 46, at 185-87.

73 The primacy of facts or the primacy of reality is an important principle in many legal systems when it comes to determining the nature of the relationship. *See, e.g.*, *Autoclenz*, [2011] UKSC 41 at para. 3; GAMONAL & ROSADO MARZÁN, *supra* note 10, ch. 3.

74 *See also* Paz-Fuchs, *supra* note 60, at 264-65 on how difficult it is to determine whether the parties benefited from the arrangement and who benefited more.

75 *See* Yamada, *supra* note 49, at 373.

76 *See* Restatement of Emp't Law § 1.01 (Am. L. Inst. 2015).

77 *Id.* § 1.01(a)(1) [emphasis added].

also propose that a narrow exception should be allowed in situations where there are multiple purposes and the benefit to the employer is *negligible*. This exception resembles the "no immediate advantage" requirement which was part of the older conjunctive test concerning trainees and interns. When the benefit to the employer is so negligible that it is hard to consider the activity as work of any kind, compared to the activity's other purposes such as rehabilitation or training, it is justified to exclude the worker from the scope of employment and labor laws. In such cases, the purpose of employment and labor laws becomes insignificant and negligible compared to the purpose of rehabilitation or training, thus weakening the need and justification for the protection as "employee."[78]

Zatz also supports an approach which examines whether the work performed benefited the employer,[79] but he argues that the "productive work" test is also problematic, because there are forms of work that provide benefits to others but should not be considered employment. He gives the example of unpaid volunteer work.[80] We agree that this is true when employing the "productive work" test exclusively, but this problem is solved once the two additional preconditions proposed below are also included.

C. Precondition 2: Remuneration and Other Contractual Elements

1. Voluntariness, Exchange, and Bargain

As explained above, courts often ask whether the relationship is "economic" or if the work is performed on the "market." As Zatz observes, this has led courts to identify economic relationships with contractual relationships.[81] Courts often expect the employment relationship to meet three aspects of contracts: voluntariness (the parties voluntarily enter into the contract); exchange of labor for compensation; and bargain (negotiation of contractual terms including level of compensation).[82] This expectation may lead to the exclusion of various groups, such as incarcerated people who do not voluntarily enter such relationships, holders of public office who are not directly "hired" but are appointed, and volunteers who do not receive compensation.

We should therefore inquire whether it is justified to view these three contractual aspects as necessary preconditions for employee status. First, let us consider the voluntariness that is expected from both the employee and the employer. From the employer perspective, it is

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78 A similar exception is offered in the Employment Standards Manual in Ontario, Canada in the specific context of individuals with disabilities who perform work in rehabilitation centers. While the Ontario Employment Standards Act (ESA) excludes them if "the primary purpose" of the arrangement is their rehabilitation, the Manual suggests that this exclusion will apply only when the economic productivity of their work is "minor and merely incidental". *See* EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL (January 11, 2022) at Part III, Other Exceptions – Section 3(5), https://www.ontario.ca/document/employment-standard-act-policy-and-interpretation-manual.

79 Zatz, *supra* note 28, at 952-53.

80 *Id.* at 919.

81 *Id.* at 885.

82 *Id.* at 885-89. *See also Henthorn*, 29 F.3d at 686: "a prerequisite to finding that an inmate has 'employee' status under the FLSA is that the prisoner has freely contracted with a non-prison employer to sell his labor". On the voluntariness requirement, *see also* Colin Fenwick, *Regulating Prisoners' Labour in Australia: A Preliminary View*, 16 AUSTL. J. LAB. L. 284, 302-05 (2003).

unjustified to recognize an employment relationship when a person works for the benefit of an employer who did request their work. A person cannot become someone else's employee on their own decision. In this rare scenario, an employment relationship did not exist even though the work was for the benefit of another person, because there was no mutual intention to create binding legal relations, and therefore, this work should not be remunerated. Indeed, according to the U.S. Restatement of Employment Law, "an individual renders services as an employee of an employer if … the employer consents to receive the individual's services."[83] However, if the relationship is imposed upon the employer by the force of the law, this should not negate employment status simply because the law determined how these workers will be elected or appointed by competent entities.[84] As Mark Freedland and Nicola Kountouris argue, intention to create a legally binding relationship in the context of employment is more relaxed, allowing for "more complex series of alternative intentions than does the general law of intention to create legal relations."[85] In a scenario of forced labor where the components of voluntariness, exchange, or bargain cannot be completed, it is unjustified to allow employers to escape employer liability just because they violated the worker's rights by forcing them to work. The person who provided the work may have done so because they were compelled to do so, but they should not be punished twice. They should be protected from a purposive point of view, as their relationship with the employer is characterized by vulnerabilities which employment and labor laws aim to address.[86].

Second, the requirement of bargain is problematic for several reasons. It is based on the false assumption that there is a clear dichotomy between traditional market exchanges and purely non-market ones.[87] From a purposive perspective, it is hard to see why the lack of bargaining over wages justifies exclusion from the entire corpus of employment and labor laws. Many employees do not have the ability to impact the terms of the exchange (i.e. to bargain). They must accept the terms imposed on them by the employer. They are often presented with a standard form agreement provided by the employer which is not subject to negotiation.[88] Those who do not have the ability to bargain, even informally, are usually the most vulnerable workers in the market. It is unreasonable to negate their employment status for lack of bargain.

We therefore propose to view the requirements of exchange and bargain together, in the narrow sense of a basic requirement for consideration, which can be provided in forms other than those which hold monetary value. In practice, this means that there is no requirement for

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83 Restatement of Emp't Law § 1.01(a)(2) (Am. L. Inst. 2015).

84 Mark Freedland & Nicola Kountouris, The Legal Construction Of Personal Work Relations 136 (2011).

85 *Id*. *See also* Fenwick, *supra* note 82, at 286, who considers the "re-orientation of labour law away from the traditional construction of the subject … around the contract of employment".

86 The problem of forced labor should be addressed – prevented and punished – but this is a separate matter. Our point is that voluntary entrance into the relationship should not be considered a precondition for employee status as far as the employee's voluntary choice is concerned. When a victim of forced labor sues for employment rights, they should not be rejected.

87 Zatz, *supra* note 28, at 904-07.

88 *See* Hugh Collins, *Legal Responses to the Standard Form Contract of Employment*, 36 INDUS. L.J. 2 (2007). *See also* Fenwick, *supra* note 82, who highlights the paradoxes of the legal regulation of work. On the one hand, regulation is justified to protect employees who are presumed to have limited bargaining power, and on the other hand, employment relationship is based on a contract which presumes the parties freely negotiated its terms. Furthermore, while employees with limited bargaining power are provided with legal protections, prisoners who have no bargaining powers are not.

remuneration in exchange for the work. Indeed, the case law in some contexts, such as the distinction between an employee and a volunteer, includes a "threshold-remuneration test."[89] This test, which was adopted by a majority of federal circuit courts, involves a "two-step inquiry"[90] whereby the court first examines whether the individual received compensation ("a salary or wages, or indirect benefits that are not merely incidental")[91] and, only if they did, the court moves to apply the multi-factor test of employee status.[92] For example, "volunteer" firefighters were recognized as employees for the purpose of Title VII when they received significant benefits (including pension and life insurance),[93] and were not recognized as employees when the benefits received were "purely incidental" to the volunteer service.[94]

Other legal systems similarly require that the work is remunerated to be considered employment. This requirement is sometimes explicitly stated in the legislation. For example, in Ontario, Canada, the Employment Standards Act (ESA) defines an employee as including "(a) a person … who performs work … *for wages*, (2) a person who supplies services … *for wages*."[95] In the UK, the National Minimum Wage Act excludes "unremunerated voluntary workers."[96] In other cases, however, the requirement flows from the case law. In the EU, remuneration is considered an essential element in worker classification cases before the CJEU.[97] As discussed above, in the case of *Lawrie-Blum*, a worker was defined as any person who performs services for and under the direction of another person, in return for which they *receive remuneration*, and who is engaged in effective and genuine activities.[98] Yet the requirement is applied quite flexibly under EU law.[99] For example, the CJEU has ruled that earning substantially less than the

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89 See Juino, 717 F.3d at 435. See also Joe Uhlman, The Roof is on Fire: Dangers to the Volunteer Emergency Services after Mendel v. City of Gibraltar, 66 U. KAN. L. REV. 819, 832 (2018).

90 A minority of circuit courts uses a multi-factor test to distinguish between employees and volunteers. However, this multi-factor test should not be used at the preliminary stage of preconditions but only once the worker met the preconditions. As the Second Circuit Court explains in O'Connor v. Davis, 126 F.3d 112, 115-16 (2d Cir. 1997), cert denied, 552 U.S. 1114 (1998): "the common feature shared by both the employee and the independent contractor is that they are 'hired part[ies]' …, and thus, a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual have been hired in the first instance. … the preliminary question of remuneration is dispositive".

91 *See also* United States v. City of New York, 359 F.3d 83, 92 (2d Cir. 2004): "remuneration need not to be a salary … but must consist of 'substantial benefits not merely incidental to the activity performed'".

92 *See Juino*, 717 F.3d at 435 and other case law cited in Uhlman, *supra* note 89, at 832-33.

93 *See, e.g.*, Pietras v. Board of Fire Commissioners, 180 F.3d 468 (2d Cir. 1999). *See also* RESTATEMENT OF EMP'T LAW § 1.02, Reporters' Notes cmt. e (AM. L. INST. 2015).

94 *See, e.g.*, *Juino*, 717 F.3d 431. *See also* RESTATEMENT OF EMP'T LAW § 1.02, Reporters' Notes cmt. e (AM. L. INST. 2015).

95 Section 1 [emphasis added].

96 Edmonds v. Lawson, [2000] 2 WLR 1091, [2000] IRLR 391, [2000] QB 501, [2000] EWCA Civ 69, [2000] ICR 567 at para. 7. *See* Section 44 of the National minimum Wage Act 1998: "A worker employed by a charity, a voluntary organization, an associated fund-raising body or a statutory body does not qualify for the national minimum wage in respect of that employment if he receives, and under the terms of his employment … is entitled to no monetary payments … except in respect of expenses actually incurred in the performance of his duties … and no benefits in kind of any description….".

97 Risak, *supra* note 33, at 367.

98 *Lawrie-Blum*, [1986] ECR 2121.

99 *See, e.g.*, CJEU C-518/15 Ville de Nivelles v. Matzak [2018] ECLI:EU:C:2018:82, where the CJEU held that a person, who was a volunteer firefighter under national law (Belgium), may be classified as a "worker" for the purpose of the Working Time Directive if they pursued real, genuine activities under the direction of another person for which they received remuneration.

minimum wage was irrelevant, that remuneration could consist of in-kind benefits, and that remuneration can come from subsidies as long as they amount to consideration for the services performed.[100]

While we agree that a basic requirement for consideration (e.g. a form of remuneration in exchange for the work which benefited the employer) is justified, a requirement of *actual* remuneration is problematic because it rewards employers who exploit workers. The right question is not whether wages were paid in practice or not. Rather, it is whether the work *should* be remunerated. Otherwise, the employer who contravened the minimum wage law will unjustifiably escape liability. We therefore propose that a second precondition for employment status be that the work *should* be remunerated (regardless of whether wages are paid in practice or have been promised or not). Since this requirement is rather vague, a legal presumption and a sub-test will be considered in the next two sections.

To summarize this section, while courts have often required voluntariness, exchange, and bargain as conditions for the existence of an employment relationship, there is no justification for doing so where the goal is protecting workers from vulnerability (i.e. the purpose of employment and labor laws). At the same time, a more limited variation of these preconditions can be justified from a normative perspective. Importantly, voluntariness should be a precondition of employment only to a very limited extent; a person cannot work on their own initiative, without the agreement of the beneficiary, and expect to become an employee. As for the requirements of exchange and bargain, they can be justified only in the sense of requiring that the work *should be* remunerated.

2. Presumption of Remuneration and Lack of Intention to Create a Legally Binding Relationship

The precondition discussed above begs the question: which work is the kind of work that should be remunerated? In response to this concern, we propose a legal presumption that work for the benefit of the employer (i.e. meeting the first precondition) should be remunerated in exchange for that benefit, unless proven otherwise. Recall that all three preconditions have to be met. The question then becomes whether there is a reason why work for the benefit of another person should *not* be remunerated in certain circumstances. One reason could be that the parties did not intend to create a legally binding relationship between them. For example, as discussed above, this can happen when the work was imposed on the employer without their explicit or implied consent. Another example is when a person helps a family member or a friend, they perform work for the benefit of another person, but this is usually not an employment relationship because there was no intention to create legally enforceable relations (assuming there are no signs to the contrary). Therefore, such work should not be remunerated. Indeed, while intention to create a legally binding relationship is not an essential requirement for the formation of a contract under U.S. law,[101] there are some situations – such as "social engagements and agreements with a family group" – in which the "normal understanding is that

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100 *See* review of case law in Risak, *supra* note 33, at 367-68. *See also* RISAK & DULLINGER, *supra* note 33, at 37ff.

101 Restatement (Second) of Contracts § 21 (Am. L. Inst. 1981).

no legal obligation arises, and some unusual manifestation of intention is necessary to create a contract".[102]

By contrast, intention to create legal relations is a requirement under UK and Canadian law.[103] But the result in most cases is very similar to the U.S. because courts in the UK and Canada presume that the parties to a commercial agreement intended to create binding legal relationship unless rebutted by evidence.[104] Further, they presume that the parties did *not* intend to create binding legal relationship when the interaction is with family or friends unless rebutted by evidence.[105] In practice this means that most commercial agreements will be enforceable without the need to prove intention.[106] But it is not always clear whether an agreement is commercial or not, and some jurisdictions require intention to create a legally binding relationship when assessing the existence of employment contracts. In the UK, for example, this requirement has often led to the exclusion of apprentices and trainees, holders of certain public or private offices, and volunteer workers.[107] In the context of volunteers, UK case law uses the test of mutuality of obligations to examine the extent to which the volunteer was obliged to perform the work, as a variation of intention to create binding legal relations.[108] In the context of officeholders, UK case law often held that these positions were not contractual, especially when payment is received by virtue of holding an office and when the officeholder is appointed to a position.[109] Similarly, ministers of religion were excluded through case law for absence of intention to create a contract of employment. This requirement was later adopted by the legislation.[110] However, the scope of employment laws in the UK is sometimes extended beyond the contract of employment.[111]

Officeholders, such as judges, are people who perform work for someone else; namely, the state. Their work is, of course, remunerated. Their work will generally be considered employment if one examines their relationship based on the multi-factor test. To some extent, they are all controlled by their employer and do not operate as an independent business. From a purposive perspective, they exhibit vulnerabilities which employment and labor laws aim to address. The element of a legally binding relationship should therefore be understood narrowly; it should not be used to exclude officeholders and other such groups.

3. When the Work is not Remunerated and the Sub-Test of Motivation

In many employment situations, the work should be remunerated simply because this is what the parties agreed to – either explicitly or implicitly. What happens when a person performing work did not receive remuneration and it is argued that they agreed to this arrangement? Here we propose a sub-test, which examines the motivation of the worker. We ask:

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102 *Id.* § 21, cmt. c.
103 *See, e.g.*, Baird Textile Holdings Ltd v. Marks & Spencer plc, [2001] EWCA Civ 274 at para. 59.
104 *See* Edwards v. Skyways Ltd., [1964] 1 WLR 349 (CA).
105 *See* Balfour v. Balfour, [1919] 2 KB 571 (CA).
106 Gregory Klass, *Intent to Contract*, 95 VIRGINIA L. REV. 1437, 1459-60 (2009).
107 FREEDLAND & KOUNTOURIS, *supra* note 84, at 137.
108 *Id.* at 145.
109 *Id.* at 141.
110 *Id.* at 143.
111 *Id.* at 145.

why would a person agree to dedicate their time and skills for the benefit of another without getting paid? If a person performs work as a volunteer for altruistic or personal interest reasons, perhaps because it is their hobby, there are good reasons to exclude this work from the scope of most employment and labor laws. By contrast, if the motivation is professional development, that is to gain experience, learn new things and hone existing skills, the relationship is characterized by vulnerabilities associated with employment. It is important to clarify that the focus on the worker's motivation, which in this instance would be to work for free, is not the same as giving weight to the subjective intention of the parties regarding the choice of status. The parties cannot contract out of employment status even if they intend to do so.[112]

To conclude the discussion of the second precondition, current case law requires several contractual elements, such as voluntariness, exchange, and bargain, which we argued are mostly unjustified. Instead, we propose as a second precondition for employment that the work *should* be remunerated (regardless of whether wages are paid in practice or have been promised or not) and that if the work benefits the employer, the work should be remunerated unless proven otherwise. There are three cases where the work benefits the employer but should not be remunerated. First, when the work was imposed on the employer without their explicit or implied consent. Second, when the parties did not intend to create a legally binding relationship. Third, when the work is performed for free or insignificant compensation, and the motivation for performing work is altruism or personal, non-professional interest. This is not a closed list but will probably cover most cases which justify denial of employee status at the preliminary stage.

D. Precondition 3: Substantially Performing Work Personally

This section discusses a third and final precondition, that the work is substantially performed personally. While this precondition might be less relevant to most groups of pre-excluded workers mentioned so far, it is nonetheless a required condition for employment status. Courts usually require that work be performed personally as part of the multi-factor test to distinguish between employees and independent contractors. For example, one of the factors examined under the U.S. common law control test as well as the economic realities test is whether the worker can hire helpers.[113] If one can subcontract their work, it indicates a level of independence which works against classification as an employee. This consideration is also reflected in the ILO recommendation on how to distinguish between an employee and an independent contractor.[114] Considering these "personal relations" as part of the multi-factor test means that it is merely one factor among many other non-determinative factors. Yet the personal relations condition is, as a matter of practice, a *necessary* condition. It is a central component of the employment relationship. Indeed, the U.S. Restatement of Employment Law defines an

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112 See Guy Davidov, Non-Waivability in Labour Law, 40 OXFORD J. LEGAL STUD. 482 (2020); Alison Braley-Rattai, A Volunteer by Any Other Name: Navigating the Contours of the 'True Volunteer' in Canadian Employment Law, 23 CANADIAN LAB. & EMP. L.J. 247, 267, 286 (2021).

113 *Community for Creative Non-Violence*, 490 U.S. at 751-52 (as part of the common law control test: "the hired party's role in hiring and paying assistants") and Real v. Driscoll Strawberry Associates Inc, 603 F.2d 748, 754 (9th Cir. 1979) (as part of the economic realities test: "the alleged employee's … employment of helpers"). Similarly in Canada, *see Sagaz*, 2001 SCC 59 at para. 47, where the multi-factor test asks "whether the worker hires his or her own helpers".

114 ILO Employment Relationship Recommendation, 2006 (no. 198), section 13.

employee by reference to an "individual," implying a requirement for personal relations.[115] In the UK, the legislation makes it clear that personal performance of work is a precondition of employment.[116] The view of employment as necessarily a personal relationship between an employer and an employee seems justified, given that employment law is grounded in the idea that labor is not a commodity[117] and that employees engage in human activity.[118] Indeed, most employment laws aim to protect or promote human dignity, health and well-being, which are relevant for humans.[119] Unlike other commercial activities, the employee is selling their labor, which is part of who they are. Even if some employment protections are also relevant to small businesses and should be extended to relationships which are not personal (e.g., independent contractor), most employment and labor laws are based on a personal employee-employer relationship.[120] We therefore propose that personal relations be included in the preliminary stage as a third and final precondition for employment status.

However, this precondition should apply with three caveats. First, personal performance of work is not a *sufficient* condition to be recognized as an employee. Often independent contractors are required to personally perform work. It is one of three preconditions. If all three are met, then the multi-factor test will be considered. But one cannot be an employee without this precondition. Second, this precondition is met when a *substantial* amount of the work is performed personally. That is, hiring helpers or finding a replacement in some exceptional circumstances does not mean that the precondition was not satisfied.[121] Sometimes the worker has no other choice but to hire a helper to protect their job. For example, when they are sick or need to attend to an emergency, and the employer expects them (for some reason) to take responsibility for finding a replacement. Some workers show loyalty and commitment to their employer and will hire a replacement to ensure smooth operations while they are absent; this should not prevent them from being protected as employees. As long as the use of helpers or replacements is the exception and the worker generally performs the work themselves, there is no justification to negate the existence of an employment relationship. Moreover, even when the worker hires helpers on a regular basis, if they work alongside the other worker, the precondition of personal relations is met because the worker performs the work themselves. Then, we move to the multi-factor test. Here it could be that hiring helpers suggests that the worker has a business

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115 Restatement of Emp't Law § 1.01 (Am. L. Inst. 2015).

116 This is made explicitly for "workers" (an intermediary group in the UK) and implicitly for employees. *See* UK Employment Rights Act 1996, section 230(3), which defines a worker as an individual who "undertakes to do or perform personally any work or services for another party" (among other requirements).

117 "Labour is not a commodity" is a fundamental principle which the International Labour Organization is based on and appears in the Declaration of Philadelphia, Art I(a). It has been endorsed in many court decisions and scholarly works.

118 JOHN W. BUDD, EMPLOYMENT WITH A HUMAN FACE: BALANCING EFFICIENCY, EQUITY, AND VOICE (2005). Budd argues that employment is not merely an economic activity but rather a human activity which requires equity and voice.

119 *See, e.g.*, Guy Davidov, *A Purposive Interpretation of the National Minimum Wage Act*, 72 MODERN L. REV. 581 (2009). As noted by the Supreme Court of Canada in Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313 at para. 91: "Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support, and as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect".

120 *See* FREEDLAND & KOUNTOURIS, *supra* note 84, at 369ff; DAVIDOV, *supra* note 17, at 124-26.

121 *See, e.g.*, Ready-Mixed Concrete (South East) Ltd v. Minister of Pensions, [1968] 2 QB 497 (QB).

of their own with ability to manage risks and enjoy profits. But at the preliminary stage, the precondition is satisfied when work is performed personally.

Third, the precondition must be examined based on the *actual* evidence of the relationship. If the worker can hire helpers in theory but in practice rarely does so, this precondition is satisfied.[122] For example, if the written contract allows a worker to hire others to do the work (a substitution clause) but doing so is realistically not feasible, then the precondition is met. Otherwise, employers may exploit the classification by adding a substitution clause into employment agreements even in circumstances when the parties understand that there is no practical possibility to hire replacements. In the UK, courts used to accord considerable weight to substitution clauses, which was widely criticized in the literature.[123] In recent years the case law has evolved and circumstances in which substitution clauses are used to exclude employment and labor law protections have narrowed.[124] To conclude, the third precondition asks whether the work was in practice performed substantially or predominantly by the worker in question.[125] Alternatively, it can ask whether the element of personal relations is a dominant feature in the actual relationship.[126]

III. APPLICATION

A. Introduction

In Part II, we advocated a narrow set of preconditions for employment status: (1) performing work or providing services that benefit an employer (regardless of whether there is also a personal benefit for the worker) unless such benefit is negligible; (2) the work should be remunerated (regardless of whether wages are paid in practice or have been promised or not); and (3) the work is substantially performed by the worker personally. We will now turn to apply our proposed preconditions to the various groups of pre-excluded workers. For each of these groups, we briefly describe the current laws in different jurisdictions and then demonstrate how our own proposal helps to draw the line between coverage and exclusion.

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122 *See, e.g.*, Slayman v. FedEx Ground Package System, Inc., 765 F.3d 1033 (9th Cir. 2014) (drivers were employees; while they were allowed to hire helpers to do their work, this ability was limited and controlled by FedEx).

123 A.C.L. Davies, *Sensible Thinking About Sham Transactions*, 38 INDUS. L.J. 318 (2009).

124 Pimlico Plumbers Ltd v. Smith, [2018] UKSC 29. And *see* Michael Ford, *Pimlico Plumbers: Cutting the Gordian Knot of Substitution Clauses?*, UK LABOUR LAW BLOG (July 19, 2018), https://wordpress.com/view/uklabourlawblog.com; Alan L. Bogg & Michael D. Ford, *The Death of Contract in Employment Status*, 137 LAW QUARTERLY REV. 392 (2021). But see most recently Independent Workers Union of Great Britain v. CAC, [2023] UKSC 43, in which Deliveroo riders were excluded from employment protections because of a substitution clause, raising new doubts about the UK Supreme Court's approach.

125 FREEDLAND & KOUNTOURIS, *supra* note 84, at 375-76.

126 This is the test adopted by the UK Supreme Court in *Pimlico Plumbers*, [2018] UKSC 29 at para. 32. Although the UK Supreme Court reiterated this approach in Independent Workers Union of Great Britain v. CAC, [2023] UKSC 43, at para. 53, as well as the importance of looking at the reality of the relationship rather than the written terms of the contract (at par. 56), in our view it failed to apply these principles correctly. The Court ignored the fact that substitution was in practice very rare (as acknowledged at para. 27) and concluded that Deliveroo riders were not entitled to labor rights because of a substitution right (at para. 69-70).

B. Trainees and Apprentices

Trainees and apprentices are also sometimes referred to as interns. Here, we focus on situations in which trainees and apprentices are required to complete training to obtain a degree, a certificate, or a license, or are generally learning a specific trade directly from a tradesperson, as opposed to more "general" interns who wish to gain work experience. The latter group will be discussed together with volunteers below.

In the U.S., the FLSA allows the exemption of trainees and apprentices from some provisions.[127] In addition, as we have seen, different tests which examine whether the work benefits the employer were developed by the DOL and the courts. The shift from a conjunctive test according to which six elements must be met to exclude trainees and apprentices from coverage to the more relaxed "primary beneficiary" test resulted in more cases of exclusion of trainees and apprentices from coverage.[128]

Some countries regulate the status of trainees and apprentices in the legislation. In those countries, trainees and apprentices are sometimes considered employees for all purposes, and are sometimes regulated under a separate status and enjoy some of the rights of employees.[129] In Ontario (Canada), for example, there is specific legislation for apprentices,[130] but generally trainees and apprentices are considered employees. The ESA defines an employee as including "a person who receives training from a person who is an employer, if the skill in which the person is being trained is a skill used by the employer's employees."[131] This means that trainees and apprentices performing work while participating in on-the-job training are employees.[132] In contrast, the ESA excludes from coverage secondary school students performing work under a work experience program authorized by the school board and students who perform work under a program approved by a college or a university.[133] The ESA previously excluded trainees who

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127 According to § 213(7) and § 214(a) of the FLSA, employment of learners and apprentices can be exempted from the minimum wage and hours of work provisions, in whole or in part.

128 *See supra* text accompanying note 70.

129 For a review of various forms of regulation in different countries, *see* Andrew Stewart et al, *The Regulation of Internships: A Comparative Study*, ILO EMPLOYMENT WORKING PAPER NO. 240 (2018), https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_635740.pdf; INTERNSHIPS, EMPLOYABILITY AND THE SEARCH FOR DECENT WORK EXPERIENCE (Andrew Stewart et al eds., 2021). *See also* INTERNATIONAL LABOUR OFFICE, A FRAMEWORK FOR QUALITY APPRENTICESHIPS: REPORT IV(1) (2019), para. 3.6, https://www.ilo.org/ilc/ILCSessions/110/reports/reports-to-the-conference/WCMS_731155/lang--en/index.htm. Based on this report, the ILO adopted in 2023 a recommendation to protect the rights at work of apprentices, but the recommendation did not include a reference to their status as employees. *See* ILO, Quality Apprenticeships Recommendation, 2023 (No. 208), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:4347381.

130 Apprenticeship and Certification Act, 1998, S.O. 1998, c. 22; Trades Qualifications and Apprenticeship Act, R.S.O. 1990, c. T.17.

131 Section 1(1).

132 EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee).

133 Section 3(5)1-2.1. By contrast, under the federal legislation an intern is not considered an employee but will be entitled to most protection. The Canada Labour Code distinguishes between an "intern" and a "student intern". While both are not considered employees, an intern is a person whose primary purpose for being in the workplace is to gain knowledge or experience and does not have to be as part of a formal educational

met a conjunctive list of six conditions.[134] This statutory provision codified a decision by the Ontario Labour Relations Board in a trainee case,[135] where the Board followed the test set out in the 1947 U.S. Supreme Court case *Walling v. Portland Terminal Co.* discussed above.[136] However, this provision was repealed in 2017[137] because it was difficult to enforce and was misused by employers who labelled employees as interns to evade liability under the ESA.[138]

In other countries, the legislation does not fully address the issue, and the courts engage in determining the status of trainees and apprentices.[139] In the UK, while the minimum wage legislation does apply to apprentices,[140] questions regarding whether the person is an "apprentice" and whether they engage in a "contract of employment" remain open. It seems that courts, at least in some cases, analyze the benefits of the activities to the parties. For example, in

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program. A student intern performs work to fulfil the requirement of a program offered by educational institutes. An intern is fully protected under Part III of the Canada Labour Code, entitled to minimum employment standards including minimum wage (s. 164). By contrast, not all labor standards in Part III apply to student interns. For example, they may be unpaid and because are not compensated for overtime pay, cannot exceed the standard hours of work. *See* GOVERNMENT OF CANADA, FEDERAL LABOUR STANDARDS FOR INTERNS AND STUDENT INTERNS, https://www.canada.ca/en/services/jobs/workplace/federal-labour-standards/interns.html.

134 Section 1(2) of the ESA (repealed). For case law applying the six conditions, *see, e.g.*, Girex Bancorp Inc. v. Lynette Hsieh, 2004 CANLII 24679 (ON LBR), https://www.canlii.org/en/on/onlrb/doc/2004/2004canlii24679/2004canlii24679.pdf.

135 Hakimi v. Canadian Aesthetic Academy Inc, (2002) CANLII 27778 (ON LRB).

136 *See supra* text accompanying note 47.

137 Fair Workplaces, Better Jobs Act, 2017 S.O. 2017, c. 22.

138 THE CHANGING WORKPLACES REVIEW, *supra* note 24, at 274-75.

139 In the EU, the Council Recommendation of 10 March 2014 on a Quality Framework for Traineeships, which aims to improve trainees working conditions, does not address the issue of employee status (OJ C 88, 27.3.2014, p. 1-4, https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32014H0327(01)). Under this Recommendation, traineeships are understood as "a limited period of work practice, whether paid of not, which includes a learning and training component, undertaken in order to gain practical and professional experience with a view to improving employability and facilitating transition to regular employment". In European Youth Forum (YFJ) v. Belgium, the European Committee of Social Rights held that Article 7§5 of the Revised European Social Charter (Council of Europe, European Social Charter (Revised), 3 May 1996, EST 163), which recognizes the right of "apprentices" to a fair wage, did not apply to trainees or interns because apprenticeship is understood as a more "systematic, structured, long-term training" (European Youth Forum (YFJ) v. Belgium, Compliant No. 150/2017 (8 September 2021), https://hudoc.esc.coe.int/fre/?i=cc-150-2017-dmerits-en, at paras. 69-70). The Committee further held that trainees did not fall within the scope of Article 4§1 of the Charter, which recognizes the right of "workers" to a remuneration because the primary purpose of traineeship schemes is "to acquire professional experience and to improve practical skills of the young person", *id*. at para. 122. By contrast, the Committee found that interns engaging in "bogus internships" where "they perform 'real and genuine work' … should be considered as 'workers' for the purposes of the Charter", *id*. at para. 124. Note, however, that the CJEU did recognize trainees as "workers" in a number of cases where the individual met the Lawrie-Blum definition of a worker – a person who performs services for and under the direction of another person in return for which they receive remuneration and who is engaged in effective and genuine activities. *See supra* note 38. *See also* Annika Rosin, *Precariousness of Trainees Working in the Framework of a Traineeship Agreement*, 32 IJCLLIR 131, 156 (2016); Andrew Stewart & Rosemary Owens, *Work at the Intersection of Employment, Education, Training and Volunteering*, *in* OXFORD HANDBOOK OF THE LAW OF WORK (Guy Davidov, Brian Langille & Gillian Lester eds., forthcoming 2024).

140 National Minimum Wage Act 1998, sections 54(1) and 54(2) (an employee means "an individual who has entered into or works under … a contract of employment" which means "a contract of service or apprenticeship").

the case of *Edmonds v. Lawson*,[141] the England and Wales Court of Appeal held that a pupil barrister who received no pay was not an apprentice and hence not entitled to minimum wage. Despite acknowledging that the "pupil master will often benefit from the pupil's work,"[142] the Court held that the 12-month pupillage relationship was characterized by "the lack of expectation that the [pupil barristers] will render services of value."[143] When there are benefits to both parties, courts engage in a primary purpose analysis like that of U.S. courts.[144]

Applying our proposed set of preconditions, how would the issue be determined? The precondition of performing work or providing services that benefit an employer is determinative in such cases. Such relationships may entail benefits for the trainee or the apprentice and benefits for the employer. Normally, the trainee/apprentice benefits from the employer's guidance and supervision, but performs many tasks independently which benefit the employer too. Usually when the trainee/apprentice starts, they learn the work and start to gain working experience and their contribution to the employer is limited. However, their contribution does increase over time. It is therefore appropriate to examine the contribution to the employer holistically based on the entire period of training or apprenticeship and not distinguish between various stages or phases. Reviewing the entire period of training or apprenticeship, the more significant the contribution to the employer is, the more apparent it is that an employment relationship exists. Only when the contribution to the employer is negligible should the trainee/apprentice not be considered an employee.

According to this approach, it is likely that trainees and apprentices will be excluded from employment and labor laws only when the training is done as part of a formal educational program because these programs tend to focus on student learning. Making such limited exclusions explicit in legislation is preferable in order to increase determinacy.[145] But this exception should not be too broad. According to the U.S. Restatement of Employment Law, "students who render uncompensated services to satisfy education or training requirements for graduation or for admission into a particular profession of craft generally are not employees."[146] While completing a training program for graduation purposes may have negligible benefits to the employer, other training programs, like law articling (in countries requiring that) or medical residencies, often entail intensive labor for the benefit of the employer. There is no justification for excluding the latter type of workers from protection.

Even if the exclusion will be limited to situations where the benefit to the employer is negligible, there is a risk that employers will exploit this leniency by relying on the fact that most trainees will not sue for re-classification or protection. To address this concern, we propose a presumption that the work performed by apprentices or trainees, with the exception of formal

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141 *Supra* note 96.

142 *Id*. at para. 24.

143 *Id.* at para. 34. For critique of this case, *see* FREEDLAND & KOUNTOURIS, *supra* note 84, at 137-38; DAVIDOV, *supra* note 17, at 200-01.

144 *See* discussion of *Wiltshire Police Authority*, [1980] ICR 649, in Part II.

145 In Canada, *see* ESA, *supra* note 133. In the UK, *see* Regulations 53-54 of the National Minimum Wage Regulations 2015. For other examples, *see* Rosemary Owens & Andrew Stewart, *Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern*, 155 INTERNATIONAL LABOUR REVIEW 679, 691-93 (2016).

146 Restatement of Emp't Law § 1.02 cmt. g (Am. L. Inst. 2015).

educational programs, is for the benefit of the employer. The employer should bear the onus of rebutting this presumption.

To conclude, trainees and apprentices generally pass the first precondition. While they benefit from guidance and supervision, they also perform many tasks independently which benefit the employer. This is the test that is most relevant for them. The other preconditions are not in dispute in such cases, but we mention them briefly for completeness. Trainees and apprentices pass the second precondition because work which benefits the employer should be remunerated. Even if the trainee or apprentice was not paid, they should be, because their motivation was not altruistic or related to a personal interest. They perform the work because of their interest in professional development. They also pass the third precondition because they personally perform the activity. Given that trainees are under the control of the business and normally would not have any characteristics of an independent business, they are also likely to pass the multi-factor test and be considered employees.

C. Pre-Employment Training or Selection Courses

Next, consider situations of pre-employment training courses. This is similar to *Walling v. Portland Terminal Co.*, where the Supreme Court held that a practical training course for about a week prior to an offer of a full-time position was not considered employment for the purpose of FLSA. The Court reasoned that because the hiring company received "no immediate advantage" from the work done during the training, the trainees were not employees during that time.[147] While the employer's opportunity to assess the pool of candidates for employment is a benefit, the Court did not see it as such.[148]

Here again, the main issue is with the first precondition. Since this is the pre-employment stage, it is relevant to consider: (1) whether the parties intended to enter an employment relationship and the training is a preliminary stage of this arrangement; and (2) whether the training is general, similar to training provided in an educational institution, or specific, similar to on-the-job training provided by employers. The first precondition is met if the course aims to train the worker to perform a specific designated job as part of a preliminary stage to employment, and the worker must complete the training before beginning work. This is true even if the employer decides not to hire the applicant at the end of the course. This is because the applicant was at the employer's disposal, following their orders, and investing time for the benefit of the employer. While employers enjoy the managerial prerogative to determine whether training will be provided more gradually (e.g., on-the-job training) or more intensively prior to the start of work, this decision should not impact the applicants' rights as employees. We therefore disagree with the Court's approach in *Walling*, which looked at the pre-employment training days in isolation. By contrast, if the training is not job-specific and will benefit the applicant wherever they go – not only with this particular employer – and the benefit to the applicant is significant, for example, it grants certification or diploma upon completion – then it is a mix between benefit to the worker and benefit to the employer. Assuming the employer pays for the course, the benefit to the employer would probably be considered negligible.

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147 *Supra* note 47.

148 *Id.* at 152.

What if the purpose of the course is to select the best candidates? Or if the purpose is training but also selection when it is clear that a large segment of applicants will not be hired? These are sometimes referred to as "working interviews." The federal Department of Labor clarified that "working interviews" during which job applicants perform work are considered employment,[149] but the case law is rare and unclear.[150] In Canada, the Ontario Employment Standards Act Manual states that job candidates who go through a pre-employment selection course are not considered employees, provided that the program is "reasonably limited in duration".[151] From a purposive standpoint, if the selection process is short, then this could be an exception to an employment relationship. Reasonable time for a selection process, which requires applicants to be free and available, should be a maximum of a day or two in our view. Any longer should be considered employment. At that point, it would become similar to on-the-job training or a "probationary period" which are both considered employment.[152]

D. Workers with Disabilities

The question whether a worker provides benefit to an employer which is not insignificant or negligible is also important in the context of workers with severe disabilities. In principle, employees with disabilities are employees for all purposes. The law prohibits employers from discriminating against them and imposes accessibility and accommodation obligations upon employers.[153] However, there are workers whose severe disabilities may substantially undermine their work productivity. The law therefore allows for some exemptions. For example, the FLSA permits employers under special certificates to hire people whose "productive capacity is impaired" by their physical or mental disability for a wage lower than minimum wage.[154] These

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149 *See* U.S. DEP'T OF LABOR, NEWS RELEASE (December 14, 2018), https://www.dol.gov/newsroom/releases/whd/whd20181214.

150 *See, e.g.*, Acosta v. Smiley Dental Associates Inc., 2018 U.S. Dist. LEXIS 224987 (M.D. Tenn., September 27, 2018), where a dental clinic required job candidates to perform "working interviews" as part of their application and was ordered to pay for this work. Note however that since the clinic engaged in a variety of violations, the injunction order did not specify whether the pay order included the working interview time. *Cf.* Nance v. May Trucking Company, No. 14-35640 (9th Cir. 2017), where the Ninth Circuit held that a trucking company did not have to pay drivers who participated in an application process – mandatory three-day orientation program including driving and skills tests. Because the purpose of the program was to ascertain the drivers training and abilities and not all drivers were hired, the Court found that the drivers were not employees under the FLSA. The difference between the cases may be explained by reference to the question of whether the work benefited the employer. While the dental clinic presumably charged patients for the work, the trucking company did not. *See* Robert W. Small, *What Employers Need to Keep in Mind During Working Interviews*, REGER, RIZZO & DARNALL LLP, https://www.regerlaw.com/what-employers-need-to-keep-in-mind-during-working-interviews.html. In any case, as we argue below, even a three-day orientation/selection program should qualify as employment.

151 EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee).

152 A related problem which we do not discuss here is that some employers refuse to pay for training for existing employees. The FLSA exempts current employees' training only if it meets four conditions: attendance is outside of regular working hours; attendance is voluntary; the training is not directly related to the job, and does not involve the performance of any productive work. *See* Code of Federal Regulations, 29 C.F.R. §§ 785.27-785.32.

153 Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. § 12101 et seq.

154 According to § 214(c)(1) of the FLSA: "The Secretary to the extent necessary to prevent curtailment of opportunities for employment, shall by regulation or order provide for the employment, under special certificates, of individuals … whose earning or productive capacity is impaired by age, physical or mental deficiency, or injury, at wages which are lower than the minimum wage …".

workers are still considered "employees" under the FLSA.[155] They are therefore entitled to other rights and protections under employment and labor law. However, workers with disabilities who are enrolled in vocational rehabilitation programs are sometimes excluded from protection when courts apply the primary purpose test. For example, the National Labor Relations Board and the courts examine on a case-by-case basis whether the relationship between the parties is "typically industrial" or "primarily rehabilitative" for the purpose of coverage under the NLRA.[156] In *Brevard*, the Board held that the janitorial work performed by persons with severe disabilities while enrolled in a special program with a non-profit organization was "primarily rehabilitative" rather than economic and thus not covered under the NLRA.[157] Applying the traditional common law control test, the dissent found that they met the definition of an employee as they worked alongside other workers, under the employer's direction and control, in exchange for an hourly wage equivalent to that of other workers, and were subject to the same production and quality standards.[158] Importantly, the dissent noted that "economic activity need not to be the sole, or even dominant, purpose of a cognizable employment relationship…All the [NLRA] requires is that there be *an* economic aspect of the relationship."[159] However, the primary purpose test seems to prevail albeit with varying outcomes. More recently, the Board held that janitors with disabilities, enrolled in Sinai Hospital of Baltimore's vocational services program, were employees because the program failed to demonstrate that the relationship was primarily rehabilitative. This decision (including the primary purpose test) was upheld by the Fourth Circuit.[160]

Similarly in Ontario, Canada, the ESA excludes individuals who perform work "in a simulated job or working environment if the *primary purpose* in placing the individual in the job or environment is his or her rehabilitation."[161] A non-exhaustive list of factors is considered in

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155 For example, § 214(c)(5) of the FLSA states that "any employee receiving a special minimum wage at a rate specified pursuant to this subsection …. may petition the Secretary to obtain a review of such special minimum wage rate".

156 *See* Brevard Achievement Center, Inc., 342 NLRB 982, 983-84 (2004); Goodwill Industries of Denver, 304 NLRB 764, 765 (1991); Goodwill Industries of Tidewater, 304 NLRB 767 (1991); Arkansas Lighthouse for the Blind v. NLRB, 851 F2d 180 (8th Cir. 1988). *See also* Zatz, *supra* note 28, at 901; Tomassetti, *supra* note 59.

157 *Brevard*, 342 NLRB 982 at 986-87. The Board considers a non-exhaustive list of factors including: "the existence of employer-provided counseling, training, or rehabilitative services; the existence of any production standards; the existence and nature of disciplinary procedures; the applicable terms and conditions of employment (particularly in comparison to those of nondisabled individuals employed at the same facility); and the average tenure of employment, including the existence/absence of a job-placement program", *id.* at 983-84.

158 *Id.* at 990-91.

159 *Id.* at 991.

160 Sinai Hospital of Baltimore, Inc. v. NLRB, 33 F.4th 715 (4th Cir. 2022). The workers with disabilities worked alongside others during eight-hour shifts and were subject to the same terms and conditions, productivity standards and discipline.

161 Section 3(5)6 [emphasis added]. This exclusion codified the decision in Re Kaszuba and Salvation Army Sheltered Workshop et al, 1983 CANLII 1795 (ON SC), which referred to the "substance of the relationship" as being "one of rehabilitation", where the mischief the ESA was designed to prevent is not relevant. *See* EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part III (Other Exceptions – Section 3(5)). This exclusion was scheduled to be repealed in 2019 by a bill passed by the previous Liberal government (Fair Workplaces, Better Jobs Act, *supra* note 137). However, since the Progressive Conservative government was elected in 2017, the day in which this will come into effect has been delayed (Making Ontario Open for Business Act, 2018).

the case law to determine the primary purpose of the activity, including the method and the amount of payment, the profitability of the work, and the hours of work performed.[162] Importantly, while this non-exhaustive list may result in the exclusion of many workers from coverage, the Employment Standards Manual notes that this statutory exclusion will apply only when the economic productivity is a "minor and merely incidental aspect of an individual's participation in the work performed at a sheltered workshop."[163] As explained in Part II, we propose a similar exception to the first precondition which will apply broadly to all pre-excluded groups of workers, not just persons with disabilities.

Applying our proposed first precondition, the question for the courts should be whether the employer benefited from the arrangement. Indeed, the arrangement may have multiple purposes, including rehabilitative or therapeutic purposes for the benefit of the worker, and economic purposes for the benefit of the employer. Workers with severe disabilities who work in rehabilitation centers should pass the first precondition if their work benefits the employer (regardless of whether the worker benefits) and as long as the benefit to the employer is not negligible.[164] The other preconditions apply as well. Therefore we propose a more inclusive and simpler test compared with current U.S. law. Such a test better captures the people who should be covered by employment and labor laws based on their general purpose. At the same time, it is of course possible to exclude people in vocational rehabilitation programs from some specific employment standards if their unique characteristics so justify.

E. Prisoners

As we have seen, another situation in which activities may have mixed purposes – rehabilitative and economic – is prison labor. Often prisoners perform work both inside (e.g., maintenance, cooking and cleaning, but also industry work) and outside the prison. Such work is often for private employers. Should prisoners be considered employees in those situations?

In the U.S., while the *FLSA* does not exclude prisoners, the case law does.[165] As Zatz explains, until the 1980s courts have held that an employment relationship does not exist between prisoners and private entities due to limited control exercised by the private entity over the prisoners.[166] However, the case of *Carter v. Dutchess Community College*, where the Second Circuit held in 1984 that a prisoner was an employee of a community college because both the college and the prison exercised control over him, marked a turning point.[167] In *Watson v.*

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162 EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part III (Other Exceptions – Section 3(5)).

163 *Id*. The Manual is "the primary reference source of the policies of the Director of Employment Standards respecting the interpretation, administration an enforcement" of the ESA, but the Ministry of Labour "makes no warranty, express or implied, about the currency, accuracy or completeness of the Manual", *id*.

164 This is in line with the EU case of *Fenoll*, discussed in *supra* note 40.

165 Prisoners are sometimes excluded from the coverage of employment and labor laws through legislation. In Ontario, Canada, for example, an inmate who "participates inside or outside the institution, penitentiary, place or facility in a work project or rehabilitation program" is excluded from the ESA, section 3(5)4. In the UK, section 45 of the National Minimum Wage Act excludes prisoners. *See also* MANTOUVALOU, *supra* note 16, at 53-54 for a review of the case law on the exclusion of prisoners from the coverage of other employment statutes.

166 Zatz, *supra* note 28, at 872-73.

167 Carter v. Dutchess Community College, 735 F.2d 8, 14 (2d Cir. 1984); Zatz, *supra* note 28, at 873.

Graves, the Fifth Circuit held that an employment relationship existed between prisoners on a work release program and a construction company, because the company exerted significant control over the prisoners.[168] But then courts started to determine employment status by engaging in an analysis beyond control.[169] In *Vanskike v. Peters*, a case involving a prisoner performing work as a janitor, kitchen worker, and knit shop piece-line worker, the Seventh Circuit held that while "prisoners are not categorically excluded from the FLSA's coverage simply because they are prisoners,"[170] the purpose of the work was rehabilitative or penological rather than pecuniary, and the relationship between the parties did "not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but rather from incarceration itself."[171] Focusing on the existence of an economic relationship, courts in cases under the FLSA, as well as other employment statutes,[172] mostly turn to the exclusive market test and classify prison work as not primarily economic.[173] In a smaller number of cases, courts apply the "productive work" test and classify prison work as employment, holding mainly in cases involving work for private businesses outside of prison that the employer economically benefited from the prisoner's work.[174]

Resembling the exclusive market approach, the Canadian Federal Court of Appeal ruled recently that prisoners who perform "correctional industries" work in agriculture, manufacturing, services, textiles, and construction, operated by a special operating agency of the Correctional Service of Canada,[175] are not employees because the purpose of the work is rehabilitation and reintegration.[176] This was despite numerous reports about issues related to race and gender discrimination, lack of training, low pay (roughly 5-7 dollars a day), and health and safety

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168 Watson v. Graves, 909 F.2d 1549, 1554-55 (5th Cir. 1990).

169 Zatz, *supra* note 28, at 875. For example, the D.C. Circuit in *Henthorn*, 29 F.3d at 686 stated that "the traditional factors of the 'economic reality' test 'fail to capture the true nature of [most prison employment] relationship[s] for essentially they presuppose a free labor situation".

170 Vanskike v. Peters, 974 F.2d 806, 808 (7th Cir. 1992).

171 *Id.* at 809. *See also Henthorn*, 29 F.3d at 686: "in cases … in which the prisoner is legally compelled to part with his labor as part of a penological work assignment and is paid by the prison authorities themselves, the prisoner may not state a claim under the FLSA, for he is truly an involuntary servant to whom no compensation is actually owed".

172 See, e.g., Jackson Taylor Kirklin, Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons, 111 COLUM. L. REV. 1048 (2011); Hannah C. Merrill, Working on the Other Side of the Fence: Relief of Incarcerated Individuals after Employment Discrimination, 28 WILLIAM & MARY JOURNAL OF RACE, GENDER, AND SOCIAL JUSTICE 199 (2021).

173 *See* Zatz, *supra* note 28, at 882. *See, e.g.*, Bennett v. Frank, 395 F.3d 409 (7th Cir. 2005), which drew a distinction between working inside a private or public prison (which serves goals incompatible with the FLSA) and working outside for private companies under work-release programs. *See also* RESTATEMENT OF EMP'T LAW § 1.02, Reporters' Notes cmt. c (AM. L. INST. 2015). But *see Henthorn*, 29 F.3d at 685-86, which recognizes the difficulty in these distinctions: "should a prisoner working for a private employer who sets up shop within the prison compound not be paid minimum wage because he does not leave the prison grounds to do his work, while a prisoner performing the same work for the same employer but in a facility outside the prison should receive FLSA protection? …Neither the inside/outside nor the public/private distinction alone provides an adequate answer to which prisoner work situations should be covered by the FLSA."

174 Zatz, *supra* note 28, at 892-97.

175 GOVERNMENT OF CANADA, CORRECTIONAL SERVICE CANADA, HISTORY AND OVERVIEW OF CORCAN, https://www.csc-scc.gc.ca/002/005/002005-0001-en.shtml.

176 *Guérin*, 2019 FCA 272 at paras. 67-69.

violations.[177] The Court held that "[i]nmates in Canadian penitentiaries have long received remuneration for their work,"[178] but this is not pay for work performed but rather an incentive intended to encourage them to participate in programs that facilitate their reintegration into the community.[179] It added that prisoners who refuse to participate also get compensation, though less, and that the level of pay "is based on criteria different from those underlying salary normally paid."[180]

While it might be argued that the main purpose of the prisoner's activity is rehabilitative and that they benefit from improving their employability, such work does have value for the employer, be that the correctional facility or the outside private entity. The correctional facility and the outside private entity benefit from the sale of goods and services produced by prisoners and the correctional facility also benefits from using their labor as substitute for subcontractors to perform various services including food preparation, cleaning and maintenance.[181] If we apply our proposed first precondition, then prisoners should pass this stage because clearly the benefit to the employer is not negligible. Regarding the second precondition, arguments about their involuntary entry into work are irrelevant from a purposive point of view. As we explained in the previous part, forced labor should not be a reason to exclude workers from the protection of employment and labor law as well. At the same time, there could be justification to exclude prisoners from some specific employment and labor laws when the purpose of the law does not align with their unique circumstances (for example, wrongful dismissal laws).

F. Business Owners: Partners and Shareholders

The first precondition of work performed for the benefit of the employer also raises issues in situations where a worker owns the business they work in. This happens when a person is a sole proprietor, a partner, or a shareholder and works in their business.

The U.S. test focuses on ownership and control: "[a]n individual is not an employee of an enterprise if the individual through an ownership interest controls all or a part of the enterprise."[182] The U.S. Supreme Court held that the common law element of control is the "principal guidepost to be followed" when deciding whether partners, officers, board members, and major shareholders are considered employees.[183] The case involved four director-shareholder

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177 JORDAN HOUSE AND ASAF RASHID, SOLIDARITY BEYOND BARS: UNIONIZING PRISON LABOUR (2022); Jordan House, *Working Prisoners are entitled to Employment and Safety Standards just like anybody else*, THE CONVERSATION (November 24, 2022).

178 *Guérin*, 2019 FCA 272 at para. 3.

179 *Id.* at para. 69. The Court held that the question of whether employment relationship existed should have been submitted first to the administrative decision makers but continued to rule that it did not, *id.* at para. 59.

180 *Id.* at para. 69.

181 Zatz, *supra* note 28, at 895. As a Toronto-based lawyer argues, both types of work in and outside of prison benefit the institutions and the Government of Canada. Importantly, the sales of goods and services generate millions of dollars annually. See Justin Ling, *Prison Labour*, CBA NATIONAL (September 16, 2019), https://nationalmagazine.ca/en-ca/articles/law/in-depth/2019/all-work-and-low-pay.

182 Restatement of Emp't Law § 1.03 (Am. L. Inst. 2015).

183 Clackamas Gastroenterology Associates, PC v. Wells, 538 U.S. 440, 448 (2003). While this case focused on whether four shareholder physicians in a limited liability corporation were employees counted towards the 15-employee minimum threshold for the application of the ADA, the Court noted that this test should apply whenever the statutory definition of an employee was unhelpful, *id*. at 444. It reversed the decision of the

physicians who performed services on a daily basis in a medical clinic. The Court adopted the Equal Employment Opportunity Commission guidance, which lists six factors to examine "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control."[184] Importantly, the EEOC's guidance states that "[i]n most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees".[185] Stephanie Greene and Christine O'Brien argue that this language suggests a presumption that principals are employers.[186] Critiquing the focus on the control factor, the dissent stressed that employment relationships are not inherently inconsistent with ownership, and that the claimants should have been recognized as employees because they performed various employee functions based on the factors included in the common law control test.[187] Lower courts applied the shorter list of six factors in various scenarios, with sole proprietors, partners, and shareholders not being recognized as employees when they substantially controlled the firm's operations.[188]

According to the U.S. Restatement of Employment Law, to be exempted, the individual "must control the significant economic and operational decisions of all or part of an enterprise" and "such control must be based on a significant ownership interest in the enterprise".[189] In a partnership, each partner that exercises control similarly to that of a sole proprietor will be excluded from coverage and protection of employment and labor law.[190] Similarly, each owner of a limited liability company that has control over significant decisions will also be excluded.[191] While generally the officers of the corporation will be considered employees, they will be excluded when they own "all or a controlling block of voting shares in a corporation."[192] In contrast, when owners hold distinctly fewer shares than others and lack control over their work and compensation, they will be considered employees of the partnership or corporation.[193] As the Court noted, "[t]oday there are partnerships that include hundreds of members, some of whom

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Court of Appeal that concluded that the shareholder physicians were employees and remanded for reconsideration, *id.* at 451.

184 *Id.* at 449. The six non-exhaustive factors are: "whether the organization can hire or fire the individual or set the rules and regulations of the individual's work; whether and, if so, to what extent the organization supervises the individual's work; whether the individual reports to someone higher in the organization; whether and, if so, to what extent the individual is able to influence the organization; whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; whether the individual shares in the profits, losses, and liabilities of the organization", *id.* at 449-50.

185 U.S. Equal Employment Opportunity Commission, Compliance Manual (2000), Section 2: Threshold Issues, 2-III(A)d, https://www.eeoc.gov/laws/guidance/section-2-threshold-issues.

186 Stephanie Greene & Christine Neylon O'Brien, Who Counts? The United States Supreme Court Cites "Control" as the Key to Distinguishing Employers from Employees under Federal Employment Antidiscrimination Laws, 2003 COLUM. BUS. L. REV. 761, 787 (2003).

187 *Clackamas*, 538 U.S. at 451-52.

188 RESTATEMENT OF EMP'T LAW § 1.03, Reporters' Notes cmt. b (AM. L. INST. 2015).

189 *Id.* § 1.03 cmt. a.

190 *Id*. § 1.03 cmt. b.

191 *Id*.

192 *Id*.

193 *Id.* § 1.03, illus. 2. The U.S. Restatement explains that in a large partnership (e.g., accounting firm of more than 100 partners), where the management committee is elected annually by all of the partners, the partners are employees because "[a]lthough they all have a level of control over their work, this control is not based on their ownership interest in the firm". By contrast, partners in a law firm who control a share of the partnership and make decisions for the partnership are not employees because each is a co-owner and retains control over their work, *id*. § 1.03, illus. 3-4.

may well qualify as 'employees' because control is concentrated in a small number of managing partners".[194]

By contrast, in the UK and Canada, partners have long been excluded under common law because courts reason that a person cannot be their own employee.[195] However, shareholders may be recognized as employees; even "a major shareholder with a controlling interest in the company" may be recognized as an employee[196] if they assume an employee position (e.g., an officer) and "function in dual capacities"[197] and as long as the employment arrangement is not a sham.[198] In the UK, a 2013 law exempted workers from some employment and labor laws (in particular, unfair dismissal protection and redundancy pay) if they work for a company and hold shares valued at a minimum of £2000.[199] This bill was rightfully criticized, as the threshold seems very low and does not say anything about control of the business.[200] But importantly, despite being exempted from some protections, the employee status of such shareholders was not denied under this law.

While we support the U.S. test of ownership, it is important to differentiate between the concept of control used to distinguish between employees and independent contractors, and the concept of controlling ownership, which can help assess whether the precondition of work that benefits an employer was met as part of the preliminary stage. Collapsing the two can be confusing and might lead to problematic outcomes. As Greene and O'Brien argue, the decision in *Clackamas* suggests that the existence of some element of control is sufficient to exclude individuals from coverage and protection.[201] Rosenthal similarly observes that although the *Clackamas* test "evaluates many factors, it focuses mostly on the amount of control the 'employer' exerts over the 'employee.'"[202] In Canada, similarly, the case law uses the multi-factor test to examine an issue that should be determined at the preliminary stage of the preconditions. In a recent case, concerning the Fasken law firm in British Columbia, an equity partner was forced to retire at the age of 65 and launched an age discrimination claim against the firm (a limited liability partnership). The Canadian Supreme Court held that the partner was not an employee and was therefore not protected under the human rights legislation, which was limited to various social spheres such as "employment." Applying the multi-factor test to the facts of the case, the Court ruled that an employment relationship did not exist as the claimant had an opportunity to participate in the partnership decision-making process and he was more an

194 *Clackamas*, 538 U.S. at 446.

195 In the UK, *see* Ellis v. Joseph Ellis & Co., [1905] 1 K.B. 324 (C.A.). In Canada, *see* GEOFFREY ENGLAND ET AL, EMPLOYMENT LAW IN CANADA (4th ed. 2005) § 2.43; EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee).

196 EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee).

197 Lee v. Lee's Air Farming Ltd, [1960] 3 All E.R. 420, 426 (P.C.), cited in ENGLAND, *supra* note 195, § 2.46.

198 Allish v. Allied Engineering of BC Ltd, [1957] BCJ No 137, 22 WWR 641 (CA), cited in ENGLAND, *supra* note 195, § 2.46.

199 Section 31 of the Growth and Infrastructure Act 2013, c. 27 amended the Employment Rights Act 1996 to create the employment status of employee shareholder in the section 205A.

200 See, e.g., Jeremias Prassl, Employee Shareholder 'Status': Dismantling the Contract of Employment, 42 INDUS. L.J. 307 (2013).

201 Greene & O'Brien, *supra* note 186, at 786.

202 Lawrence D. Rosenthal, No Good Deed Goes Unpunished: The Lack of Protection for Volunteers under Federal Anti-Discrimination Statutes, 2016 BYU L. REV. 117, 119 n.15 (2016).

owner of a business than an employee.[203] This conclusion seems rather problematic given that the claimant was one of 260 partners with a very limited decision-making authority. Furthermore, clearly the decision to mandate retirement at the age of 65 was not his decision and was imposed on him.[204] It is plausible that each partner took upon themselves some risks which are similar to those taken by an independent contractor, and that therefore perhaps some specific employment and labor laws should not apply to partners. However, while the claimant was one of the owners of the firm, he was also an employee for the purpose of some protections, such as the protection against discrimination. Importantly, the Court acknowledged that there could be situations in which partners will be considered employees of the partnership for the purpose of human rights legislation "where the powers, rights and protections normally associated with a partnership were greatly diminished".[205] But it held that this was not such a case. By contrast, the UK Supreme Court held that a law firm partner in a limited liability partnership (LLP) provided services *for* the LLP and was therefore a "worker" (an intermediate category between an employee and a self-employed), the result being that whistleblower protections applied to her.[206] This is more in line with our proposed first precondition which examines whether the person performed work for the benefit of another person. We will now turn to its application.

Applying our proposed first precondition, a partner of an equal share in a small partnership, or a sole shareholder of an incorporated company, who are working in their own business, should not be considered employees of that business because they do not perform the work for the benefit of someone else. The same is true when a company has a small number of shareholders in more or less equal shares, akin to a small partnership. In these scenarios, the person performing the work is working for themselves, for their own business. They therefore do not require the protection of employment and labor laws which purport to protect employees in their relationship with an employer; a relationship which is characterized by a relative vulnerability of the employee vis-à-vis their employer.[207]

However, as the number of partners or shareholders increases, and the relative power of the partner or shareholder to make decisions independently decreases, it is more apparent that each junior partner or small shareholder is working for the benefit of someone else. Although the worker is also a part owner of that other party (the firm or partnership), their influence on decision-making could be minimal. Take, for example, the case of the Fasken law firm mentioned above. One partner out of hundreds of partners, some of them senior with managing powers, is more akin to an employee than an owner. Therefore, the preconditions are met.

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203 *McCormick*, [2014] 2 SCR 108.

204 For a critique of this decision which argues that the Court should have focused on the specific purpose of the human rights legislation instead of the general purpose of employment and labor law, *see* Brian Langille & Pnina Alon-Shenker, *Law Firm Partners and the Scope of Labour Laws*, 4 CAN. J. HUM. RTS. 211 (2015).

205 *McCormick*, [2014] 2 SCR 108 at para. 46.

206 Clyde & Co LLP v. Bates van Winkelhof, [2014] UKSC 32, 3 All ER 225, at para. 16.

207 While they are excluded for the purpose and context of employment and labor law, they may be considered employees for other purposes. Indeed, the U.S. Supreme Court held that the sole shareholder and president of a professional corporation was an employee for the purpose of a pension plan under Employee Retirement Income Security Act (ERISA), finding that the Congress intent was that owners would be covered under ERISA pension plan. *See* Yates v. Hendon, 541 U.S. 1 (2004) cited in RESTATEMENT OF EMP'T LAW § 1.03, Reporters' Notes cmt. c (AM. L. INST. 2015). A consideration of the purpose of this specific law is out of the scope of this Article. In contrast, it has been noted that when the rights of third parties are involved, owners should not be treated as employees (see ENGLAND, *supra* note 195, § 2.49).

G. Corporate Directors

Corporate directors are usually not considered employees. In the U.S., the same test as the one for shareholders applies.[208] Again, since the *Clackamas* test focuses on control, the general understanding is that directors are not employees because the organization "does not hire or fire its directors; the Board selects its own members" and the organization does not "supervise or regulate the directors' work."[209] In some cases, directors are also not paid for their services and are akin to volunteers.[210] In Ontario, Canada, the ESA explicitly excludes "a director of a corporation".[211] However, like a corporate shareholder, a director may hold a dual role. A director may be recognized as an employee if they can show that they are in a relationship with the company *separately* from their role as directors.[212] In the EU, the CJEU considers various criteria which resemble a multi-factor test emphasizing subordination, including how members are recruited and could be removed, the nature of their duties, and the scope of their powers.[213]

It is not clear to us why directors are treated like shareholders. While they represent the shareholders, the directors do not necessarily have an ownership stake in the company. Members of the board of directors provide services for the benefit of others – the company and the shareholders. Assuming they do not own shares, directors should therefore meet the proposed first precondition. Their status should be considered at the next stage on a case-by-case basis through the multi-factor test. Some may fail to meet the multi-factor test and be classified as independent contractors, but other cases may lead to the opposite conclusion. Indeed, the CJEU held in a number of cases that a corporate director was an employee because they were in a relationship of subordination with the company.[214]

There is, however, another possible explanation for the exclusion of directors from employee status in the U.S. and Canada. It could be that directors are excluded because they have the authority to perform and exercise power by virtue of their legal status as officeholders and are governed by the corporate bylaws rather than an employment contract.[215] We discuss the exclusion of officeholders in the next section.

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208 *Clackamas*, 538 U.S. 440.

209 Fichman v. Media Ctr., 512 F.3d 1157, 1160 (9th Cir. 2008). *See also* Chavero v. L. 241, Div. of the Amalgam. Tran, 787 F.2d 1154, 1157 (7th Cir. 1986) ("Directors are traditionally employer rather than employee positions").

210 *See, e.g.*, *Fichman*, 512 F.3d at 1160.

211 Section 3(5)11.

212 *See* section 3(6) of the ESA and EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee). *See* also Lingelbach v. James Tire Centres Ltd, [1994] SJ No 640, 7 CCEL (2d) 297, 303 (CA) cited in ENGLAND, *supra* note 195, § 2.49.

213 RISAK & DULLINGER, *supra* note 33, at 36-37.

214 *See* CJEU, C-232/09 Danosa v. LKB Lizings SIA, ECLI:EU:C:2010:647 and other cases cited in Menegatti, *supra* note 35, at 33-35. *See also* RISAK & DULLINGER, *supra* note 33, at 40.

215 In the U.S. *see Fichman*, 512 F.3d at 1160-61 ("The Board is governed by bylaws that the Board itself adopts. The Board generally operates as a democracy. That the Board has created a system of self-governance does not place any individual director in the position of subservience contemplated by the conventional master-servant relationship"). In Canada, *see* Re Leicester Club & County Racecourse Co.; Ex p. Cannon, 30 Ch. D. 629, 633 (1885), cited in ENGLAND, *supra* note 195, § 2.49.

H. Officeholders

So far, our focus was on the first precondition. For each type of worker discussed above, we have seen that the simple test of whether they work for the benefit of others or not is both a useful way to describe some of the existing laws and normatively justified. We now move to discuss two types of workers whose status will be determined by the second precondition – officeholders in this section and volunteers in the next one.

The FLSA explicitly excludes people who hold a public elected office from the definition of "employee."[216] The "personal staff" of the officeholder and immediate advisors are also excluded, albeit for unclear reasons. Those appointed by an officeholder to serve on a policymaking level and workers of the legislative body are excluded as well.[217] Similar exclusions appear in employment discrimination laws, although since 1991 those chosen or appointed by the officeholder enjoy the same anti-discrimination protections.[218] They are still excluded from the FLSA, and elected officials themselves remain excluded from all of the aforementioned laws. There is some discussion in the case law on who counts as "personal staff," whether one is an "immediate advisor," and who is an appointee "on a policymaking level."[219] Most strikingly, the latter group is understood by courts to include judges.[220]

Some countries previously excluded not only public officials but even the entire category of "civil servants" from employment and labor laws. However, the view that being of service to the public negates employment relationships is less common nowadays. For example, in the UK, the traditional understanding was that there is no intention to create an employment contract because civil servants are employed "at pleasure," meaning they can be removed from office at any time.[221] This is hardly contradictory to employee status; most employees in the U.S. can be dismissed at will. In any case, the law in the UK has evolved and the traditional understanding lost significance, as most statutes today explicitly state that they apply to civil servants.[222] Similarly, the CJEU narrowly interprets Article 45(4) of the Treaty on Functioning of the European Union, which exempts "employment in public service" from the application of the freedom of movement provision.[223] More importantly, irrespective of the nature of that relationship, when public servants perform services "for and under the direction of another

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216 § 203(e)(2)(C) of the FLSA.

217 *Id.*

218 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (2018); The Age Discrimination in Employment Act, 29 U.S.C. § 630(f) (2018). For the coverage of exempted workers *see* Civil Right Act of 1991, § 321.

219 *See, e.g.*, Teneyuca v. Bexar County, 767 F.2d 148 (5th Cir. 1985); Lloyd v. Birkman, 127 F. Supp. 3d 725 (US District Court Western Texas 2015); Kelley v. City of Albuquerque, 542 F.3d 802 (10th Cir. 2008).

220 Gregory v. Ashcroft, 501 U.S. 452 (1991); EEOC v. Massachusetts, 858 F.2d 52 (1st Cir. 1988); Wheale v. Polk County, No. 21-13676 (11th Cir. 2022).

221 *See* FREEDLAND & KOUNTOURIS, *supra* note 84, at 141.

222 *Id.* at 142; DEAKIN AND MORRIS' LABOUR LAW, *supra* note 11, at 2.30.

223 *Lawrie-Blum*, [1986] ECR 2121 at para. 27, defines the excluded public service employment as "posts which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the state or of other public authorities and which therefore require a special relationship of allegiance to the state".

person" in return for remuneration they are recognized as "workers" under EU law.[224] This includes judges.[225] Judges were also recognized as employees for some purposes under the UK law.[226] In Canada, most public officeholders are now considered employees for most purposes.[227] However, elected officials are generally excluded from employment law coverage under Canadian case law, with the stated reason that their removal from office is not considered termination of employment.[228] Others are excluded through specific legislation. In Ontario, for example, holders of political, religious or judicial office,[229] members of quasi-judicial tribunals,[230] and holders of elected offices in organizations including trade unions, are all excluded from the ESA.[231] These exclusions reflect the position of the common law in Canada.[232]

Based on our proposed tests, there is no justification for the exclusion of officeholders, including elected officials and judges, from the entire scope of employment and labor laws. They perform work for an employer, and, as was explained in Part II, the fact that some office holders are elected by the public or nominated by external bodies does not diminish their need for protection. Even if the employer (the state) did not get to choose them or bargain with them (because their salary is often set in legislation), it does not matter for the purpose of employment and labor laws. If they need a vacation, parental leave, or protection from sexual harassment, they are in a vulnerable situation vis-à-vis the employer just like other employees.

I. Volunteers

The case of volunteers raises a dilemma. On the one hand, there are good reasons to encourage volunteerism as an important social activity, and recognizing volunteers as employees might defeat this purpose. On the other hand, we must safeguard against employers hiring workers and labeling them as volunteers to avoid liability. Some workers will agree to this arrangement in the hopes of landing a paid job with the employer later on or gaining experience that will land them a job somewhere else. Employees in vulnerable situations may be exploited by employers and work for free. In such cases the need for employment and labor law protection is strong.

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224 *Id.* at para. 17. *See also* RISAK & DULLINGER, *supra* note 33, at 40, 61.

225 O'Brien v. Ministry of Justice, C-393/10 [2012] ICR 955. As noted by the Court, "the sole fact that judges are treated as judicial office holders is insufficient in itself" to exclude them from labor protections, *id.* at para. 41. It was further noted that, although they have more flexibility than other workers, they have to work during defined times and are subject to other rules, *id.* at paras. 42ff.

226 O'Brien v. Ministry of Justice, [2013] UKSC 6, [2013] 2 All ER 1; Gilham v. Ministry of Justice [2019] UKSC 44, [2020] 1 All ER 1. These decisions were based on the CJEU guidance.

227 Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, at paras. 112-16. *See also* ENGLAND, *supra* note 174, § 17.219.

228 ENGLAND, *supra* note 195, §§ 2.51-2.52.

229 Section 3(5)7.

230 Section 3(5)8.

231 Section 3(5)9.

232 EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part III (Other Exceptions – Section 3(5)).

Volunteers are not protected under most U.S. employment and labor laws, including the FLSA,[233] Title VII of the Civil Rights Act of 1964,[234] and the NLRA.[235] Some courts apply conventional multi-factor tests to distinguish between an employee and a genuine volunteer.[236] But these tests, designed for the employee/independent contractor distinction, are not very helpful in the current context.[237] Often volunteers have to apply for their position, must be present at certain times, are subject to directions, rules, and codes of conduct, and can be let go. Furthermore, they do not operate a business of their own. Indeed, in most cases U.S. case law recognizes the need for a "two-step inquiry" in the context of volunteers.[238] While the elements of the test are not settled,[239] courts often consider remuneration as a dispositive factor before applying the multi-factor test of employee status.[240] Remuneration "may consist of either direct compensation, such as a salary or wages, or indirect benefits that are not merely incidental to the activity performed."[241] Generally speaking, when significant benefits are received – even if non-monetary and provided by a third party – the work will not be considered volunteering.[242] The general rule is that "[t]he absence of compensation or other material inducement is a condition of volunteer status,"[243] and this includes "the promise of any type of material gain, whether in the form of monetary compensation, some special benefit such as insurance, or an in-kind payment important to a reasonable person in the individual's circumstances."[244] For example, the U.S. Supreme Court held in the *Alamo Foundations* case that associates in a non-profit religious organization who received in-kind benefits such as food, shelter, clothing, transportation and medical benefits were employees under the FLSA.[245]

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233 The FLSA explicitly excludes volunteers in the public sector (§ 203(e)(4)(A)) but the case law allows the exclusion of volunteers in other sectors as well (*see* Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 302 (1985)).

234 *O'Connor*, 126 F.3d at 113-16.

235 WBAI Pacifica Foundation, 328 NLRB 1273, 1275 (NLRB 1999).

236 For application of the economic realities test *see, e.g.*, *Tony & Susan Alamo Foundations*, 471 U.S. 290. For application of the common law control test *see, e.g.*, Bryson v. Middlefield Volunteer Fire Department, Inc., 656 F.3d 348 (6th Cir. 2011).

237 *See, e.g.*, Todaro v. Township of Union, 27 F. Supp. 2d 517, 534 (D.N.J. 1998); Haavistola v. Community Fire Co. of Rising Sun, 6 F.3d 211, 220 (4th Cir. 1993); Smith v. Berks Community Television, 657 F. Supp. 794, 795 (E.D.Pa. 1987).

238 *See supra* text accompanying note 92.

239 *See* Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PENN. J. LAB. & EMP. L. 147, 171-79 (2006); Ariana R. Levinson & Chad Eisenback, *Cooperative Principles and Fair Labor Standards: Volunteering for Food Co-Ops*, 2020 MICH. ST. L. REV. 189, 221ff (2020).

240 *See supra* text accompanying note 92. According to the Restatement of Employment Law, "[a]n individual is a volunteer and not an employee if the individual renders uncoerced services to a principal without being offered a material inducement". RESTATEMENT OF EMP'T LAW § 1.02 (AM. L. INST. 2015) [emphasis added].

241 *Juino*, 717 F.3d at 435.

242 Restatement of Emp't Law § 1.02 cmt. e (Am. L. Inst. 2015).

243 An employer's promise to hire the volunteer in the future amounts to a material inducement; but a volunteer's unilateral expectation to be offered a paid job does not negate a volunteer status. *See* RESTATEMENT OF EMP'T LAW § 1.02 cmt. f (AM. L. INST. 2015).

244 RESTATEMENT OF EMP'T LAW § 1.02 cmt. e (AM. L. INST. 2015). This rule can be altered by specific legislation, for example, workers compensation legislation. *See* RESTATEMENT OF EMP'T LAW § 1.02 cmt. a (AM. L. INST. 2015).

245 *Tony & Susan Alamo Foundation*, 471 U.S. at 292-93. Most associates were former drug addicts and criminals, who although did not view the benefits as compensation, were "entirely dependent" on the organization for "long periods" and expected to be provided with these benefits.

However, when the remuneration is merely incidental to the activity performed – e.g., reimbursement of expenses, free lunch, or insurance coverage for workplace hazards – it does not amount to material inducement.[246] Under the FLSA Regulations, this exception includes a "uniform allowance" reimbursement for tuition, transportation and meal costs, inclusion in group insurance plans, pension plans or "length of service" awards. But these benefits "must not be tied to productivity," i.e., how much time the volunteer invests in the activity.[247]

In Canada, similarly, the case law in the context of workers' compensation legislation advances a model which focuses on proof of payment – "whether it be in the form of money or 'in kind' exchanges – and whether that payment, if any, was sufficient to constitute more than a mere honorarium or reimbursement of expenses."[248] When the worker received payment, they were determined to be employees, and when the worker was not in receipt of wages or in-kind benefits, they were considered volunteers.[249] However, this seems to be limited to workers' compensation cases. Employment standards legislation generally defines employees as working for wages, but also prohibits employers from contracting out of employment standards legislation and avoiding liability by simply not paying wages.[250] As the Ontario Employment Standards Act Manual states: "The fact that no wages were paid is not determinative of volunteer status."[251] The Manual lists four factors developed in the case law that can assist in the determination whether someone is a true volunteer: (1) whether the person performing the services views the arrangement as in pursuit of a livelihood (as opposed to, for example, providing services to a friend or family); (2) whether the person receiving the services is conferred a benefit; (3) how the arrangement was initiated; and (4) whether an economic imbalance between the parties was a factor in structuring the arrangement.[252] In British Columbia, the Employment Standards Tribunal held that while the multi-factor test can be relevant, several factors will assist in determining the true nature of the relationship, including: whether the work is performed for civic, charitable or humanitarian reasons; whether the worker

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246 *See* RESTATEMENT OF EMP'T LAW § 1.02 cmt. e (AM. L. INST. 2015). Under FLSA, § 203(e)(4)(A), "any individual who volunteers to perform services for a public agency" is excluded if that individual "receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services". The case law, for example under Title VII, adopted a similar test beyond public agencies which assesses whether "substantial benefits not merely incidental to the activity performed" were provided. *See, e.g.*, York v. Association of the Bar of the City of New York, 286 F.3d 122, 126 (2d Cir. 2002).

247 The Code of Federal Regulations, 29 C.F.R. §§ 553.106(b)-(e). An individual may lose their status as a volunteer based on examining "the total amount of payment made (expenses, benefits, fees) in the context of the economic realities of the particular situation" (29 C.F.R. § 553.106(f)). *See also* Uhlman, *supra* note 89, at 831. In *Pietras*, 180 F.3d 468, the Court distinguished in the context of a Title VII's claim between a volunteer who was only entitled to a disability pension (*Haavistola*, 6 F.3d 211) and one who was entitled to retirement pension, life insurance, death benefits, disability insurance and some medical benefits. The latter was deemed an employee.

248 Braley-Rattai, *supra* note 112, at 261. *See* review of case law there. In the UK as well, reimbursement of expenses is acceptable in volunteer status; see DEAKIN AND MORRIS' LABOUR LAW, *supra* note 11, at 2.27.

249 *See* review of case law and the BC WORKERS' COMPENSATION ACT MANUAL, cited in Braley-Rattai, *supra* note 112, at 262.

250 *Id.* at 262-63.

251 EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee) and *see* Robinson o/a Station Street Café v. Ramsay and Ramsay (December 30, 1988), ESC 2434 (Adamson).

252 Consumer Liability Discharge Corporation v. Molica (July 24, 1981), ESC 1032 (Davis) and *see* EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee).

has expectation of pay; whether the person offers their services freely and without coercion; whether the services are offered on a consistent full-time basis or on an "as-needed" basis; and whether the services are different in scope, duties and expectations from paid positions. The nature of the enterprise (e.g., non-profit) is also a factor but not a determining one.[253]

As explained in Part II, we proposed as the second precondition a requirement that the work *should* be remunerated. When the parties agreed explicitly or implicitly that the work would be remunerated, there is no issue. When remuneration was promised or received, the second precondition is satisfied. This includes in-kind benefits (such as food, clothing, shelter) and other job-related benefits (e.g. pension or life insurance) except for minor benefits (e.g. lunch) or reimbursement of expenses related to the performance of the work. The difficulty arises when the parties did not agree on remuneration. We generally support the Canadian approach that a person should not be excluded from employment and labor law protection simply because wages were not paid in practice or have not been promised. Therefore, we proposed as the second precondition a presumption that work for the benefit of another person should be remunerated. This presumption may be rebutted in the case of genuine volunteers. For the identification of genuine volunteer work, we proposed a sub-test which examines the motivation of the person performing the work.[254] When asking the question about motivation, several answers are possible. We divide them into three.

The first possible motivation for working without pay is altruism. Importantly, this altruist volunteer work is only authentic when the organization receiving the work or service is not for-profit.[255] The idea of altruism in the service of for-profit firms is contradictory on its face. If the motivation is altruism, then the worker is a true volunteer. Still, there are good justifications for some employment and labor law coverage. Volunteers need protection against workplace health and safety hazards, discrimination, and harassment. The fact that they should not be remunerated is not important from a purposive standpoint. They are still subject to the control of organizations that are well positioned to ensure discrimination-free environment and the health and safety of the volunteers. It is also justified to extend some working time rules (limits and breaks) on their work.[256] However, since most protections are irrelevant – and especially all those related to the wages and other benefits – it makes sense to determine that true volunteers are not employees and to extend some specific protections as needed through legislation. Indeed, the scope of employment and labor law has been extended to volunteers in some countries, for example, the 2010 Equality Act in the UK provides some protection to volunteers.[257]

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253 Re Shawnee Venables, 2018 BCEST 11 at paras. 28-31.

254 Again, by motivation we do not mean to examine the subjective intentions of the parties regarding the status of the worker (*see supra* text accompanying note 112). *See also* Cleveland v. City of Elmendorf, 388 F.3d 522, 528 (5th Cir. 2004), where the Court stressed that the examination is not of "the personal motivations behind the provision of services" but rather of "the objective facts surrounding the services performed". On the need to identify the motivation *see also* Braley-Rattai, *supra* note 112, at 292.

255 Braley-Rattai also proposes to limit true volunteer work to the non-profit sector (*supra* note 112, at 282-83). She lists three conditions: (1) unpaid work; (2) for a non-profit organization; (3) for humanitarian and other similar motivations, *id.* at 283-87.

256 As Risak argues in the context of EU law, *supra* note 33, at 368-69.

257 FREEDLAND & KOUNTOURIS, *supra* note 84, at 145.

What if a volunteer for altruistic reasons received some payment? First, we should note that work for altruistic reasons can still be considered employment if the work *should* be remunerated, for example, if the parties agreed on compensation or if compensation was provided in exchange for work (no bargain is required), as was in the *Alamo Foundation* case.[258] At the same time, reimbursement of expenses or other small incidental payments do not refute the conclusion that this is authentic volunteer work. This part of the case law makes sense as long as an altruistic motivation has been identified.

What if a volunteer performs work for altruistic reasons, but without the availability of a volunteer the employer would have hired someone to do the work as an employee? Should this work still be recognized as authentic volunteer work? For example, a retired person may want to contribute to society by volunteering in a hospital a few hours a day. Assume that they have the time and the financial means to do so. While they may gain various benefits from this arrangement, including being active and staying socially connected, an important motivation is altruism. However, by helping the operation of the hospital, they might be replacing a paid employee, and the question is whether this should be prevented. Despite the difficulty, this should still count as authentic volunteer work, i.e. volunteering that should be allowed and encouraged. It seems unreasonable to prevent people who really want to volunteer from being able to do so and to limit volunteer work to roles and jobs that the organization does not really need. At the same time, it is important to be cautious not to create the expectation that in order to enjoy reasonable public services people have to volunteer. Assume for example a town in which fire and emergency services are inadequate and the town council calls for residents to volunteer. Responding to this call, the volunteers may in fact perform work or services for altruistic reasons to help their community. However, this volunteer work is arguably imposed on the residents largely due to the state or town's failure to provide essential services. Some basic and reasonable health and safety services to the community should be provided by employees, who are paid by public organizations or the state. If volunteer work is required to provide these basic services, it should not be considered altruism.[259]

A second possible motivation for working for free is professional development. Some workers (usually young, recent graduates) agree to work as unpaid interns in order to gain work experience, hone their skills, expand their network, and overall improve their chances of later securing a paid job. Some U.S. cases recognized such internships and rejected claims that interns were employees.[260] According to the U.S. Restatement of Employment Law, "[i]nterns who provide services without compensation or a clear promise of future employment generally are not employees for purposes of this Restatement."[261] Furthermore, the DOL guidelines under the FLSA consider unpaid internships in the public sector and non-profit organizations permissible volunteer work if "the intern volunteers without expectation of compensation."[262] The International Labor Organization also recognizes that some volunteer work may provide "non-

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258 *See supra* note 245.

259 *See also* Braley-Rattai, *supra* note 112, at 276-77, who makes the important point that volunteer work cannot and should not substitute for government services.

260 *See supra* text accompanying notes 49-54.

261 Restatement of Emp't Law § 1.02 cmt. g (Am. L. Inst. 2015).

262 U.S. DEP'T OF LABOR, *supra* note 56.

monetary benefits" such as "skills development, social connections, [and] job contacts"[263] and accepts that volunteering can take place in "all types of institutional settings" including private businesses.[264] However, this phenomenon of unpaid internship has been widely criticized.[265] Even when it is in the public sector, unpaid internships can be as harmful and problematic as in the private sector, especially for those who "want to pursue careers in public service and thus need to gain experience and credentials to become competitive for permanent employment."[266]

It is important to note that these types of internships are unlike apprenticeships or professional training where the apprentice or trainee acquires skills and learning for a particular profession. Here, the purpose is to gain work experience more generally. We therefore discuss the status of interns separately from trainees and apprentices. At the same time, it should also not be recognized as volunteer work. The motivation is to receive some benefits – even if non-monetary, and non-immediate – in exchange for the work performed. As the Canadian case law suggests, if the work is in pursuit of livelihood, it is not true volunteer work.[267] Often this arrangement is initiated by the employer, who takes advantage of the worker's vulnerability to impose work without pay. In extreme cases, employers expect workers to work for free in exchange for help in obtaining a work permit or a visa.[268] Sometimes, this arrangement is initiated by the intern, but it is clear that the intern would have preferred to be paid for the job. Interns who engage in this arrangement are certainly in need of employment and labor law protection. When courts recognize this arrangement as volunteer work, it not only defeats the purpose of minimum wage but also denies the interns of a wide variety of other employment and labor law protections. Moreover, unpaid internships come at the expense of hiring paid employees and therefore negatively affect job seekers more broadly.[269] It also raises equity issues as only those who are financially supported by others can offer to work for free. Indeed, in some legal systems (e.g., Ontario) interns are considered employees. As noted above, people who receive training from an employer are employees if the skill is used or could be used by the employer's employees. This is even if the intern agreed to take training on an unpaid basis.

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263 INTERNATIONAL LABOUR ORGANIZATION, MANUAL ON THE MEASUREMENT OF VOLUNTEER WORK (2011), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_167639.pdf at 3.6(b)(vi), cited in Braley-Rattai, *supra* note 112, at 280-81.

264 INTERNATIONAL LABOUR ORGANIZATION, *supra* note 263, at 3.6(f), cited in Braley-Rattai, *supra* note 112, at 272.

265 *See supra* text accompanying notes 68-71.

266 Yamada, *supra* note 49, at 377.

267 *Consumer Liability Discharge Corporation*, ESC 1032. *See also* Lisa J. Bernt, *Suppressing the Mischief: New Work, Old Problems*, 6 NE. U. L.J. 311, 342-43 (2014), who argues that true volunteers "are those whose volunteer work will not affect their job prospects or livelihoods in any meaningful way". By contrast, people whose livelihood is dependent on their volunteer work, even if by non-monetary means (e.g., job opportunities or occupational access) are not true volunteers.

268 *See* Joanna Howe, Andrew Stewart & Rosemary Owens, *Temporary Migrant Labour and Unpaid Work in Australia*, 40 SYDNEY L. REV. 183 (2018).

269 Since internships are often not short and involve not only students but also graduates. *See* Andrew Stewart, *The Nature and Prevalence of Internship*, *in* INTERNSHIPS, EMPLOYABILITY AND THE SEARCH FOR DECENT WORK EXPERIENCE 17, 32 (Andrew Stewart et al eds., 2021); Brudney, *supra* note 46, at 186-87.

Furthermore, the fact that the interns did not negotiate for or expect to receive wages does not negate employment status.[270]

What if the motivation for the work is mixed, and includes altruistic reasons but also professional development? Consider a relatively new yoga instructor, who volunteers to give yoga classes in their child's school to support the kids' growth and development, but also to enhance their resume and build a network of prospective clients. In the U.S., it seems sufficient that one of the motivations is altruistic to exclude the person from employment protection.[271] However, this could open the possibility for exploitation very similar to the form of unpaid internships discussed above. If one of the motivations is professional development, we believe that this should be considered employment, at least as far as the preconditions are concerned.

A third possible motivation for volunteer work is personal (non-professional) interest. While the Regulations under the FLSA refer specifically to "civic, charitable, or humanitarian reasons,"[272] the U.S. Supreme Court defined volunteers in much broader terms: as individuals who work "solely for [their] personal purpose or pleasure." [273] Subsequent case law clarified that volunteers do not need to be "exclusively, or even predominantly, motivated by 'civic, charitable, or humanitarian reasons.'"[274] This line of cases has led to the exclusion of unpaid interns from protection—a practice we have already criticized above—but has also allowed the exclusion of work that is of special personal interest to the volunteer, such as a hobby. For example, an employee who worked as a welder also performed some work as a crew chief on racing cars, then sued for unpaid wages. The First Circuit held that he performed this work as a volunteer, partly because he served as a crew chief "for his personal enjoyment rather than for the benefit of [the employer]".[275] In another case, the NLRB held that radio station staff were not employees under the NLRA because their relationship with the radio station was not "rudimentary economic" as the work was unpaid and they worked "out of an interest in seeing the station continue to exist and thrive, out of concern for the content of the programs they produce, and for the personal enrichment of doing a service to the community and receiving recognition from the community."[276] By contrast, the DC Circuit held that auxiliary choristers in a non-profit opera company were employees under the NLRA despite the fact that they provided "a service to the community" and "presumably derive[d] pleasure and satisfaction in performing."[277] The D.C. Circuit reasoned that there was an economic relationship between the parties, as the choristers received monetary compensation for their work ($214 for each

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270 *See* EMPLOYMENT STANDARDS ACT POLICY AND INTERPRETATION MANUAL, *supra* note 78, at Part I (Employee). *See also* 1153800 Ontario Inc. o/a Baker's Dozen Donuts v. Sherren, 2000 CANLII 4482 (ON LRB).

271 *See* Brown v. New York City Department of Education, 755 F.3d 154, 163, 165 (2d Cir. 2014), cited in Braley-Rattai, *supra* note 112, at 291. In this case, Brown worked with high school students, where one of his goals was to help and mentor them. At the same time, he was unemployed and a recent high school graduate who also hoped "to build his resume and to emulate his role model".

272 *See* Code of Federal Regulations, 29 C.F.R. § 553.101.

273 Tony & Susan Alamo Foundation, 471 U.S. at 295.

274 Todaro v. TP. of Union, 40 F. Supp. 2d 226, 230 (D.N.J. 1999). In *Cleveland*, 388 F.3d at 528, the Court explained that the Supreme Court used "a common-sense analysis" and that there was "no indication that the Department of Labor sought to reject such a notion when refining the definition".

275 Roman v. Maietta Construction Inc., 143 F.3d 71, 75-76 (1st Cir. 1998).

276 *WBAI*, 328 NLRB at 1274-75.

277 Seattle Opera Association, 331 NLRB 1072, 1073 (2000), certification affd. 292 F.3d 757 (D.C. Cir. 2002).

production they participated in), signed a letter of intent agreeing to attend rehearsals and performances on time, were given instructions, and were expected to comply with a handbook.[278]

As explained above, it should be assumed that people who donate their time and expertise to perform work for someone else would prefer to be paid and should be paid. However, somewhat similarly to altruism, there is a societal interest in allowing people to pursue their personal interest outside of work. That may include, for example, coaching a recreational sports league or assisting productions in a community theatre. This exception to work that should be remunerated should be limited to unique cases such as hobbies not in pursuit of livelihood.[279] This is especially critical in for-profit organizations.[280] Expanding this exception any further would create a risk of exploitation. Many of us enjoy our work and may agree to do it for free for some time, should payment not become available. There could also be situations in which some people (e.g., older workers) would prefer to be paid, but cannot find work and for reasons such as avoiding social isolation and achieving greater life satisfaction will agree to work for free. These instances should not be considered authentic volunteer work.

To conclude, genuine volunteers can be excluded from employee status, but this is only justified when their motivation to work is altruistic or as part of a personal interest such as a hobby. When the motivation is professional development (as with unpaid interns), the second precondition is met and they should be considered employees. Finally, people who work for in-kind benefits or other forms of non-wage compensation (which is not reimbursement of expenses) should not be considered genuine volunteers.

CONCLUSION

Many groups of workers have been denied access to employment and labor laws. That includes volunteers, prisoners, persons with disabilities participating in vocational rehabilitation programs, corporate shareholders and directors, judges, officeholders, interns, trainees, apprentices, and partners in a business partnership. They are excluded even though they often meet the more conventional tests used to distinguish between employees and independent contractors. Their exclusion is often facilitated through judicial consideration of some preliminary requirements (preconditions) for employee status – such as an examination of the "economic" nature of the relationship, the "primary beneficiary" of the work, or whether the work was remunerated. Different tests have been developed in the case law for the various pre-excluded groups without a more comprehensive examination of them all. This Article surveyed the case law on the various pre-excluded groups in the U.S. as well as other legal systems (the UK, Canada, and the EU) and suggested that they can fit into three general preconditions. The first examines who benefits from the work, the second looks at the existence of a contract or

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278 *Id.*

279 Like in the case of volunteers for altruistic reasons, there may be good justifications for some employment and labor law coverage for volunteers for personal interest reasons, a discussion which is beyond the scope of this Article.

280 On the possibility of volunteering in this sector *see* Sabine Tsuruda, *Volunteer Work, Inclusivity, and Social Equality, in* PHILOSOPHICAL FOUNDATIONS OF LABOUR LAW 306, 308 (Gillian Lester, Hugh Collins & Virginia Mantouvalou eds., 2018): "A person may, for example, want to volunteer at a museum simply because she loves art".

some elements of the contract (including, in particular, remuneration), and the third asks whether the worker has to personally perform the work. We aimed to offer a coherent and simplified way to understand the different strands of jurisprudence concerning pre-excluded groups.

In addition, this Article critically examined the different tests adopted in different legal systems and proposed a narrow set of preconditions that best advances the purpose of employment and labor laws, as well as consistency and predictability: (1) performing work or providing services that benefit an employer (regardless of whether there is also a personal benefit for the worker) unless such benefit is negligible; (2) the work *should* be remunerated (regardless of whether wages are paid in practice or have been promised or not); and (3) the work is substantially personally performed by the worker in question. For the second precondition, we proposed to add a presumption that work for the benefit of an employer should be remunerated, and three reasons that can refute this presumption: work was imposed on the employer without being requested; lack of intention to create a legally binding relationship; and authentic volunteering. Finally, this Article demonstrated how each pre-excluded group is treated under the current law and how our proposal is more effective in ensuring that those in need of protection of employment and labor laws are not unjustly excluded.