This is Exhibit E referred to in the affidavit of Kiara Sandhu sworn before me, this 19 day of Nov 2015

A commissioner for taking affidavits

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MEMORANDUM

DATE: October 22, 2014

TO: Lynne Buchanan, Employment Standards Program Manager

FROM: Katy Dixon, Assistant Attorney General
Amanda Goss, Senior Counsel

SUBJECT: **Are 15, 16 and 17 year old hockey players in the Western Hockey League employees for the purposes of determining possible violations of child labor laws?**

I. INTRODUCTION

At your request, I have researched the question of whether the teams of the Western Hockey League (WHL) based in Washington State (Seattle Thunderbirds, Spokane Chiefs, the Everett Silvertips, and the Tri City Americans) are employing minors. This analysis focuses on the factors that are relevant in determining whether there is an employment relationship between the players and the teams. While aspects of this analysis might apply to other scenarios involving athletics teams, this discussion is tailored to the specific facts of this sports league based on information gathered thus far.

The definitions of employee and employer in the Industrial Welfare Act are intentionally broad to facilitate the Act's remedial purpose. However, the Department of Labor and Industries does recognize an exemption for work performed by trainees. Representatives of the WHL contend that there is no employment relationship between the players, its member teams, and the WHL and that the players are effectively trainees, engaged in amateur sports with a goal of developing their skills to perhaps one day play professionally.

Drawing upon cases interpreting the federal Fair Labor Standards Act (FLSA), determining whether an individual is a trainee or an employee is a fact specific assessment that depends, for example, on who benefits most from the arrangement: the "trainee" or the employer.

This memo does not specifically address potential violations of the Minimum Wage Act. However, the legal analysis of whether the players are exempt trainees remains the same, regardless of whether the player is a minor or an adult. As such, if L&I determines that the relationship between the team and the players is one of employment, minimum wage laws are probably also implicated.

II. BRIEF ANSWER

Unlike students competing in sports for their high schools or colleges, the players of the WHL are playing hockey for for-profit businesses. The only exception to the broad definition of employee contained in the Industrial Welfare Act that might apply to the players is the exception for interns/trainees. Most likely, the players do not meet each of the six elements laid out in L&I policy to qualify as trainees because the WHL teams receive an immediate advantage from the player's performance. If, on the other hand, the six elements of the test are applied more loosely, as some courts have been inclined to do, the players may still fit within the trainee exemption if it is determined that the players benefit more from their time with WHL than the teams benefit from their participation. However, the stronger argument is for continuing to investigate based on an interpretation that the hockey players are employees.

III. FACTUAL BACKGROUND

L&I received a complaint from an individual associated with an organization called the Canadian Hockey League Players Association asserting that the Canadian Hockey League and its subsidiary, the Western Hockey League (WHL), are employing minors for around 50 hours a week (including time spent in practice, playing and traveling to games) in exchange for a modest stipends (from $35 to $125 a week), a travel allowance of $100-$200 a month, occasional bonuses, room and board, plus an education package that provides scholarships for college tuition and certain related expenses for each year a player competes in the WHL, subject to numerous restrictions.

The WHL teams compete in a level of hockey called major junior hockey. Three leagues, the Quebec Major Junior Hockey League, the Ontario Hockey League, and the Western Hockey League together make up the Canadian Hockey League (CHL) and comprise major junior hockey. Major junior hockey is traditionally a route to playing professionally in the National Hockey League (NHL): since 1969 a majority of professional hockey players have come from major junior teams.[1] It is not clear what percentage of major junior hockey players go on to play professionally later on, how many play hockey at the collegiate level in Canada, and how many players leave hockey altogether. The NHL has an agreement with the CHL where the NHL "grants" the CHL approximately $10 million per season, which may indicate a subsidy for player

[1] Background information on major junior hockey comes from the law review article: Marc Bianchi, *Guardian of Amateurism or Legal Defiant? The Dichotomous Nature of NCAA Men's Ice Hockey Regulation*, 10 Seton Hall J. Sports & Ent. L. 165 (2010).

development, but it is unclear from the terms of the agreement. Unlike minor league baseball teams, the WHL teams have no formal relationship with any NHL team, and there is no farm system where players are traded back and forth between leagues. There is another hockey league, the American Hockey League, that has 30 professional teams in the U.S. and Canada and serves as the primary development circuit for the NHL. There are no American Hockey League teams or NHL teams in Washington, making the WHL the most elite form of hockey played in this state.[2]

The players for WHL teams live with families in the community where the team is located. CHL regulations require that a player be between the ages of sixteen and twenty to play major junior hockey. Players are obtained by way of a draft system. Teams are limited to four sixteen-year-old players and three twenty-year-old players on their rosters. Teams are also allowed to call up fifteen-year-old players for as many as five games in a season. There do not appear to be specific restrictions on the number of seventeen, eighteen and nineteen year old players a team can have. A team's total roster consists of around 50 players: 23 are on the active roster and 27 are regarded as prospects.[3]

An individual who plays major junior hockey signs a contract with the team for which he plays. For the most part, the contract between a player and a team is a standard-form agreement with little room for negotiation. Remuneration and other benefits are set and regulated by the league. The WHL approves each player agreement between the player and the team (i.e. Seattle Thunderbirds) but it is the team and the player who are the actual parties to the agreement. The agreement provides for the costs the team will cover (room and board, costs of enrollment in a local high school, etc...) and the responsibilities of the player (to play exclusively for the team, to abide by all requirements of the WHL, to allow the team to use the player's likeness, etc...). Players who are not U.S. nationals may need a work visa to be in the United States to play for the team.[4]

Participating in one major junior game destroys a player's ability to play hockey in American colleges and universities, since the National Collegiate Athletic Association (NCAA) considers major junior hockey to be professional hockey.[5] A player can also destroy his college eligibility without playing in a major junior game. If a player signs a contract to play for a major junior team, he loses all his eligibility to play college hockey in the U.S.[6]

The three major junior leagues are similarly structured and play similar schedules. The WHL is comprised of twenty-two teams and plays a seventy-two game regular season schedule. The

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[2] See http://theahl.com/team-map-directory-s11579
[3] See: http://juniorhockeybook.com/whl-draft-whl-bantam-draft-western-hockey-league-bantam-draft/
[4] See http://hfboards.hockeysfuture.com/showthread.php?t=1733173
[5] See NCAA Division I Policy Manual 2014-2015 Bylaw 12.2.3.2.4 Major Junior Ice Hockey stating "Ice hockey teams in the United States and Canada, classified by the Canadian Hockey Association as major junior teams, are considered professional teams under NCAA legislation."
[6] See http://www.whl.ca/page/faqs.

playoff schedule has the potential to add another twenty eight games to a team's season, thus increasing the total number of games played to almost 100. Major junior training camps get underway at the end of August, and the regular season ends in mid-March, and playoffs run into early May. The structure of the season mirrors that of a professional NHL season with an emphasis on maximizing game-time.

The CHL and WHL are non-profit organizations, but the individual teams are for-profit entities. The Spokane Chiefs, the Everett Silvertips and the Tri City Americans are corporations; the Seattle Thunderbirds is an LLC. All four teams have L&I accounts and report worker hours in the "clerical", "outside sales personnel", and "athletic team (care of team, gear and facilities)" risk classifications for industrial insurance premium assessment purposes. Everett and Seattle report worker hours in the "retail stores" classification. Seattle, Spokane and the Tri City team report in the "Contact Sports" classification, which includes players, but also includes managers, coaches and referees. It appears that the teams are reporting and paying premiums for coaches and other personnel, but not the players.[7] It is not possible to determine the number or identity of individuals included in the quarterly reports, since businesses are only required to enter the sum of all worker hours in each risk classification. The Everett team was audited by L&I in 2008, with a determination that the players are not subject to mandatory industrial insurance coverage because they have out of state coverage from a private worker's compensation insurance company based in Canada.

The WHL responded to the child labor complaint with a February 11, 2014 letter. The league contends that the major junior hockey players are amateur athletes, not employees, and are similar to players on high school and college sports teams. The WHL asserts that major junior hockey provides a path for players who wish to compete in hockey at the highest competitive levels, with the WHL effectively subsiding the cost of the player's training by providing room and board, equipment and college scholarships. The WHL contends that this is no more an employment relationship than a scenario where an athlete receives a scholarship to attend boarding school. They assert that there is no Washington legal authority addressing this issue, but that federal law concerning trainees under the Fair Labor Standards Act supports their conclusion that the players are not employees, because they have no expectation of being paid wages and the benefits of playing flow principally to the players, not the team or the league. The WHL suggests, in a general fashion, that there is a long standing tradition of treating hockey players as amateur athletes, and that there is no reason to treat WHL players differently from athletes competing at the highest levels in college programs. The WHL also contends that the fact that L&I has allowed these teams to operate for years without asserting an employment

[7] WAC 296-17A-6707. 6707-1 Hockey teams:
Applies to players, coaches, referees, and managers employed by a professional hockey team.
This classification excludes employees engaged in caring for the team and equipment, the care and operation of the arena/stadium, and care of the facility in which the team organization is housed who are to be reported separately in classification 6706 and officials of community or school amateur sporting events are to be reported separately in classification 6103.

relationship between the league and its players suggests that the Depar..
has not believed, that such a relationship exists. However, to my knowledge, ..
complaint of its nature that the Department has received.

In 2000, a Canadian tax court found that the Wheat Kings, a WHL team based in Brandon, Manitoba, was required to pay unemployment taxes for its players. Rejecting the team's argument that the players were in an educational training program, the judge concluded, "the business of the Wheat Kings is simply the business of hockey. It is a commercial organization—albeit beloved by the citizens of Brandon—carrying on business for profit. The players are employees who receive remuneration—defined as cash—pursuant to the appropriate regulations governing insurable earnings." *McCrimmon Holdings Ltd. v. M.N.R.* 2000-11-24 Tax Court of Canada Judgments.

With the past year, union organizers in Canada have taken initial steps towards forming a player's union. Unifor, Canada's largest private-sector union, has been meeting with government officials regarding conditions of WHL players, but unionizing efforts are still in the early stages. In October 2014, a class action law suit was filed in Canada alleging that the WHL's parent league, the Canadian Hockey League, conspired to breach Canadian minimum wage laws by underpaying players.

IV. DISCUSSION

A. Statutory definitions of "employ" "employer" and "employee" in the Industrial Welfare Act are intentionally broad, but subject to certain narrowly defined exceptions

RCW 49.12.121 governs the "labor of minors employed in any trade, business, or occupation in the state of Washington." RCW 49.12.005(4) defines "employee" as an "employee who is employed in the business of the employee's employer whether by way of manual labor or otherwise." "Employ" is not defined in RCW 49.12.005 or RCW 49.12.121. However, L&I defines "employ" in child labor regulations as "to engage, suffer or permit to work." WAC 296-125-015(2).

There is currently very little in the way of case law interpreting these definitions of employ, employer and employment. In an appeal currently pending at the court of appeals, *Doty v. Dep't of Labor and Indus.*, Docket No. 31290-9-III, L&I used the definition of the term "work" in *Webster's Third New International Dictionary* 2634 (2002) as "an activity in which one exerts strength or faculties to do or perform something." L&I argued that this definition most advances the child labor statute, since it focuses on the labor of a child and would allow for regulation of harmful activities. Under this definition, the hockey players of the WHL would clearly seem to be working, since they are exerting themselves to perform as hockey players, both in training and

in actual games in front of spectators. It also seems clear that the particular teams of the WHL have engaged the players to do this work. Indeed, it is one of the major functions of the standard player agreement to ensure that players play exclusively for one WHL team.

The definitions of "employer" and "employee" in Chapter 49.12 RCW are broad, which is consistent with the law's remedial purpose, that "all employees be protected from conditions of labor which have a pernicious effect on their health." RCW 49.12.010. However, there are some exceptions to the application of child labor and industrial welfare laws. Independent contractors, for example, are not subject to the Act. There are also certain statutory exemptions (newspaper vendors, agricultural labor on family farms) that would not apply. The regulation for student learners in WAC 296-128-180 does not apply because the hockey players are not receiving hockey instruction through an accredited school, college, or university.

The WHL may contend that the players are volunteering for the team, not working. However, the league will probably not succeed in establishing that the players are volunteers because a worker can only volunteer services for a non-profit organization, and without an expectation of pay. Additionally, if the stipends the players receive qualify as compensation, the players will probably not qualify as volunteers. RCW 49.46.010(3)(d).

The WHL contends that its hockey players are student-athletes comparable to those that play for elite teams at the high school and collegiate level. While there is legal authority from other states that concludes that student-athletes are not subject to mandatory workers compensation coverage and other employment regulations, these cases turn on the fact that students who receive athletic scholarships are students first, and their scholarships are intended to facilitate their education. *See Rensing v. Indiana State Univ. Bd. of Trustees*, 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."). The WHL draws on this logic by stressing the fact that the league helps coordinate the completion of a player's high school education, including covering any incidental educational expenses, and because the league offers college scholarships, subject to limitations, for each year of WHL play time. However, it does not appear that the WHL has any formal relationship with any Washington state college or high school. As such, the student-athlete analysis would not directly apply to the teams of the WHL, which are for-profit businesses, not educational institutions.[8]

[8] Although not directly relevant here, two recent legal decisions have made headlines by challenging some of the legal presumptions of the student-athlete model. In *Northwestern University and College Athletes Players Association*, No. 13-RC-121359 (March 26, 2014), a regional director of the National Labor Relations Board found that football players at Northwestern University were compensated through tuition and other expenses, worked long hours, and brought substantial revenue to the University such that they qualified as employees who are entitled to unionize. Also, in *O'Bannon v. National Collegiate Athletic Association*, 7 F.Supp.3d 955 (N.D. Cal. Aug. 8, 2014) a federal judge found that men playing basketball and football for elite college teams are entitled to receive limited compensation for the use of their names and images in media broadcasts and in video games. Both decisions have been appealed.

It appears most likely, based on the letter received from the attorney for the WHL that the league will contend that the hockey players are akin to trainees. The WHL asserts that the nature of the relationship between the players and the league teams is "one of development." WHL letter February 19, 2014, page 7. The WHL argues that the federal case law on trainees is applicable to the circumstances of the hockey players, because the training they receive playing for the WHL is similar to what they would receive playing for a school sponsored hockey team, that the players don't displace employees and that they have no expectation of wages. WHL letter February 19, 2014, page 7-8.

L&I's policy on "Hours Worked" ES.C.2 contains a section that mirrors a Department of Labor (DOL) policy articulating six elements necessary for an individual to qualify as an intern or trainee exempt from wage and hour regulations. Both polices require that all six elements be met for an individual to be exempt.

Because there is no case law in Washington state interpreting the definitions of employer, employee and employ in the Industrial Welfare Act and WAC 296-125-015, and because those definitions closely track the definitions in the FLSA, federal case law interpreting the FLSA provides the best guidance in determining whether the hockey players of the WHL are exempt as trainees or covered as employees. Some of these cases involve minors, but courts have not analyzed the employment relationship any differently when the purported trainees were minors as compared to adults.

While federal and state policies require that all six elements be met, federal courts have interpreted the elements more loosely, focusing especially on whether the employer or the purported trainee is benefiting most from the experience. Courts have given differing degrees of weight to the other factors contained in the DOL test. The determination is very specific to the facts of each case.

B. **Determinations of whether an individual is an exempt trainee or covered employee are fact intensive, with L&I policy requiring that each of the six elements of the test be met for an individual to be exempt**

To determine whether a worker is covered under the FLSA or exempt as a trainee, federal Courts apply an analysis developed in the 1947 U.S. Supreme Court case *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639, 91 L. Ed. 809 (1947). In that case, a railroad held a week-long training course for prospective brakemen. The Supreme Court concluded that for the week in question the individuals were "trainees", and not covered employees under FLSA. The court found that the trainees did not displace any of the regular employees, who did most of the work themselves, and who supervised the trainees in their duties. *Walling*, 330 U.S. at 149-50. The

court also concluded that the trainees' work did not expedite the company business, but may have actually impeded the railroad's regular work. *Id.* at 150. The Court held that FLSA "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction . . . the [FLSA] was not intended to penalize [employers] for providing, free of charge, the same kind of instruction [as a vocational school] at a place and in a manner which would most greatly benefit the trainee." *Id.* at 152-53. The Court concluded that because the railroad received no immediate advantage from any work done by the trainees, they were not employees.

The DOL subsequently developed a six part test to determine whether interns working at for-profit businesses fall within the "trainee" exemption laid out in the *Portland Terminal* case. The DOL's fact sheet states that an intern is exempt only if *all* of the six elements of the test are met:

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.[9]

L&I has an administrative policy that mirrors DOL's six part test, with the word "trainee" substituted for the word "intern" along with a few other small linguistic differences. *See* Administrative Policy ES.C.2. Like the federal policy, L&I requires that every element be satisfied. Courts have taken different approaches to DOL's test, with some courts giving substantial deference to the DOL and agreeing that all six parts of the test must be met before a trainee/intern is exempt under the FLSA. *See Atkins v. General Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir.1983). Other courts have concluded that the DOL test provides guidance, but need not be strictly applied, and that the "totality of the circumstances" controls whether a trainee is an employee under the FLSA. *See Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1025–26 (10th Cir.1993). Under this approach, a trainee/intern could fail one or more elements of the test and still be exempt. Other courts have essentially rejected the six-part test as too rigid and "all or nothing," concluding that the general test is whether the employee or the employer is

[9] Wage and Hour Division, U.S. Dep't of Labor, Fact Sheet No. 71: Internship Programs Under the Fair Labor Standards Act 2 (Apr. 2010), available at http://www.dol.gov/whd/regs/compliance/whdfs71.htm.

the primary beneficiary of the trainees' labor. *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 (4th Cir.1989).

Applying these various tests, courts have concluded that homeless participants in a work program doing kitchen and sanitation work were employees, not trainees, *Archie v. Grand Cent. Partnership, Inc.*, 997 F. Supp. 504 (S.D.N.Y. 1998); that individuals working as unpaid interns for a film production company, running errands, making copies and building sets were employees, *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (2013); that sixteen year olds working on construction projects as part of church sponsored youth program were employee, *Reich v. Shiloh True Light Church of Christ*, 895 F. Supp. 799 (W.D.N.C. 1995); and that radiology students performing x-ray examinations were employees of the hospital. *Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979).

However, courts have also concluded that trainees are not employees under the FLSA if the employer receives no immediate benefit from their work and the training is limited in duration. *See Donovan v. Trans World Airlines, Inc.*, 726 F.2d 415, 416–17 (8th Cir.1984) (airline trainees are not employees under FLSA because airline receives no immediate benefit from their training); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 (5th Cir. 1982) (same); *see also Reich*, 992 F.2d at 1025–29 (fire fighter trainees are not employees under FLSA during time in training at the fire-fighting academy).

While the cases vary significantly in their facts and outcomes, there are two common circumstances where courts tend to find that individuals qualify as exempt interns: in the first case there are scenarios where for-profit businesses have pre-employment training programs for a period of days or weeks. In such cases, courts have held that the pre-employment training creates a labor pool, that employers do not immediately benefit from such a training, and that the trainees do not expect to be paid for their training, or expect that they will necessarily have a job when the training is concluded. *See, e.g. Walling*, 330 U.S. at 148; *Trans World Airlines, Inc.*, 726 F.2d at 416-417. In the second scenario, the purported work is carried out in conjunction with an organization's rehabilitative or educational function, such as a job training program for homeless individuals or a work study for students. *See, e.g. Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1327 (10th Cir. 1981). In those cases, courts have found that the work is secondary to the more basic educational and/or rehabilitative function, and that the work would not exist apart from this mission, so there is no employment relationship and no expectation of wages. I have not found any cases, however, where a court has determined that individuals in sustained work-like relationships for for-profit businesses qualified as interns.[10]

[10] The Ninth Circuit has not specifically considered the DOL test. In *Williams v. Strickland*, the plaintiff was a homeless alcoholic who entered a six-month rehabilitation program run by the Salvation Army. 87 F.3d 1064, 1066 (9th Cir.1996). Williams turned over his food stamps and welfare benefits in exchange for room and board; he worked full time making furniture and in the loading dock and received a stipend of between seven and twenty dollars a week. However, the court concluded that Williams was not an employee under FLSA because he "had

Application

No federal court has applied the DOL test to a scenario involving athletes. If a court were to apply the test to the facts of the hockey players of the WHL, a central question will be who benefits most from their performance. Although the test has six discrete required elements, courts have often considered the elements more holistically, with an eye towards the "realities of the situation."

1. **Whether, 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;**

With respect to this element, there are two related issues. First, is playing hockey in the WHL similar to the kind of athletic/sports training that a high school student might receive? Secondly, is sports/athletic training really the kind of training contemplated by the test?

The WHL could argue that the hockey training the players receive is similar to the kind of training received in high school and college athletic programs. Ice hockey does not appear to be a sanctioned sport in Washington State high schools and I cannot find any Washington high school that has an affiliated ice hockey team.[11] As such, playing ice hockey is not exactly similar to the kind of athletic training that would be offered in a high school environment in this state.

However, many high school students do receive training in team sports, which may be "similar" to the training the WHL players received. Generally, the training scenarios contemplated by the test refer to vocational training, i.e. training geared to future employment. To meet this element, the player's hockey training would have to be construed as training for future employment, and the WHL's training would need to be sufficiently similar to the kind of athletic training high school students receive.

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neither an express nor an implied agreement for compensation." *Williams*, 87 F.3d at 1067. The court concluded that the relationship was "solely rehabilitative" and that any benefits Williams received were intended to facilitate his treatment for alcohol abuse. The dissent in the case noted that the Salvation Army received substantial profits from the value of the furniture produced by Williams and that a rehabilitative motive did not preclude an employment relationship. Recently, a federal district court in Oregon interpreted *Williams* to mean that the two determinative questions are (1) whether employer receives an "immediate advantage" from the trainees work and (2) whether there was an express or implied agreement for compensation. *Nance v. May Trucking Co.*, 2014 WL 199136 (Dist. Or. Jan. 15, 2014). That court found that plaintiffs were not employees during their two and four day training/orientation for a trucking company.

[11] From the website of the Western Washington High School Hockey League: the WWHSHL "is the league in which the high school hockey teams west of the cascade mountains play. Since ice hockey is not a sanctioned sport in the state of Washington, the WWHSHL is an independent (sic) league, and is in no way, shape, or form affiliated with the schools themselves." http://wikibin.org/articles/western-washington-high-school-hockey-league.html.

2. Whether the internship experience is for the benefit of the intern;

The playing experience greatly benefits the players if they hope to continue playing hockey professionally. The team is benefiting directly, too, however, because they are able to field a team. The WHL might be able to operate without minor players, but they cannot operate without a team. The issue then is who is benefiting more, the players or the team. A court would apply a comparative analysis to decide if the players or the team is benefiting the most from the relationship. In *Williams*, for example, the court concluded that the homeless participant was benefiting most from the Salvation Army's rehabilitation program and the benefit he provided by building furniture was mostly to compensate Salvation Army for the costs of the program. 87 F.3d at 1067. However, in *Glatt* the court found that interns on a movie set only received benefits incidental to working in the office like any other employee, whereas the employer earned the benefits of their unpaid work, which otherwise would have required paid employees. 293 F.R.D. at 533.

It is not clear exactly how much money the WHL and the teams spend on player stipends, housing, room and board, and college scholarships, and how much income they are receiving from ticket sales, merchandising and from other sources, such as subsidies from the NHL. If the income teams receive barely outstrips their costs, this could be an argument that the team exists principally to benefit the players in their training and development. To the extent that the players benefit by being able to compete and improve their hockey skills and increase their chances of playing professionally, the players probably meet this test.

3. The intern does not displace regular employees, but works under close supervision of existing staff;

The players do not displace regular employees because there are no players in the league who are treated as employees. However, this is not dispositive. Without the players, there is no team. The players may receive slightly larger stipends for each year they play in the league, however they are otherwise treated the same, making them essentially an entire team of "interns."

It may be that if the team was not made up of its current players that the league itself would fold. In other cases, courts have held that where the entire business would cease to exist without the trainees, that the trainees did not displace regular employees and that there was no employment relationship. *Solis*, 642 F.3d at 518. There, the court considered a religious boarding school for students grades nine through twelve. The student's religious training included a work component, and the students were required to work four hours a day in one of several vocational programs, including providing housekeeping and nursing care, selling produce and repairing cars. The court held that the work was just a corollary of the educational mission of the school, not a business relationship in and of itself. However, the school in that case was a religious non-profit, unlike the for-profit sports teams at issue here. The court also found it significant that it would be possible for existing staff to continue providing those services if the students did not, and that the instructors had to take time out of their own work to assist the students, meaning tha

the school did not gain an unfair advantage from its use of student workers. In contrast, in the WHL there are currently no paid players that could conceivably replace the unpaid minors.

4. **Whether the employer that provides the training derives any immediate advantage from the activities of the intern; or whether on occasion its operations may actually be impeded;**

In that the teams would not exist without their players, and no income would be possible without a team, the teams of the WHL would appear to immediately benefit from the players. This is especially true if the team is making a significant profit above and beyond what they are paying out in scholarships and expenses.

Currently, the file does not contain any information regarding the yearly ticket sales, profit margins or income streams of the four Washington teams—that information would be useful for L&I to obtain. If the teams were making a substantial profit above and beyond expenses, this would indicate more strongly that the primary objective of the team is profit, not simply to provide a mechanism for player development.

5. **Whether the intern is entitled to a job at the conclusion of the internship**; and

It is unclear what expectation or commitment the players receive regarding play from year to year with their WHL team. While they are apparently drafted to play for one team, and sign a contract for one hockey season, it is not clear if they generally continue from year to year or if they can be cut by the team or are must try out each season.

In any event, the players are not entitled to a *paying* job at the conclusion of their time with the WHL. The players may be entitled to another season of play in the WHL, depending upon their performance, and until they reach the maximum age of 20. While there is not much information available, it appears players either continue playing hockey professionally in the National Hockey League or one of its subsidiary leagues after their time with the WHL concludes, or they play at the collegiate level in Canada, or they leave hockey altogether. Unlike other internship scenarios, however, there will be no paying job with any team of the WHL. If they play professionally, it will be for another team in another league entirely.

6. **Whether the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.**

In that the players receive modest stipends and additional bonuses of unknown amounts in exchange for playing for the team, this element is possibly not met. Even a stipend of $35-$50 a week could qualify as wages. The standard player agreement does not mention any stipend; it would be useful to know how the amount of the stipend is calculated and whether there is any written agreement laying out the terms of payment.

Even if the players do not expect compensation, they may still be entitled to wages. Given the fervor with which the players likely approach the game, many would probably be willing to play and train for even less than they are currently given. This does not mean that they are not owed the wages, however.

V. CONCLUSION

For L&I to find that the WHL has violated child labor laws, there must be sufficient evidence of an employment relationship between the hockey players and their respective teams. There is virtually no case law in Washington interpreting the definitions of employee and employer in the Industrial Welfare Act. While there are similar definitions in the FLSA, no federal court has considered how these definitions should be applied to minor players of for-profit sports teams.

Because of the remedial nature of the Industrial Welfare Act, the definitions of employee and employer should be interpreted broadly. The only clear exemption that might apply to the players of the WHL is the trainee/intern exemption. L&I has a policy that lays out six required elements for that exemption. Applied strictly, the players would likely not meet the test. For one, the teams do appear to benefit immediately from the player's performance on the ice. The players may also have an expectation of wages in the form of weekly stipends. Because no other exemption besides the trainee exemption clearly applies to the players, it is appropriate for the Department to continue to investigate based on an interpretation that the hockey players are employees. This interpretation is bolstered by the fact that I have not found any cases where a court has found that individuals in sustained work-like relationships for for-profit businesses qualified as interns.

That said, federal courts are quite varied in their application of the intern/trainee exemption, with some courts finding that if the alleged work is secondary to and supportive of a more basic educational mission, that there is no employment relationship. This lack of clarity creates some risk if any resulting citation is appealed, and the matter is litigated, which it likely will be.

At this point L&I could choose to accept WHL's assertion that the players are trainees and not in an employment relationship with the league or its teams and decline to investigate further.

However, because it does not appear that all six elements of the trainee exemption are met per L&I policy, L&I has a solid basis for determining that the players are employees under the IWA. As such, the stronger argument is for continuing to investigate. If the investigation continues to substantiate an employment relationship, L&I can then determine whether the league or its teams have violated child labor hours with respect to hours worked and other conditions of employment. Investigating further will put the Department in a better position to issue a final determination, and to support that determination if it is appealed.

The league and teams will probably continue to argue that the hockey players are student-athletes and that they are the primary beneficiaries of their time with the WHL. As such, L&I

should be mindful of any facts that would go towards establishing or negating any of the elements in L&I's six part policy on trainees. To that end, I have drafted a set of questions, provided as a separate document, that can be developed and refined if L&I decides to investigate further.

Please keep in mind that this reflects my opinion as an Assistant Attorney General and does not necessarily reflect the opinion of the Attorney General.