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VOCATIONAL SCHOOLS ARE NO VACATION: DETERMINING WHO REALLY BENEFITS FROM STUDENT LABOR

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Abstract: On April 28, 2011, in *Solis v. Laurelbrook Sanitarium & School, Inc.*, the U.S. Court of Appeals for the Sixth Circuit held that students who worked as part of the curriculum at a religious-based boarding school were not employees under the Fair Labor Standards Act. In so holding, the Sixth Circuit expressly endorsed the “primary benefit” test for determining whether trainees are employees for purposes of the FLSA. The primary benefit test effectuates the purpose of the FLSA, provides courts with the flexibility to prevent employers from exploiting workers, and ultimately benefits employees and students like those at Laurelbrook. Nevertheless, the test does little to clarify Congress’s circular definitions of “employ” and “employee,” leaving employers and schools like Laurelbrook without much guidance.

INTRODUCTION

Laurelbrook Sanitarium and School, Inc. (“Laurelbrook”) is a religious-based boarding school for high school students that incorporates hands-on training into its curriculum to teach students responsibility and respect for manual labor.¹ Laurelbrook students split their day between academic classes and practical work in one of the school’s vocational courses.² Following an investigation, Hilda Solis, the United States Department of Labor Secretary (the “Secretary”), alleged that Laurelbrook was violating multiple child labor provisions of the Fair Labor Standards Act (FLSA) including regulations on age, child labor hours, and hazardous occupations.³ In February 2007, the Secretary

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¹ See *Solis v. Laurelbrook Sanitarium & Sch., Inc. (Laurelbrook II)*, 642 F.3d 518, 520 (6th Cir. 2011); Brief for the Laurelbrook Sanitarium & Sch., Inc. at 37, *Laurelbrook II*, 642 F.3d 518 (No. 09–6128) [hereinafter Brief for Laurelbrook].

² *Solis v. Laurelbrook Sanitarium & Sch., Inc. (Laurelbrook I)*, No. 1:07-CV-30, 2009 WL 2146230, at *1 (E.D. Tenn. July 15, 2009), *aff’d*, 642 F.3d 518.

³ See Brief for the Secretary of Labor at 1, 17–19, *Laurelbrook II*, 642 F.3d 518 (No. 09–6128) [hereinafter Brief for Secretary].

filed suit in the District Court for the Eastern District of Tennessee to enjoin Laurelbrook from future violations of the FLSA.⁴

Laurelbrook argued that it was categorically exempt from the FLSA because it is a vocational school.⁵ The district court did not adopt Laurelbrook's categorical approach, but nevertheless found that the FLSA did not apply.⁶ The court reasoned that Laurelbrook's students were not employees because the students, not Laurelbrook, were the primary beneficiaries of their work.⁷ The United States Court of Appeals for the Sixth Circuit affirmed the district court and expressly endorsed the "primary benefit" test.⁸ The primary benefit test provides the flexibility courts need to evaluate training programs because it allows courts to consider the totality of the circumstances surrounding the training program while not requiring strict adherence to specific factors.⁹ Students like those at Laurelbrook may also benefit from the primary benefit test because employers may try to provide meaningful training with adequate supervision in order to avoid the costly and burdensome requirements of the FLSA.¹⁰

I. LAURELBROOK'S VOCATIONAL TRAINING PROGRAM

Laurelbrook is a boarding school for ninth through twelfth grade students that is run by Seventh-Day Adventists near Dayton, Tennessee.¹¹ Laurelbrook aims to provide students with "a balanced program of spiritual, academic and vocational training . . . with a goal of reproducing the character of God and preparing for His service."¹² Central to this goal, and in addition to four hours of academic classes, Laurel-

⁴ *Laurelbrook II*, 642 F.3d at 519, 521.

⁵ See Defendant's Memorandum in Opposition to Application for Preliminary Injunction at 1–2, 8–10, *Laurelbrook I*, No. 1:07-CV-30, 2009 WL 2146230 [hereinafter Defendant's Memo]. Laurelbrook also argued that its educational and religious values were interwoven, and that compliance with the FLSA would compromise the purpose of its vocational program. See Brief for Laurelbrook, *supra* note 1, at 14–15 ("Laurelbrook (and other vocational schools) cannot have a *bona fide* vocational program if the FLSA regulations apply."); Defendant's Memo, *supra*, at 7–8 (arguing that Laurelbrook's vocational program's purpose would be "seriously compromised" by an injunction).

⁶ See *Laurelbrook I*, 2009 WL 2146230, at *5, *7 (applying a test based on the "totality of the circumstances").

⁷ *Id.* at *7.

⁸ *Laurelbrook II*, 642 F.3d at 532.

⁹ See *id.* at 529 (discussing how the primary benefit test's generality allows it to consider unique situations).

¹⁰ See *id.*

¹¹ *Solis v. Laurelbrook Sanitarium & Sch., Inc. (Laurelbrook I)*, No. 1:07-CV-30, 2009 WL 2146230, at *1 (E.D. Tenn. July 15, 2009).

¹² *Id.*

brook students spend four hours per school day learning practical skills.¹³ Laurelbrook offers a range of practical courses in part so that students learn the skills necessary to be foreign missionaries.¹⁴

Students learn specific trades, but also contribute to the maintenance of Laurelbrook's operation.¹⁵ Students help with such tasks as landscaping, construction, housekeeping, and boiler room duty.¹⁶ Although religious schools need not be accredited, Laurelbrook sought and received full accreditation of its vocational program.¹⁷ Laurelbrook's accreditation allows its students to transfer to other schools in Tennessee and still receive credit for some of their work at Laurelbrook.¹⁸

In addition to its boarding school, Laurelbrook also runs a nursing home, or "Sanitarium."¹⁹ The Seventh-Day Adventist philosophy of education teaches students the importance of learning "how to treat the sick and to care for the injured."²⁰ Therefore, as part of their education at Laurelbrook, students work in the kitchen and housekeeping departments of the Sanitarium.²¹ Some students are also trained as Certified Nursing Assistants and are allowed to work directly with patients.²² Yet although the students help run the Sanitarium, the students' assistance actually impedes its operations.²³ The Sanitarium exists solely as a vehicle for the school's vocational program.²⁴ Laurelbrook would have

¹³ *Id.* at *2.

¹⁴ See *id.* Laurelbrook offers "Agriculture, Building Arts, Grounds [M]anagement, Mechanical Arts, Office Procedures, Plant Services, Water Services, Certified Nurses Assistant, Child Development, Environmental Services, and Food Service" courses. *Id.*

¹⁵ *Solis v. Laurelbrook Sanitarium & Sch., Inc. (Laurelbrook II)*, 642 F.3d 518, 530 (6th Cir. 2011); *Laurelbrook I*, 2009 WL 2146230, at *3; Brief for Secretary, *supra* note 3, at 5.

¹⁶ *Laurelbrook II*, 642 F.3d at 530; *Laurelbrook I*, 2009 WL 2146230, at *3; Brief for Secretary, *supra* note 3, at 5, 12. Students are also assigned other jobs which contribute to the school's maintenance, including laundry, kitchen duty, garbage collection, logging, electricity, and farming. Brief for Secretary, *supra* note 3, at 5, 7, 12.

¹⁷ Brief for Laurelbrook, *supra* note 1, at 2.

¹⁸ *Laurelbrook I*, 2009 WL 2146230, at *3. Laurelbrook's entire curriculum, including its vocational program, is accredited through an agency approved by the Tennessee Department of Education to accredit member schools. *Laurelbrook II*, 642 F.3d at 520. Laurelbrook sought accreditation because it wanted "to be the best" and give its students transferable credits. Brief for Laurelbrook, *supra* note 1, at 2 (internal quotations omitted).

¹⁹ *Laurelbrook I*, 2009 WL 2146230, at *2. Laurelbrook received Medicaid funding for running the Sanitarium. *Id.*

²⁰ Brief for Laurelbrook, *supra* note 1, at 5 (internal quotations omitted).

²¹ *Laurelbrook I*, 2009 WL 2146230, at *3.

²² *Id.* Laurelbrook does not pay the students for their work or guarantee them a job after graduation. *Id.*

²³ See *Laurelbrook II*, 642 F.3d at 530–31; *Laurelbrook I*, 2009 WL 2146230, at *3.

²⁴ *Laurelbrook I*, 2009 WL 2146230, at *3.

no purpose in continuing the Sanitarium if not for the vocational program.²⁵

Laurelbrook's unique hands-on curriculum prompted "a concerned citizen" to report the school to the Wage and Hour Division (WHD) of the U.S. Department of Labor for possible child labor violations.²⁶ The WHD investigated Laurelbrook and determined that it had violated the FLSA for such practices as employing students during school hours and allowing them to work in hazardous occupations.²⁷ In order to prevent future violations, the Secretary sought injunctive relief against Laurelbrook in the district court.²⁸

The district court denied the Secretary's requested injunction, stating that Laurelbrook students worked for "their own broad educational benefit, and thus are not performing work within the meaning of the [FLSA]."²⁹ The court found that although Laurelbrook received some benefit from the students' work, it was the students who received the primary benefit.³⁰ The Secretary appealed to the Sixth Circuit, claiming that the district court failed to apply the proper test for determining the applicability of the FLSA.³¹ The Sixth Circuit affirmed the district court, however, and expressly endorsed the "primary benefit" test.³²

II. EMPLOYEE STATUS UNDER THE FLSA

The primary issue on appeal was whether the district court erred in finding that Laurelbrook students were not "employees" under the

²⁵ *Id.*

²⁶ *Laurelbrook II*, 642 F.3d at 519.

²⁷ *Id.*; Brief for Secretary, *supra* note 3, at 17–18. For example, the Secretary alleged that Laurelbrook allowed students to drive garbage trucks, use nail guns, and operate circular saws. Brief for Secretary, *supra* note 3, at 18.

²⁸ *Laurelbrook II*, 642 F.3d at 519. According to the Department of Labor, Laurelbrook violated the FLSA by employing "oppressive child labor" which includes: (1) any nonagricultural employment under the age of sixteen for more than three hours per school day and eighteen hours per week while school is in session; or (2) employment of children under the age of eighteen in any occupation that the secretary declares particularly hazardous for children. See *Laurelbrook II*, 642 F.3d at 521–22; Brief for Secretary, *supra* note 3, at 17–19, 25–27.

²⁹ *Laurelbrook I*, 2009 WL 2146230, at *7.

³⁰ See *id.*

³¹ *Laurelbrook II*, 642 F.3d at 521.

³² *Id.* at 525–26, 532. The Sixth Circuit relied on *Walling v. Portland Terminal Co.* where the Supreme Court held that when a training program mainly benefits the trainees, rather than the alleged employer, the trainees should not be deemed "employees" for FLSA purposes. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947); *Laurelbrook II*, 642 F.3d at 525–26.

FLSA.³³ The FLSA opaquely defines an “employee” as “any individual employed by an employer,” and “employ” as including “to suffer or permit to work.”³⁴ Although the FLSA’s definitions are remarkably broad, the Supreme Court has limited the definition of “employ” to exclude those who work for their own benefit, such as in a training or educational program.³⁵ The Court in *Walling v. Portland Terminal Co.* reasoned that Congress did not intend to outlaw relationships where individuals forgo payment for the opportunity to learn valuable skills which cannot be taught in a classroom.³⁶ Instead, one of the purposes of the FLSA was to prevent employers from manipulating children into working for free and displacing regular entry-level workers.³⁷ The FLSA is also meant to protect children’s educational opportunities by preventing them from working during school hours.³⁸

Courts apply various tests to determine whether a student is an “employee” under the FLSA.³⁹ Despite the various tests, it has long been held that the FLSA standard is based on the circumstances surrounding the alleged employment activities, not on the labels affixed by the parties.⁴⁰ Courts do not look at whether an employer calls its workers “employees,” “volunteers,” or “trainees.”⁴¹ Instead, courts de-

³³ *Solis v. Laurelbrook Sanitarium & Sch., Inc. (Laurelbrook II)*, 642 F.3d 518, 521 (6th Cir. 2011).

³⁴ *Id.* at 522 (quoting 29 U.S.C. § 203(e)(1), (g)(2006)).

³⁵ See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152–53 (1947) (stating that Congress did not intend to outlaw relationships of individuals “who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by others persons either for their pleasure or profit”).

³⁶ See *id.*

³⁷ See *Laurelbrook II*, 642 F.3d at 527; *McLaughlin v. McGee Bros. Co.*, 681 F. Supp. 1117, 1132, 1134–35 (W.D.N.C. 1988) (finding the FLSA “clearly” applied because the minors were “manifestly being exploited” by the defendants to do adult work), *aff’d sub nom.* *Brock v. Wendell’s Wookwork, Inc.*, 867 F.2d 196 (4th Cir. 1989).

³⁸ See U.S. DEP’T OF LABOR, *Wages and Hours Worked: Child Labor Protections (Nonagricultural Work)*, (Sept. 2009), <http://www.dol.gov/compliance/guide/childlbr.htm>.

³⁹ See *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (applying the WHD’s six-part test, but disagreeing that all six factors must be met for “employee” status); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) (stating that “the general test used to determine if an employee is entitled to the protections of the [FLSA] is whether the employee or the employer is the primary beneficiary of the trainees’ labor”); *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir. 1983) (applying the WHD’s six-part test, but primarily focusing on the “primary benefit” factor); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 (5th Cir. 1982) (applying the WHD’s six-part test).

⁴⁰ See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729–30 (1947); *Laurelbrook II*, 642 F.3d at 524; see also *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 528 (1950) (Frankfurter, J., dissenting); *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984).

⁴¹ See *Laurelbrook II*, 642 F.3d at 524.

termine whether the FLSA applies by looking at the quality of the training and the benefits the alleged employees receive from the work.⁴²

A. *Determining Employee Status: Categorically Exempt or a Six-Part Test?*

Laurelbrook argued that it was categorically exempt from the FLSA because it is a legitimate vocational school.⁴³ According to Laurelbrook, the Supreme Court in *Walling v. Portland Terminal* “made [it] clear that the FLSA does not apply to vocational schools”⁴⁴ In *Portland Terminal*, the Court held that prospective brakemen in a railroad training program were not employees under the FLSA.⁴⁵ The Court explained that “[h]ad these trainees taken courses . . . in a public or private vocational school, . . . it could not reasonably be suggested that they were employees of the school within the meaning of the Act.”⁴⁶ The Court further explained that if the term employee applied to everyone who “work[ed] for their own advantage on the premises of another[,] . . . all students would be employees of the school or college they attended, and as such entitled to receive minimum wages.”⁴⁷

The Sixth Circuit disposed of Laurelbrook’s categorical approach because it bypassed any real consideration of the economic realities of the alleged employment relationship.⁴⁸ The court rejected Laurelbrook’s reliance on language from *Portland Terminal* referencing vocational schools because the Court in that case was evaluating an employer-based training program, not a vocational school.⁴⁹ Therefore, the language from *Portland Terminal* on which Laurelbrook relied was mere dicta.⁵⁰ The Sixth Circuit also noted that other courts have found vocational students to be “employees” governed by the FLSA, and therefore other courts have not categorically excluded vocational schools from FLSA coverage.⁵¹

⁴² See *id.* at 526, 529; *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 477 (M.D. Tenn. 1979), *rev’d on other grounds*, 668 F.2d 234, 236 (6th Cir. 1981).

⁴³ Brief for Laurelbrook, *supra* note 1, at 14.

⁴⁴ *Id.*

⁴⁵ 330 U.S. at 149, 153.

⁴⁶ *Id.* at 152–53.

⁴⁷ *Id.* at 152.

⁴⁸ *Laurelbrook II*, 642 F.3d at 523–24.

⁴⁹ See *id.*

⁵⁰ See *id.* (agreeing with the court in *Marshall* that the language in *Portland Terminal* was meant to “point out the absurdity of regarding as employment a student’s regular school work performed primarily for its educational value”) (internal quotations omitted).

⁵¹ See *id.* at 524; see also *Reich v. Shiloh True Light Church of Christ*, 895 F. Supp. 799, 819 (W.D.N.C. 1995) (finding children in church’s vocational program were employees under

Alternatively, the Secretary urged the Sixth Circuit to apply the Wage and Hour Division's (WHD) six-part test to determine whether students in training programs were employees under the FLSA.⁵² In an attempt to guide employers, the WHD designed its test based on the Supreme Court's reasoning in *Portland Terminal*.⁵³ Under the WHD test, vocational students or trainees are not employees under the FLSA if: (1) "[t]he training, even though it includes actual operation of the facilities of the employer, is similar to [the work] given in a vocational school;" (2) the training is done for trainee's benefit; (3) the trainees work under close supervision and do not displace regular employees; (4) "[t]he employer [providing] the training derives no immediate advantage from the activities of the trainees," and occasionally the training may actually impede the employer's operations; (5) "[t]he trainees are not necessarily entitled to a job at the completion of the training period; and" (6) both parties "understand that the trainees are not entitled to wages for the time spent in training."⁵⁴ Under the WHD test, all six criteria must be satisfied.⁵⁵ The Secretary argued that the WHD test should apply in this case because the Supreme Court's decision in *Skidmore v. Swift* requires that administrative interpretations be entitled to deference.⁵⁶

The Sixth Circuit rejected the WHD test because it was inconsistent with the flexible standard articulated by the Supreme Court in *Rutherford Food Corp. v. McComb*.⁵⁷ The *Rutherford* Court expressly stated that determining an employment relationship should not depend on

the FLSA), *aff'd per curiam*, 85 F.3d 616 (4th Cir. 1996); *Marshall*, 473 F. Supp. at 467, 477 (finding college students who were hospital trainees to be employees under the FLSA).

⁵² *Laurelbrook II*, 642 F.3d at 524; Brief for Secretary, *supra* note 3, at 28–31.

⁵³ See Letter from Barbara R. Relerford, Office of Enforcement Policy, Wage and Hour Div., U.S. Dep't of Labor, (May 17, 2004), *available at* http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.pdf.

⁵⁴ *Id.*

⁵⁵ See *id.*

⁵⁶ *Laurelbrook II*, 642 F.3d at 525; Brief for Secretary, *supra* note 3, at 31; see *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (determining that the "opinions of the Administrator under this Act, while not controlling . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); see also *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (finding that an "agency's policy statements, embodied in its compliance manual and internal directives," deserve some respect). Courts differ in the extent to which they apply the WHD test. *Laurelbrook II*, 642 F.3d at 525. Some courts strictly apply the WHD test, while others have rejected it completely. See, e.g., *id.*; *Parker Fire Prot. Dist.*, 992 F.2d at 1026–27 (finding the WHD test relevant, but not dispositive); *Ensley*, 877 F.2d at 1209 & n.2 (rejecting the WHD test completely); *Atkins*, 701 F.2d at 1128 (stating the WHD test is entitled to "substantial deference").

⁵⁷ *Laurelbrook II*, 642 F.3d at 525; see *Rutherford Food Corp.*, 331 U.S. at 730.

“isolated factors” but on “the circumstances of the whole activity.”⁵⁸ A totality-of-the-circumstances approach looks at the entire training program to determine whether the educational value derived by the trainees is worth the loss of protections of the FLSA.⁵⁹ No one factor is determinative, and each program may be evaluated differently.⁶⁰ The Sixth Circuit described the WHD test as “overly rigid and inconsistent with a totality-of-the-circumstances approach,” and therefore concluded that any deference to which the test was entitled was diminished.⁶¹

B. *Focusing on the Primary Beneficiary*

Rather than adopting one of the parties’ approaches, the district court focused on who received the primary benefit of the students’ work.⁶² The court’s use of the “primary benefit” test aligns with decisions in the Fourth, Fifth, and Eighth Circuits.⁶³ Courts in those circuits have all favored a test that weighs the benefits that the trainee and trainer received from the free labor.⁶⁴

The Sixth Circuit agreed that the primary benefit test was appropriate because the Supreme Court made a similar primary benefit inquiry in *Portland Terminal*.⁶⁵ In *Portland Terminal*, a railroad company required prospective brakemen to complete the company’s unpaid training course before being eligible for hire.⁶⁶ Since the training was mandatory, the brakemen claimed that the labor made them employees under the FLSA, therefore entitling them to payment.⁶⁷ The Supreme Court disagreed because the brakemen gained valuable skills, while the railroad did not receive any “immediate advantage” from their work.⁶⁸ The court considered several factors, such as the adequacy

⁵⁸ 331 U.S. at 730.

⁵⁹ See *id.*; *Laurelbrook II*, 642 F.3d at 525, 529 (applying the primary benefit test because the WHD test failed to consider the totality of the circumstances).

⁶⁰ See *Rutherford Food Corp.*, 331 U.S. at 730; *Laurelbrook II*, 642 F.3d at 525.

⁶¹ *Laurelbrook II*, 642 F.3d at 525; see *Rutherford Food Corp.*, 331 U.S. at 730.

⁶² *Laurelbrook II*, 642 F.3d at 525–26.

⁶³ See *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005); *Ensley*, 877 F.2d at 1209 & n.2; *Am. Airlines, Inc.*, 686 F.2d at 272.

⁶⁴ See *Blair*, 420 F.3d at 829; *Ensley*, 877 F.2d at 1209 & n.2 (stating that the proper legal question is which party receives the primary benefit, and expressly declining to follow the WHD’s six-part test); *Am. Airlines, Inc.*, 686 F.2d at 272 (focusing on which party receives the “greater benefit”).

⁶⁵ *Laurelbrook II*, 642 F.3d at 526.

⁶⁶ 330 U.S. at 149–50.

⁶⁷ See *id.* at 149.

⁶⁸ *Id.* at 152–53 (internal quotations omitted).

of supervision, whether the brakemen displaced regular employees, and whether the brakemen's work expedited the company's business.⁶⁹

The Sixth Circuit determined that the flexibility of the primary benefit test adequately protected against the evils the FLSA was meant to target, including the displacement of regular employees and exploitation of labor.⁷⁰ To determine who received the primary benefit, the Sixth Circuit recognized that some of the WHD factors might be helpful.⁷¹ Therefore, although the court rejected the rigidity of requiring all WHD factors, it did not reject the use of WHD factors to help guide the primary benefit inquiry.⁷² For example, whether trainees derive any educational benefit from the program and whether the program hinders the alleged employer's operations may help the court determine whether trainees are working for their own benefit or whether the employer is simply seeking free labor.⁷³

Applying the primary benefit test to Laurelbrook, the Sixth Circuit acknowledged that Laurelbrook received some benefit from its students' free labor.⁷⁴ Laurelbrook benefitted from students' contribution to the maintenance of the school, and the school received payment for some of the services performed by the students.⁷⁵ For example, Laurelbrook students helped sell flowers and produce, and Laurelbrook retained the proceeds.⁷⁶ Laurelbrook also received Medicaid funding for providing services to patients at the Sanitarium where Laurelbrook students worked for free.⁷⁷ The court weighed these benefits against the costs Laurelbrook incurred in providing students with hands-on training.⁷⁸ For example, the court noted that Laurelbrook's operations were actually hindered by the students' work.⁷⁹ Without the burden of training students, Laurelbrook's employees could complete more work in less time.⁸⁰ Therefore, although Laurelbrook received some benefit

⁶⁹ See *id.* at 149–50.

⁷⁰ *Laurelbrook II*, 642 F.3d at 527, 529.

⁷¹ *Id.* at 525, 529.

⁷² *Id.*

⁷³ See *id.* at 529.

⁷⁴ See *id.* at 530.

⁷⁵ *Laurelbrook II*, 642 F.3d at 530.

⁷⁶ *Id.*

⁷⁷ See *id.* at 520, 530.

⁷⁸ See *id.* at 530–31.

⁷⁹ *Id.*

⁸⁰ *Laurelbrook II*, 642 F.3d at 531. The Sanitarium staff would have been able to provide the same services without student help. *Id.*

from the students' free labor, the benefit was offset by the disruption to Laurelbrook's operations.⁸¹

The Sixth Circuit determined that Laurelbrook's students were the primary beneficiaries of their labor.⁸² The free labor Laurelbrook received did not outweigh the significant tangible and intangible benefits the program provided to students.⁸³ Laurelbrook's curriculum gave students hands-on training that enabled them to be especially competitive in the workplace.⁸⁴ Laurelbrook gave students meaningful work, and teachers adequately supervised them.⁸⁵ The court also heavily emphasized the intangible benefits Laurelbrook students received from "a well-rounded education . . . in an environment consistent with their beliefs."⁸⁶ Laurelbrook's students learned about responsibility and the dignity of manual labor, had a strong work ethic, and often took on more leadership roles both in and outside the classroom.⁸⁷ The Sixth Circuit decided that these intangible benefits tipped the primary benefit scale in the students' favor.⁸⁸

III. THE "PRIMARY BENEFIT" TEST

The parties' rigid approaches were not aligned with the flexible, totality-of-the-circumstances approach called for by the Supreme Court in *Rutherford*.⁸⁹ Laurelbrook's asserted categorical exemption of all vocational schools from the FLSA ignored the need to assess the economic realities of its training program.⁹⁰ Similarly, the Secretary's proposed use of the WHD test was inadequate because it inflexibly required satisfaction of all six of the test's factors.⁹¹ In contrast, the primary benefit test does not require specific factors, but allows courts to consider all factors that are relevant.⁹² The primary benefit test gives employers some guid-

⁸¹ *Id.* at 530–31.

⁸² *Id.* at 532.

⁸³ *Id.* at 531–32.

⁸⁴ *See id.* at 531.

⁸⁵ *See Laurelbrook II*, 642 F.3d at 531.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Solis v. Laurelbrook Sanitarium & Sch., Inc. (Laurelbrook II)*, 642 F.3d 518, 523–25 (6th Cir. 2011); *see Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (stating that an employment relationship should be determined by "the circumstances of the whole activity," not "isolated factors").

⁹⁰ *Laurelbrook II*, 642 F.3d at 523–24.

⁹¹ *See id.* at 525, 529.

⁹² *See id.* at 529.

ance as to what courts will consider when determining employee status, but it does not impose a precise formula on courts.⁹³

The “primary benefit” test effectuates the purpose of the FLSA by allowing courts to discern and eliminate the types of harmful child labor Congress sought to prevent.⁹⁴ When a court discerns that an employer is the primary beneficiary of a child’s labor, this may signal to the court that the employer is taking advantage of the child.⁹⁵ Conversely, where the work primarily benefits the children, and either hinders or insignificantly benefits the employer, it is unlikely that the employer is using children simply to avoid paying adult employees.⁹⁶ Focusing on the primary beneficiary allows courts the flexibility to identify employers who abuse children for commercial gain and hold such employers accountable under the FLSA.⁹⁷

Despite its advantages, however, the primary benefit test is problematic for employers and schools like Laurelbrook because it creates uncertainty about who is an employee under the FLSA.⁹⁸ To avoid violating the FLSA, employers and schools like Laurelbrook must attempt to discern the primary beneficiary of student or trainee work without any specific checklist of factors.⁹⁹ The primary benefit test, although flexible for courts, requires a balancing of benefits that may be difficult for employers to preemptively appraise.¹⁰⁰ Parties may not know that they are in violation of the FLSA until after a court’s ruling.¹⁰¹ These

⁹³ See *id.* (discussing how the primary benefit test focuses on generalities); Gerard P. Panaro, *The HR Troubleshooter: Unpaid Internships and the FLSA*, 17 No. 5 HR ADVISOR: LEGAL & PRACTICAL GUIDANCE ART. 6, 54, 59 (2011) (discussing the dangerous uncertainties that a generalized approach would put on intern versus employee determinations).

⁹⁴ See *Laurelbrook II*, 642 F.3d at 529. For example, in enacting the FLSA, Congress sought to prevent situations in which adults must compete with children for jobs. *Id.*; *McLaughlin v. McGee Bros. Co.*, 681 F. Supp. 1117, 1132, 1134–35 (W.D.N.C. 1988), *aff’d sub nom. Brock v. Wendell’s Wookwork, Inc.*, 867 F.2d 196 (4th Cir. 1989).

⁹⁵ See *Laurelbrook II*, 642 F.3d at 529; *McLaughlin*, 681 F. Supp. at 1132, 1134–35 (discussing how the FLSA was meant to prevent the shameless exploitation of children).

⁹⁶ *Laurelbrook II*, 642 F.3d at 529.

⁹⁷ See *id.*; *McLaughlin*, 681 F. Supp. at 1134–35.

⁹⁸ See Panaro, *supra* note 93, at 59 (stating that a totality-of-the-circumstances approach makes the “employee” determination more “uncertain, risky, dangerous and complicated” because employers do not know what factors will be evaluated).

⁹⁹ See *id.*

¹⁰⁰ *Laurelbrook II*, 642 F.3d at 525; Panaro, *supra* note 93, at 59.

¹⁰¹ See Panaro, *supra* note 93, at 54, 59; David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 233 (2002) (arguing that inconsistent results are almost guaranteed when the trier of fact must engage in an extensive, subjective analysis). As there is no bright line test, courts may exercise broad discretion when determining which party is the primary beneficiary. See *Laurelbrook II*, 642 F.3d at 522–23, 529; Yamada, *supra*, at 233.

mistakes may be costly for employers.¹⁰² Yet although it is imperfect, the primary benefit test ultimately benefits students and trainees because it incentivizes potential employers to improve their training programs in order to avoid FLSA regulation.¹⁰³

CONCLUSION

The primary benefit test provides courts with the flexibility to protect against the evils the FLSA meant to target, including the displacement of regular employees and the exploitation of labor. Nevertheless, Congress must address the FLSA's circular definitions of "employ" and "employee." Until Congress clarifies these definitions, courts will continually grapple with how to determine who is an "employee" for FLSA purposes. Court-by-court variation in determining who is protected by the FLSA ultimately creates uncertainty for employers and vocational schools like Laurelbrook.

¹⁰² See *Laurelbrook II*, 642 F.3d at 529 (discussing the "costly and burdensome requirements" of the FLSA); Panaro, *supra* note 93, at 54, 59 (mentioning the costly consequences of misjudging the applicability of the FLSA); see also Brief for Laurelbrook, *supra* note 1, at 14 (asserting that Laurelbrook's training program could not exist if FLSA regulations applied).

¹⁰³ See *Laurelbrook II*, 642 F.3d at 529; Panaro, *supra* note 93, at 59.