COURT FILE NUMBER	1401-11912
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	LUKAS WALTER as REPRESENTATIVE PLAINTIFF
DEFENDANTS	WESTERN HOCKEY LEAGUE, McCRIMMON HOLDINGS, LTD. AND 32155 MANITOBA LTD., A PARTNERSHIP c.o.b. as BRANDON WHEAT KINGS., 1056648 ONTARIO INC., REXALL SPORTS CORP., EHT, INC., KAMLOOPS BLAZERS HOCKEY CLUB, INC., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., HURRICANES HOCKEY LIMITED PARTNERSHIP, PRINCE ALBERT RAIDERS HOCKEY CLUB INC., BRODSKY WEST HOLDINGS LTD., REBELS SPORTS LTD., QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD., SASKATOON BLADES HOCKEY CLUB LTD., VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP, WEST COAST HOCKEY ENTERPRISES LTD., MEDICINE HAT TIGERS HOCKEY CLUB LTD., PORTLAND WINTER HAWKS, INC., BRETT SPORTS & ENTERTAINMENT, INC., THUNDERBIRD HOCKEY ENTERPRISES, LLC, TOP SHELF ENTERTAINMENT, INC., SWIFT CURRENT TIER 1 FRANCHISE INC., KOOTENAY ICE HOCKEY CLUB LTD., MOOSE JAW TIER ONE HOCKEY INC. DBA MOOSEJAW WARRIORS, and LETHBRIDGE HURRICANES HOCKEY CLUB
DOCUMENT	**SUPPLEMENTARY AFFIDAVIT OF RYAN ALLEN HANCOCK** Brought under the *Class Proceedings Act,* S.A. 2003, c. C-16.5

Clerk's Stamp

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SUPPLEMENTARY AFFIDAVIT OF RYAN ALLEN HANCOCK

Sworn on June 15, 2016

I, RYAN ALLEN HANCOCK, of the City of Philadelphia, in the State of Pennsylvania, United States of America, SWEAR AND SAY THAT:

1. I am counsel and chair of the Employment Law Department at Willig, Williams & Davidson, a law firm with its head office located in Philadelphia, Pennsylvania.

2. I have reviewed my report dated June 15, 2016, which is marked as **Exhibit "A"** to this affidavit and I swear that it accurately reflects my opinion and that the contents of the report are true.

3. I make this affidavit in support of the application for certification of the present action as a class proceeding and for no other or improper purpose.

SWORN (OR AFFIRMED) BEFORE ME at the Philadelphia, PA this 15th day of June, 2016.

Catherine Pantalone

Catherine Pantalone
PRINT NAME

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
CATHERINE PANTALONE, Notary Public
City of Philadelphia, Phila. County
My Commission Expires June 16, 2018

Ryan A Hancock
(Signature)

Ryan Allen Hancock
(Print Name)

1. **Please identify the test or tests courts have used to determine whether an individual is an "employee" or "trainee" under the FLSA.**

As discussed in the previously submitted Class Action report, the FLSA defines an "employee" as "an individual employed by an employer" and "employ" is defined as "to suffer or permit to work."[1] In 2010, the U.S. Department of Labor's Wage & Hour Division issued a "fact sheet" in order to provide "...general information to help determine whether interns must be paid the minimum wage and overtime under the FLSA for the services that they provide to "for-profit" private sector employers."[2] The DOL's test was derived out of the seminal U.S. Supreme Court decision of *Walling v. Portland Terminal Co.*, which created a "trainee" exception to the FLSA's definition of "employee" subject to minimum wage and overtime protections[3]

According to the U.S. Department of Labor, the most important six factors to determine if an individual is an "employee" or "trainee" not subject to the FLSA's minimum wage and overtime protections are:

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

However, several circuit courts have adopted different analytical tests to determine whether an individual is an "employee" or "trainee" for FLSA protections and what type of deference, if any, should be given to the DOL's Fact Sheet #71.

- The Second[4], Fourth[5] and Sixth Circuit[6] Courts have adopted the "primary beneficiary test," in which the main factor is whether it is a trainee or the employer who is the primary beneficiary of the "training."
- The Fifth Circuit[7] adopted the "primary beneficiary" test, cites the DOL Fact Sheet #71 factors and gives the factors "substantial deference."

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[1] 29 U.S.C § 203(e)(i) and (g).

[2] *See* U.S. Department of Labor's Wage and Hour Division's Fact Sheet #71 (April 2010) which is attached as Appendix A. It is important to note that the FLSA, unlike for-profit entities, specifically exempts unpaid volunteers at public agencies. *See* 29 U.S.C. § 203(e)(4)(A).

[3] *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947).

[4] *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2nd Cir. 2015) and *Wang v. Hearst Corp.*, No 13-4480-cv (2nd Cir. 2015).

[5] *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989).

[6] *Solis v. Laurelbrook Sanitarium*, 642 F.3d 518 (6th Cir. 2011).

- The Eighth[8] Circuit follows the "primary benefits" test but cites the DOL Fact Sheet #71 factors.
- The Tenth Circuit Court[9] has adopted a "totality of circumstance" test.
- The Eleventh Circuit[10] applies the "economic realities test."
- The First, Third, Seventh and Ninth Circuits have not adopted a specific test to date.

The analytical tests adopted by the various circuit courts to date, certainly overlap and analyze similar factors. However, the courts' application of each test determines the outcome of the claim. The main inquiry under the "primary benefits" test is ultimately whether the worker or the employer receives the primary benefit of the relationship. Under the "totality of circumstance" the inquiry specifically refuses to allow one factor to be dispositive. Both the "primary benefit" and "totality of circumstance" tests allow courts great flexibility in determining the employment relationship of interns or "trainees" while the DOL Fact Sheet #71 is more rigid.

The term "intern" or "trainee" is not defined by the Washington Minimum Wage Act,[11] Oregon Wage Claim Act,[12] Michigan Workforce Opportunity Wage Act, Maine Minimum Wage Act or the Pennsylvania Minimum Wage Act. Further, I am unaware of any decision by a state court or regulatory agency applying an intern and/or trainee exemption to minimum wage or overtime claims under state law.[13]

I am also unaware of any federal court decision or determination by a federal regulatory agency such as the U.S. Department of Labor determining whether individuals, such as a CHL hockey player, are "employees" or "trainees" under the FLSA. Accordingly, I concur with Mr. Dunn that to date, the issue "...is a question of first impression that has not been addressed or determined by any relevant U.S. authority." However, it is important to note that U.S. courts are often faced with issues of first impression. In my opinion, there is sufficient case law on this issue for a court to make a determination.[14] Regardless of which analytical test a court may use, I believe that the following are facts that a court may find useful in analyzing whether a CHL hockey player is an intern/trainee and therefore not subject to the FLSA:

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[7] *Donovan v. American Airlines*, 686 F.2d 267 (5th Cir. 1982).
[8] *Petroski v. H &R Block*, 750 F.3d 976 (8th Cir. 2014).
[9] *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–29 (10th Cir. 1993); *see also Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1006–10 (N.D. Cal. 2010).
[10] *Schumann v. Collier Anesthesia, P.A.*, (11th Cir. 2015).
[11] Wash. Rev. Code § 49.46.010(o) does state that "Any farm *intern* providing his or her services to a small farm which has a special certificate issued under RCW 49.12.470." (emphasis added).
[12] Oregon's BOLI has stated the following: https://www.oregon.gov/boli/TA/pages/t_faq_interns.aspx (last visited on June 13, 2016).
[13] The Maine Supreme Court has held that "The language used in section 629, forbidding "any person" from being required or permitted to work "as a condition of securing . . . employment," is universal and plainly connotes coverage for trainees seeking to obtain a position." *Cooper v. Springfield Terminal Ry.*, 635 A.2d 952 (1993).
[14] The State of Washington's Department of Labor & Industries has adopted an administrative policy that mirror's the DOL's Facts Sheet #71. *See* Michigan Depart of Labor & Industries Administrative Policy ES.C.2.

- The individual teams are for profit institutions;
- Without access to the CHL hockey players, the league would not and could not exist; and
- The CHL hockey players are not tied to an educational institution, unlike student athletes.

2. Does it matter how the relationship is characterized by the parties in a written agreement?

As discussed in the original Class Action report, a court will look to the "economic reality" of the relationship using the "totality of the circumstances" to determine whether an employee/employer relationship exists. Therefore, while a court may take note that a contract may define the employment relationship, it is certainly not dispositive.

3. What is the current state of the law with regard to whether sports teams are exempted from the FLSA because the team is a seasonal amusement or recreation establishment?[15]

A plain reading of the FLSA reveals that it does not expressly exempt hockey players from minimum wage and overtime protections.[16] As described more fully below, it is an employer's burden to provide sufficient evidence to a federal court in order to establish that they are exempt from the FLSA.

Even if an individual, such as a CHL hockey player is determined to be an "employee" subject to the FLSA, Section 13(a)(3) of the FLSA, exempts certain seasonal amusement and recreational establishments from minimum wage and overtime protections.[17] It is important to remember that the FLSA is a remedial law and therefore the exemptions "are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly

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[15] Pennsylvania and Michigan's wage statutes include an exception for seasonal/recreational facilities. *See* 43 Pa.Cons. Stat §333.105 and Mich. Comp. Laws § 408.41a (4)(d). However, I am unable to find any court decision which addresses the applicable exception under Pennsylvania state law. A Michigan federal court, interpreting federal and state wage law has determined that a major league franchise was exempt under federal and state law. *See Adams v. Detroit Tigers*, 961 F. Supp. 176 (E.D. Mich. 1997).

[16] Review of the Maine, Oregon, Michigan, and Pennsylvania wage statutes reveals that they, like the FLSA do not expressly exempt hockey players in general and junior hockey players in particular from minimum wage and overtime protections. However, as discussed at length, the Washington State Legislature recently amended their statute to specifically exclude "junior ice hockey players from minimum wage protections under Washington Law. Wash. Rev. Code § 49.46.010 (3)(p).

[17] 29 U.S.C. § 113(a)(3).

and unmistakably within their terms and spirit."[18] The employer, in this case a CHL hockey team, bears the burden of proving that the establishment is covered by the exemption.[19]

Under the FLSA, in order for a seasonal amusement and recreational establishments to qualify for an 13(a)(3) exemption the CHL team must not operate more than seven months in any calendar year or it meets the 33-1/3% test ("...during the preceding calendar year, its average receipts for any six months of such year were not more than 33-1/3% per centum of its average receipts for the other six months of such year ...).[20]

To date, the U.S. Supreme Court has not squarely addressed whether an major or minor league sports teams in general and a hockey team in particular is exempt for the FLSA pursuant to Section 13(a)(3). Therefore, whether an exemption would apply to a CHL hockey team remains unsettled but "[A]ny exemption from [the FLSA] must . . . be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress."[21] However, the Sixth Circuit, in *Bridewell,* found that a major league baseball team was a year-round operation, despite the fact that they did not provide "amusement and recreation" year-round.[22] Similarly, the United States District Court for the Eastern District of Louisiana has also held that a major sports team was not subject to an exemption from the FLSA under 13(a)(3).[23] These decisions, and other decisions determining that a minor and major league baseball franchise were exempt under FLSA (and state wage laws) were not brought by the players themselves.[24] However, as discussed more fully below, a class of minor league baseball players has filed a class action under various state laws and the FLSA alleging minimum wage and overtime violations.

In my opinion, the important factors for a court in considering whether a CHL hockey team is exempt would include but not be limited to:

- the length of the season (which may include pre-season and playoff games as well as the draft);
- the revenue of the team; and
- the size of the non-player staff.

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[18] *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 531 (2nd Cir. 2009)(quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

[19] *See Mullins v. City of New York*, 653 F.3d 104, 113 (2nd Cir. 2011) ("The employer who invokes the exemption bears the burden of establishing that the employee falls within the exemption.").

[20] *See* U.S. Department of Labor's Wage & Hour Division's Fact Sheet #18 attached as Appendix B.

[21] *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S. Ct. 807, 89 L. Ed. 1095 (1945).

[22] *Bridewell v. The Cincinnati Reds,* 68 F.3d 136 (6th Cir. 1995), *cert. denied,* 516 U.S. 1172, 116 S. Ct. 1263, 134 L. Ed. 2d 211 (1996).

[23] *Liger v. New Orleans Hornets NBA Ltd. P'ship.*, 565 F. Supp. 2d 680, (E.D. La. 2008).

[24] *See Adams v. Detroit Tigers*, 961 F. Supp. 176 (E.D. Mich. 1997); and *Jeffery v. Sarasota White Sox*, 1994 U.S. Dist. LEXIS 17844 (M.D. Fla. Nov. 10, 1994).

Further, to the extent that the teams in the leagues in questions carry on business year round, it is unlikely they will meet this test. Finally, the definition of "employer" under the FLSA must be construed broadly to effectuate the remedial purposes of the statute.[25]

4. What is the status of the *Senne et al. v. MLB et al.* class action matter?

On February 2, 2014, a class action was filed in the United States District Court for the Northern District of California – *Senne , et al v. Office of the Commissioner of Baseball, et al.* 3:14-cv-00608-JCS (2014). The Plaintiffs allege that the MLB (among other defendants) violated the FLSA and various state laws – California, Florida, Arizona, North Carolina, New York, Pennsylvania, Maryland, and Oregon for failing to properly pay minor league baseball players minimum wage and overtime.[26] On October 20, 2015, the federal court conditionally certified the proposed class.[27] To date, a voluminous amount of discovery has been conducted and a motion to decertify the class is pending before the court.[28] The matter is set for trial in the spring of 2017 and final pre-trial conference is scheduled for January 29, 2017.[29]

5. To what extent, if any, does the underlying Regional Director's decision offer guidance in determining whether players are employees?

In January 28, 2014, several members of Northwestern University grant-in-aid football players filed an administrative charge with the National Labor Relations Board ("NLRB") requesting a finding that the subject players are "employees" under Section 2(3) of the National Labor Relations Act ("NLRA") for organized labor purposes (collective bargaining).[30] Following an

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[25] *See Salyer v Ohio Bureau of Workers' Compensation* 83 F.3d 784 (6th Cir. 1996).

[26] A copy of the Second Amended Complaint is attached as Appendix C.

[27] A copy of the October 20, 2015 Order may be viewed at https://docs.justia.com/cases/federal/district-courts/california/candce/3:2014cv00608/274347/446 (last visited on June 8, 2016).

[28] A copy of the Docket Report in the *Senne* matter is attached as Appendix D.

[29] A copy of the court's Case Management and Pretrial Order is attached as Appendix E.

[30] 29 U.S. Code § 152(3) "The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. 151 *et seq.*], as amended from time to time, or by any other person who is not an employer as herein defined."

investigation, the NLRB Regional Director found that the players were "employees" as defined by Section 2(3). However, following review of the Regional Director's decision, the NLRB declined to exercise jurisdiction over the matter and dismissed the action because "...asserting jurisdiction would not promote stability in labor relations."

In its decision, the NLRB did not ultimately determine whether Northwestern University grant-in-aid football players were "employees" as defined by Section 2(3) of the NLRA. While the NLRB did not ultimately consider the Regional Director's determination, the analysis of the Regional Director certainly offers guidance on the definition of "employee" for student athletes under the NLRA if and when the issue comes before the NLRB again. For example, the Regional Director found the following information persuasive in determining that the players, who received scholarships were employees:

- The players are given a scholarship (compensation);
- the players are subject to special rules;
- the amount of time the player spent training; and
- the revenues generated.

Further, the players in the Northwestern matter all play on behalf of their educational institution as a student athlete which is strikingly different from CHL hockey players who are not affiliated and/or playing on behalf of an educational institution. Finally, the NLRB decision is narrowly tailored and only applies to the specific facts with regard to the Northwestern University football grant-in-aid scholarship players.

6. Assuming that a court finds that a player similarly to the CHL players are "employees" under the FLSA or applicable state law what activities are compensable?

A. <u>Compensable Activity under the FLSA</u>

Under the FLSA, a non-exempt employee must be paid minimum wage and overtime of no less than 1.5 times their regular rate of pay.[31] The FLSA defines "employ" as "to suffer or permit to work." The Department of Labor's regulations states, "An employer's liabilities and obligations under the Fair Labor Standards Act with respect to the "principal" activities his employees are employed to perform are not changed in any way by section 4 of the Portal Act, and time devoted to such activities must be taken into account in computing hours worked to the same extent as it would if the Portal Act had not been enacted. But before it can be determined whether an activity is "preliminary or postliminary to (the) principal activity or activities" which the employee is employed to perform, it is generally necessary to determine what are such "principal" activities."[32]

[31] 29 U.S.C. § 206 and 207.
[32] 29 CFR §790.8(b) (2013).

The United States Supreme Court has held that "the term 'principal activity or activities' [to] embrac[e] all activities which are an 'integral and indispensable part of the principal activities."[33] The Supreme Court has also held that "...an activity is integral and indispensable to the principal activities that an employee is employed to perform—and thus compensable under the FLSA—if it is an intrinsic element of those activities and one with which the employee cannot dispense if he is to perform his principal activities.[34]

Therefore, in order to determine if a certain activity is compensable under the FLSA or applicable state law as discussed more fully below depends if the activity is integral and indispensable to the principal activities that an employee is employed to perform and does not have the discretion to not complete.

Finally, it is important to again remember that the FLSA covers all employees and enterprises engaged in interstate commerce regardless of whether the employee works in one or multiple states. In other words, the FLSA provides for a federal minimum wage and requires overtime pay if certain conditions are met. Further, if a non-exempt employee spends part of the time working in the U.S. and a part of the week working abroad, the FLSA may apply.[35] The FLSA does not apply if the employee works the entire work week outside the U.S.[36] I am unable to find any case law or state administrative agency decision holding that an employee domiciled in one state but also travels out of state within the U.S. for a short period of time for work is not subject to the employee's state's wage laws.[37]

B. Compensable Activity under State Law

1. Washington

The Washington State Minimum Wage Act states that "hours worked" shall be considered to mean all hours during which the employee is authorized or required by the employer to be on

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[33] *Integrity Staffing Solutions, Inc. v. Busk,* 135 S. Ct. 513 (2014); *IBP, Inc.*v. *Alvarez*, 546 U.S.21, 29-30, 126 S. Ct. 514, 163 L. Ed. 2d 288 (2005) (quoting *Steiner* v. *Mitchell*, 350 U.S.247, 252-253, 76 S. Ct. 330, 100 L. Ed. 267 (1956)).

[34] *Id.* at 519.

[35] *See Wirtz v. Healy*, 227 F. Supp. 123 (N.D. of Illinois 1964) ("The exemption provided by Section 13(f) of the Act is inapplicable to a tour escort of defendants who, during a particular workweek, performs services both in a workplace within the United States and in a workplace within a foreign country, such as Canada. Thus, when a tour escort of defendants spends part of a workweek with a tour in the United States, it makes no difference where the remainder of such work in that week is performed; the tour escort is entitled to the benefits of the Act for the entire week").

[36] *See* 29 USC. §213(f); 29 C.F.R. §776.7; US Dep't of Labor Wage and Hour Division Field Operations Handbook (5/16/02) [DOL Handbook] at § 10e02; and *Wright v. Adventures Rolling Cross Country, Inc.*, 2012 US Dist. LEXIS 104378 (N.D. Cal.).

[37] *See Bostain v. Food Exp., Inc.*, 159 Wash. 2d 700 (2007).

duty on the employer's premises or at a prescribed work place."[38] Furthermore, an analysis of time worked must be determined on a case-by-case basis.[39] The Supreme Court of Washington has held that to determine whether drive time is compensable, we must examine the undisputed facts and assess whether Technicians are "on duty" at the "employer's premises" or "prescribed work place…' within the meaning of the statute.[40]

2. **Oregon**

The Oregon Bureau and Labor and Industry regulations states that hours worked means "all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty, or at a prescribed work place and all time the employee is suffered or permitted to work."[41] Further, the regulations go on to prescribe when an employee must be paid in certain factual scenarios.[42]

3. **Michigan**

The Michigan Workforce Opportunity Act does not define what is compensable under the statute, it merely states that an employer must pay all non-exempt employees for all hours worked.[43]

4. **Pennsylvania**

The Pennsylvania Minimum Wage Act does not define what is compensable. However, the Pennsylvania Department of Labor and Industry, by regulation defines hours worked to include "…time during which an employee is required by the employer to be on the premises of the employer, to be on duty or to be at the prescribed work place, time spent in traveling as part of the duties of the employee during normal working hours and time during which an employee is employed or permitted to work; provided, however, that time allowed for meals shall be excluded unless the employee is required or permitted to work during that time, and provided further, that time spent on the premises of the employer for the convenience of the employee shall be excluded."[44]

5. **Maine**

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[38] Wash. Admin. Code § 296-126-002(8).
[39] *See* Washington Department of Labor & Industries Admin. Policy ES.C.2 § 1.
[40] *Stevens v. Brink's Home Sec., Inc.*, 162 Wn.2d 42 (2007).
[41] Or. Admin. R. 839-020-004(19).
[42] Or. Admin. R. 839-020-0045(3), (4), and (5).
[43] *See* Mich. Comp. Laws §§ 408.411-424.
[44] 34 Pa. Code § 231.1(b).

The Maine Minimum Wage Act does not define what is compensable under the statute.[45]

7. **Mr. Johnsrud, in his letter to the Washington AG maintains that there is ample existing precedent to establish that the teams are not employers, what are your thoughts on the cases footnoted in his letter?**

I am unaware of any court decision, on behalf of an individual or class that has found an athlete playing for a for-profit league, such as a CHL hockey player to be an employee.[46]

Review of the letter from Mr. Johnsrud reveals that he alleges that "...there is substantial guidance from the federal courts which have held similar training circumstances, such as the players here are not employees within the meaning of the..." FLSA.[47] However, the cases cited by Mr. Johnsrud are merely those in which a federal court has determined that certain individuals were not employees under FLSA's trainee/intern exemption. However, surveying the various federal courts published decisions reveals that federal courts have also declined to apply the trainee/intern exemption.[48] In other words, the mere fact that a court has or has not applied the exemption is not particularly illustrative – what is relevant from all of the court cases are the reasons for the particular decision in light of the specific facts before the court.

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[45] *See* Me. Rev. State, § 661 *et seq.*

[46] This year, the U.S. District Court for Southern Indian held that a college student athlete was not an employee under the FLSA. *Anderson v. NCAA et al.* 1:14-CV-1710-WTL-MJD (2016). Further other courts have determined that student athletes are not an employee under various other statutes. *See Kemether v. Pennsylvania Interscholastic Athletics Ass'n*, 15 F. Supp. 2d 740, 759 n.11 (E.D. Pa. 1998) ("No federal court has defied common sense by holding student-athletes to be Title VII employees of their schools or an athletic association.") (citations omitted); *Rensing v. Indiana State Univ. Bd. of Trs.*, 444 N.E.2d 1170, 1174 (Ind. 1983) ("Scholarship recipients are considered to be students seeking advanced educational opportunities and are not considered to be professional athletes, musicians or artists employed by the University for their skills in their respective areas."); *Shephard v. Loyola Marymount Univ.*, 102 Cal. App. 4th 837, 843-47 (Cal. App. 2d Dist. 2002) (student-athlete not an "employee" under California Fair Employment and Housing Act). Furthermore, the United States Department of Labor has concluded that activities in interscholastic athletic programs "are not 'work' of the kind contemplated by [the Fair Labor Standards Act, 29 U.S.C. § 203(g)] and do not result in an employee-employer relationship between the student and the school or institution." U.S. Department of Labor, Wage and Hour Division, Field Operations Handbook § 10b03(e) (Oct. 20, 1993). The difference between a student athlete, scholarship or not, versus a CHL hockey player playing in a for-profit league and who is not tied to an educational institution is distinguishable factually and for policy reasons.

[47] *See* Letter from Barry Alan Johnsrud, Esq. on behalf of the WHL teams located in Washington to the Washington Department of Labor & Industries, pg 8 and footnote 18 (February 19, 2014).

[48] *See McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989); *Marshall v. Baptist Hospital*, 473 F. Supp. 465 (M.D. Tenn. 1979); *Archie v. Grand Central Partnership, Inc.*, 997 F. Supp. 505 (S.D.N.Y. 1998); *Reich v. Shiloh True Light*, 895 F. Supp. 799 (W.D.N.C. 1995); and *Bailey v. Pilot's Ass'n for Bay & River Delaware*, 406 F. Supp. 1302 (E.D. of Pa. 1976).

8. Is vacation and holiday pay available to CHL hockey players playing in the United States?

The FLSA does not require an employer to pay an employee for time not worked such as paid vacation and holiday leave. However, the parties may agree, through contract, a collective bargaining agreement, or an employer's policies to provide payment for such benefits. At the end of 2015, twenty-three jurisdictions across the United States adopted paid sick leave policies. For example, on January 1, 2016, employers with 10 or more employees in the state of Oregon must adopt sick policies which provide up to 40 hours of paid leave per year.[49] Under Oregon law, an employer does not have to pay out for accrued unused sick time if the employee leaves employment for any reason.[50]

9. Is the amendment to the Washington wage statute to be applied retroactively?

Typically, new legislation in Washington State, including amendments to existing law is given prospective application unless there is clear intent to apply the law retroactively or the statute is remedial.[51] A legislative decision to apply a law retroactively will be honored unless there is a constitutional impediment to doing so.[52] "In determining legislative intent, this court may look to the expressed language of the statute, the purpose of the statute, and a legislative statement of strong public policy that would be served by retroactive application."[53] To date, no court in Washington State has determined whether the amendment to exempt "junior hockey players" is retroactive, therefore, the matter is unsettled. However, a plain reading of statute reveals that the Washington Legislature did not specifically, in the statute itself state that the amendment was to be applied retroactively. In contrast, the Washington Legislature, when previously amending the Washington Wage Statute, has specially stated that an amendment to the Washington Wage Statute was "retroactive" with regard to airline employees.[54] Finally, while the Washington Department of Labor has closed their investigation into CHL teams located in Washington State, they have not issued nor taken a position on the retroactivity of the statute and I am unaware of any court, federal or state, determining that the statute is to be applied retroactively.

10. Is the theory of joint employment applicable under the FLSA?

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[49] Or. Rev. Stat. § 653.601-661.
[50] Or. Rev. Stat. § 653.606(B)(7).
[51] *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990); *see also Ferndale v. Friberg*, 107 Wn.2d 602, 732 P.2d 143 (1987); *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 663 P.2d 482 (1983); *Painting & Decorating Contractors of Am., Inc. v. Ellensburg Sch. Dist.*, 96 Wn.2d 806, 638 P.2d 1220 (1982).
[52] *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 48, 785 P.2d 815 (1990), *citing Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 302-303, 174 P.3d 1142 (2007).
[53] 107 Wn.2d 602, 605 732 P.2d 143 (1987); *In re Marriage of MacDonald*, 104 Wn.2d 745, 748, 709 P.2d 1196 (1985).
[54] Washington Senate Bill 6220 (1998). A copy of the amendment is attached as Appendix F.

On January 20, 2016, the U.S. Department of Labor's Wage & Hour Division issued an Administration Interpretation concerning joint employment under the FLSA.[55] The Administrative Interpretation is significant in that the Department of Labor puts forth the factors, including the agencies own regulations that it will consider when determining whether horizontal or vertical joint employment exists.[56]

This is Exhibit "A" referred to in the Affidavit of Ryan Allen Hancock sworn to before me, this 15th day of June, 2016.

Catherine Pantalone

Notary

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
CATHERINE PANTALONE, Notary Public
City of Philadelphia, Phila. County
My Commission Expires June 16, 2018

[55] Department of Labor, Wage and Hour Division, Administrator's Interpretation No. 2016-01 (Jan. 20, 2016), *available at* http://www.dol.gov/whd/flsa/Joint_Employment_AI.pdf.

[56] *See* 29 CFR 791.2 ((a joint employment relationship is established when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer) and the Department of Labor's Fact Sheet #35 which is attached as Appendix G.