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Click-Work or Click-Play: Crowdsourcing and the Work-Leisure Distinction  
Joseph A. Armenti\*

**I. INTRODUCTION**

The digital economy has created new forms of work, play, and value.<sup>1</sup> A site like Facebook may be worth tens of billions of dollars—almost entirely because its hundreds of millions of users spend time on it sharing, commenting, and curating. Some platforms convert such “clicking” activities into opportunities for payment. For example, firms conduct market research through crowdsourcing platforms by asking users to rate images for adult content or review Tweets. The firm benefits from the labor while the user is paid five cents upon completion of the task. Should traditional labor law apply to these activities? Or are they a form of paid leisure, impossible (or undesirable) to regulate?

With the advent of the internet, virtual work forums have emerged as a unique medium for these conflicting interests. Over the past several years, there has been a large uptake in the amount of web-based job opportunities.<sup>2</sup> These virtual work environments, while rapidly expanding in use, are absent worker protections that are otherwise enjoyed by workers of the traditional work environments.<sup>3</sup> Most succinctly, “[t]hese are new forms of labor but old forms of exploitation.”<sup>4</sup>

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<sup>1</sup> For a timeline of notable labor developments, visit AFL-CIO, *Labor History Timeline* (last visited Feb. 12, 2013), <http://www.aflcio.org/About/Our-History/Labor-History-Timeline>.

<sup>2</sup> TREBOR SCHOLZ, *DIGITAL LABOR: THE INTERNET AS PLAYGROUND AND FACTORY*, 1 (2012) (“Over the past six years, web-based work environments have emerged that are devoid of the worker protections of even the most precarious working-class jobs.”).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

While virtual work comes in different forms,<sup>5</sup> this Comment will focus on one particular form of virtual work called “crowdsourcing.” Crowdsourcing, or click-working (“clicking”),<sup>6</sup> is a way to utilize the masses of online users to perform simple tasks for a small fee.<sup>7</sup> A complicated task is broken down into many pieces and distributed to thousands of workers throughout cyberspace, which are then consolidated into a finished product.<sup>8</sup> Computers are used to automate the work distribution to clickers and to configure completed tasks.<sup>9</sup> In the past, crowdsourcing has been used in various large-scale projects, such as locating Steve Fosset<sup>10</sup> or counting craters that appear in images of Mars.<sup>11</sup> Essentially, “[c]rowdsourcing takes the products of many workers to create something greater than the sum of its parts.”<sup>12</sup> As crowdsourcing continues to gain popularity, Congress and the courts will need to grapple with employment laws as they apply to virtual work forums.

The overarching issue is one of fairness: crowdsourcing allows employers to circumvent labor and employment laws and potentially exploit a massive work force under the guise of entertainment or play. As a result, the value returned to workers for their input labor is not proportional to the benefit generated for the employer. Generally, the Federal Labor and Standards Act (FLSA) is the federal law of broad application governing minimum wage,

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<sup>5</sup> One such form is the token economics that have been created with the advent of virtual reality video games such as Second Life or Everquest. These types of virtual work make it possible to “work in a fantasy world to pay rent in reality.” F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 11 (2004).

<sup>6</sup> Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1088–89 (2009). Many call those completing crowdsourcing tasks “click-workers,” but for clarity and to avoid a naming scheme that incorporates that which is sought to be proven, this Comment will refer to those performing crowdsourcing tasks as “clickers.”

<sup>7</sup> Jeff Howe, *The Rise of Crowdsourcing*, WIRED (June 2006) at 176, 178–79.

<sup>8</sup> *Id.*

<sup>9</sup> See Cherry, *supra* note 6.

<sup>10</sup> Dan Fost, *Despite Silicon Valley Optimism, a Disease Resists Cure*, N.Y. TIMES, Apr. 14, 2008, at C6 (describing failed searches for Fossett and James Gray, a scientist who was lost at sea).

<sup>11</sup> Nick Eaton, *NASA, Microsoft wants you to help research Mars*, THE MICROSOFT BLOG (2009), <http://blog.seattlepi.com/microsoft/2009/11/18/nasa-microsoft-want-you-to-help-research-mars/>.

<sup>12</sup> See Cherry, *supra* note 6.

overtime pay, youth employment, and record keeping.<sup>13</sup> This law was meant to ensure a basic level of fairness, *inter alia*, in the relationship between the worker's input effort, the firm's benefit from the worker's input, and the worker's ultimate value in the form of compensation.<sup>14</sup> In virtual work forums, this relationship is unevenly distributed to favor the firms that are utilizing crowdsourcing. The FLSA has not been applied to offer rectification.

Consequently, the FLSA does not contain a definition of "work."<sup>15</sup> In addition to a cloudy definitional starting point, this unfairness is exacerbated by gamification: "applying game-design thinking to non-game applications to make them more fun and engaging."<sup>16</sup> Gamification continues to blur the FLSA's overly-vague distinction between work and play. Additionally, firms using crowdsourcing are not subject to any regulation that may require fairness in wages—an instance of regulatory arbitrage.<sup>17</sup> Without regulations in virtual work forums, firms may choose crowdsourcing instead of hiring additional workers in order to circumvent laws like the FLSA. The advent of unregulated virtual work calls into question the modern relevance and effectiveness of the FLSA in ensuring worker fairness through a more appropriate work/play classification.

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<sup>13</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>14</sup> "The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce." 29 U.S.C. §§ 202 (2006)

<sup>15</sup> *Id.*

<sup>16</sup> Adam Swann, *Gamification Comes of Age*, FORBESBRANDVOICE (July 16, 2012), <http://www.forbes.com/sites/gyro/2012/07/16/gamification-comes-of-age/>.

<sup>17</sup> See *infra* Part VI.

The implications of the gap in the FLSA’s protection are best found through example. Consider a clicker contributing to a question-answer crowdsourcing scheme.<sup>18</sup> Suppose a high school student makes \$15 per hour two days per week babysitting an infant for five hours until the child’s mother or father returns home from work. At the end of most weeks, she had earned approximately \$150 to spend recreationally. The babysitter lives comfortably with her parents who cover her other expenses. While the infant takes a nap, the babysitter completes human-augmented search tasks to fill the time and compensation is delivered to her account. According to the babysitter, it is “kind of fun and fills the time.” Should this be considered work or play? Does the answer change if the babysitter—now full-time and no longer financially supported by anyone— earned \$1,000 from crowdsourcing throughout the year with the intent to enhance her income? That extra money would now be spent on purchasing necessities such as food, rent, and clothes. Is this work or play? To what extent do should courts consider other sources of income, the clicker’s intent, the clicker’s age, and other factors to reach an answer to the work-leisure question that is fair to the clicker?

Another problematic work-play distinction resulting from virtual work is the Chinese gold farmer, a case in which the distinction between work and play has become a line blurred beyond recognition.<sup>19</sup> In numerous set-ups across China, rooms are filled with computers running online massive multiplayer games such as World of Warcraft. The workers put in nearly 84 hours of play per week earning gold coins that will be sold to American and European

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<sup>18</sup> This scheme is also referred to as “human augmented search.” Some brand-name manifestations of these services are Cha-Cha or KGB, popular services that provide answers via text message to questions using crowdsourcing to find the answer. See Katharine Mieszkowski, “I make \$1.45 a week and I love it”, SALON (July 24, 2006), available at [http://www.salon.com/2006/07/24/turks\\_3/](http://www.salon.com/2006/07/24/turks_3/); Post by Erik Hans Rasmussen, *Essential Tools for Crowdsourcing Answers to Your Questions*, INSTANTSHIFT (May 8, 2012), <http://www.instantshift.com/2012/05/08/essential-tools-for-crowdsourcing-answers-to-your-questions/>.

<sup>19</sup> See Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 969–72 (2011).

gamers.<sup>20</sup> The gold farmer will earn approximately thirty cents per hour for their efforts. The New York Times reports, “[c]ollectively they employ an estimated 100,000 workers, who produce the bulk of all the goods in what has become a \$1.8 billion worldwide trade in virtual items.”<sup>21</sup> How can the law manage these kinds of working/gaming relationships to assure fair compensation?

The current legal approach is insufficient for several reasons, the most obvious being that there has been no legal intervention to date in crowdsourcing. As such, the courts have yet to be tested in that regard. More importantly, the existing legal framework for determining whether something is work or leisure is vague and difficult to apply. The Supreme Court defined work as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily for the benefit of the employer and his business.”<sup>22</sup> The Court later extended the definition to off-duty work if it is an “integral and indispensable part of the [employee’s] activities.”<sup>23</sup> In fact, courts are only now dealing with the advent of smart phones extending the work day as well as the emergence of remote log-in capabilities with respect to the work-leisure divide.<sup>24</sup> As courts struggle to apply a murky framework to these emerging issues, its application would be even more difficult for crowdsourcing where an income-earning task can be “gamified.”<sup>25</sup> Accordingly, courts should seek to understand the contours of particular

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<sup>20</sup> Julian Dibbell, *The Life of the Chinese Goldfarmer*, N.Y. TIMES (June 17, 2007), [http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html?pagewanted=all&\\_r=2&](http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html?pagewanted=all&_r=2&).

<sup>21</sup> *Id.*

<sup>22</sup> *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

<sup>23</sup> *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

<sup>24</sup> Spencer Silverglate and Craig Salner, *Smartphones and the Fair Labor and Standards Act*, FOR THE DEFENSE (June 2011), <http://cspalaw.com/pdf/Smartphones.pdf>.

<sup>25</sup> See JANE MCGONIGAL, *REALITY IS BROKEN: WHY GAMES MAKE US BETTER AND HOW THEY CAN CHANGE THE WORLD* (2011). *But see* David Columbia, Soc’y of Literature, Sci. & the Arts Conference Paper, *Game of Drones* (September 2012), <http://www.uncomputing.org/wp-content/uploads/2012/10/game-of-drones.blog-version.pdf> (“Perhaps the most disturbing entry into the discourse of gamification so far is Jane McGonigal’s *Reality Is Broken*, a book that closely replicates the form of intellectual inquiry while persistently avoiding most of the important intellectual and political questions raised by the book’s subject, a book that masquerades as neutral intellectual study while avoiding any substantive reflection on its author’s direct commercial interest in its conclusions.”).

crowdsourcing work arrangements as they present themselves and attempt to discern their nature. With fairness to the clicker as the ultimate concern, courts should consider the perspective of a clicker while re-envisioning the work benefit provided to the employer. By considering these factors, courts can better understand the work-leisure divide in terms of fairness for crowdsourcing as well as other virtual work forums.

This comment will proceed to present a history of labor struggles to recast the light under which this subject is viewed away from the novelty of the internet. A connection will be made between the narrative of the traditionally exploited factory worker and the modern phenomenon of clickers. Next, Part III will summarize other relevant issues in applying the FLSA to crowdsourcing. Part IV will explore the definition “work” and how the work/play distinction has been approached in the past. Some instances of crowdsourcing will constitute work while others may not. The penultimate section will promulgate factors by which to analyze crowdsourcing and demonstrate potential application. Finally, Part VI will conclude the Comment, summarizing presented issues, noting solutions, and other areas that warrant further consideration.

## **II. CROWDSOURCING AS PART OF A LARGER NARRATIVE ON LABOR**

### *A. The Struggle for Labor Rights*

History informs the present in that employers, if left unchecked, will seek new ways to extract value from employees. Without regulation, the internet is an unchecked source of valuable labor. While online workers need not worry about work conditions, their time and energies are vulnerable as were factory workers at the turn of the century. And importantly, they face the same issue: fairness in the employer benefit to employee compensation ratio. In the

beginning of the twentieth century, a new America was emerging. As slavery had been abolished and reconstructive mechanisms were underway, factories and the manufacturing industry exploded in what would be known as America's Industrial Revolution.<sup>26</sup> With the trend towards an industrial America, unions began to form in response to the industrialization, including the famous Women's Trade Union League and the Industrial Workers of the World.<sup>27</sup> But while the formation of these unions signified a changing attitude toward workers, the conditions of America's work places were still in shambles even into the 1930's.<sup>28</sup> Factory managers were trying to meet the high demands of their buyers at the expense of their work force, and consequently, the workers were forced to endure if they wanted to feed their families.

One illustrative example of the horrendous working conditions of the time is the Triangle Shirtwaist Fire.<sup>29</sup> The Triangle Shirtwaist Fire occurred in a sweatshop typical of the time: employers worked excessively long hours for low wages and factories were unsanitary and contained dangerous working conditions.<sup>30</sup> On March 25, 1911, a fire erupted at the building that housed the garment company.<sup>31</sup> As workers attempted to flee, they found the doors and windows locked.<sup>32</sup> The management had locked these doors during the day in order to lessen the frequency of breaks and decrease the chance of a worker stealing materials.<sup>33</sup> The fire claimed the lives of 146 employees by the time it was contained.<sup>34</sup> This event highlights a traditional employer trying to acquire more value from their workforce at all costs. While virtual work

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<sup>26</sup> *Labor History Timeline*, *supra* note 1.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; *see also* REMEMBERING THE 1911 TRIANGLE FACTORY FIRE, Cornell Univ., <http://www.ilr.cornell.edu/trianglefire/story/sweatshopsStrikes.html>.

<sup>29</sup> CORINNE J. NADEN, *THE TRIANGLE SHIRTWAIST FIRE, MARCH 25, 1911: THE BLAZE THAT CHANGED AN INDUSTRY* (1971).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

forums present a safer physical work environment than a plant or factory, the risk of worker exploitation is still high.

The 1920 and 1930s saw an increase in strikes—including some where, as a result, employers actually granted workers their demands.<sup>35</sup> Other strikes were less successful, like, for example, as in the 1934 textile industry strike.<sup>36</sup> As the injustices of the managers became a major issue, Congress acted in 1938 by passing the Fair Labor and Standard Act (FLSA) to “stabilize the economy and protect the common labor force in response to the post-depression predominance of poverty and fear of an ever-increasing decline in the economy.”<sup>37</sup> While the intent of the FLSA was clear, its language was often ambiguous and left much work for the courts in its application. Nevertheless, the FLSA was a major victory in the laborer’s struggle for protections against management. Despite these advances in labor and employment law, recent studies have shown that many factories today still do not comply with workplace laws.<sup>38</sup> In fact, the U.S. Department of Labor found that 67% of Los Angeles garment factories and 63% of New York garment factories violate minimum wage and overtime laws.<sup>39</sup> Additionally, 98% of Los Angeles garment factories have had workplace health and safety problems serious enough to lead to severe injuries or death.<sup>40</sup>

From picketing and strikes to unionizing against management, workers of the early twentieth century took risks to secure the protections workers enjoy today. Management has demonstrated that they will attempt to make a higher profit at the expense of their workforce. As

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<sup>35</sup> See *Labor History Timeline*, *supra* note 1.

<sup>36</sup> *Id.*

<sup>37</sup> Ann K. Wooster, *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. Fed. 507 (2004).

<sup>38</sup> See *Labor History Timeline*, *supra* note 1.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

employers cross into the non-traditional virtual world for new sources of labor, the risks of physical injury are less, but worker fairness is still compromised.

### *B. Crowdsourcing: How it Works and Problematic Implications*

As discussed *supra*, crowdsourcing provides an employer with an instant mass of laborers.<sup>41</sup> In general, there has been a steady decrease in traditional labor in the United States, but virtual workers offer new avenues for labor.<sup>42</sup> These new laborers are paid to complete tasks that require little to no skillset. While crowdsourcing comes in several varieties, this Comment focuses one particular brand of crowdsourcing for purposes of example—compensation arrangements in the form of piece-rate payment or wages akin to the Amazon Mechanical Turk model.<sup>43</sup> In general, crowdsourcing consists of three parties; a “tripartite structure” as one author terms it.<sup>44</sup> The first is the firm, or the employer that posts a task on a crowdsourcing website.<sup>45</sup> The second is the clicker, the person at a computer who completes a task.<sup>46</sup> The third party is the vendor in charge of the crowdsourcing platform, the virtual space where tasks are posted.<sup>47</sup> As a condition of platform use, workers and firms enter into a participation agreement that is usually crafted by the vendor.<sup>48</sup>

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<sup>41</sup> See *infra* Part I.

<sup>42</sup> Florence Jaumotte, *Is Labor Compensation Still Falling in Advanced Economies?*, IMF SURVEY MAGAZINE (May 24, 2012), <http://www.imf.org/external/pubs/ft/survey/so/2012/num052412a.htm>.

<sup>43</sup> See AMAZON MECHANICAL TURK (last visited April 20, 2013), <https://www.mturk.com/mturk/welcome>.

<sup>44</sup> Alek Felstiner, *Working the Crowd: Employment and Labor Law in the Crowdsourcing Industry*, 32 BERKELEY J. EMP. & LAB. L. 143 (2011).

<sup>45</sup> *Id.* at 148.

<sup>46</sup> *Id.* at 148.

<sup>47</sup> *Id.* at 148. See, e.g., AMAZON MECHANICAL TURK *supra* note 43; TASKRABBIT (last visited on October 11, 2012), [https://www.taskrabbit.com/?utm\\_source=blog](https://www.taskrabbit.com/?utm_source=blog).

<sup>48</sup> See, e.g., AMAZON MECHANICAL TURK, *Conditions of Use*, <https://www.mturk.com/mturk/conditionsofuse>.

Notably, one familiar website has created a platform for this technology called Amazon Mechanical Turk (AMT).<sup>49</sup> Using this platform, thousands of workers log on to complete what Amazon terms “Human Intelligence Tasks” (HITs).<sup>50</sup> These HITs typically consist of tagging photos, writing on Wikipedia or Answers.com, comparing product descriptions, or gauging the suitability of various images for varying audiences.<sup>51</sup> Other tasks include transcription<sup>52</sup> or augmented searching.<sup>53</sup> While click-work is largely performed by Americans in their downtime, the trend is certainly expanding. In fact, “thousands of workers from the U.S. and [sic] more than 100 other countries have performed tasks on Mturk.com.”<sup>54</sup> To date, neither Congress nor the courts have imposed specific laws on these virtual work forums.<sup>55</sup>

In a typical crowdsourcing scheme, the requester posts a task on the crowdsourcing platform. A clicker logs onto the site, finds the task and completes it.<sup>56</sup> Tasks are usually simple in nature, requiring no special skillset.<sup>57</sup> Notably, there are crowdsourcing platforms that provide more complicated tasks for those qualifying clickers.<sup>58</sup> These more advanced tasks, or “macro tasks,” pay slightly more than other “micro tasks,” which do not require skills.<sup>59</sup> Once the task is

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<sup>49</sup> See AMAZON MECHANICAL TURK *supra* note 43.

<sup>50</sup> *Id.*; see also *Amazon Web Services Launches New Web-Based Tools For Mechanical Turk*, DATAMONITOR (July 30, 2008), available at 2008 WLNR 14200460.

<sup>51</sup> Andrea James, *Service Offers Pay For Doing Tiny Tasks Online*, SEATTLE POST INTELLIGENCER, July 31, 2008, at D2, <http://www.seattlepi.com/business/article/Amazon-service-offers-pay-for-doing-tiny-tasks-1280767.php>.

<sup>52</sup> Companies will post audio files for Turkers to type out. That transcription will then be reposted to AMT for another Turker to check its accuracy. Another HIT will ask a user to make edits, and another HIT will ask the Turker to check for quality. See Mieszkowski, *supra* note 18.

<sup>53</sup> Over the past few years, several answer services have emerged. See, e.g., KGB, <http://kgb.com/home>. Once your text is received, it is placed on a crowdsourcing site for Turkers to find an answer. The answer is found, messaged back, and the recipient may text an answer rating back to the service. The Turker receives a few cents for helping. If a Turker acquires good ratings, they may receive a bonus at the end of the week in reward for their efforts. This competitive aspect makes these tasks especially desirable and they are often taken with a minute of being posted. See Mieszkowski, *supra* note 18.

<sup>54</sup> See Mieszkowski, *supra* note 19. During the writing of this Comment, AMT banned international accounts.

<sup>55</sup> See Felstiner, *supra* note 44.

<sup>56</sup> *Id.* at 161.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

completed, payment is made from the requester to the clicker.<sup>60</sup> A percentage of that payment is usually reserved for the platform firm.<sup>61</sup>

As for physical logistics, the clicker need not commute anywhere in particular—only access to the internet is needed.<sup>62</sup> The clicker provides his own physical space, internet access, computer, and electricity.<sup>63</sup> This may seem trivial as most people already have these amenities for personal use, but it can be an important difference between virtual work and traditional work venues where an employer would provide such things in an office building.

For now, this virtual realm is left open to the freedom of contracting. Where vendors write user agreements that dispel liability and quash the suggestion of an employer-employee relationship, workers are seemingly left to fend for themselves.<sup>64</sup> For the more conscious users, clickers formed separate web forums to discuss the fairness of certain firms and platforms.<sup>65</sup> This can be useful in circumstances where an employer continually refuses to pay a clicker for a completed task by way of a refusal power often granted by the language of the user agreements.<sup>66</sup> In these forums, clickers would discuss this amongst themselves and make it known to other clickers that completing tasks for that particular employer is not worth it. Of course, this is hardly a substitute for the application of labor and employment laws.<sup>67</sup>

The clickers themselves are likely subject to a phenomenon referred to as gamification. Gamification is a process by which businesses are beginning to make tasks enjoyable to those

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<sup>60</sup> *Id.*

<sup>61</sup> *See Conditions of Use, supra* note 48 .

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> AMT's agreement includes exculpation of liability clauses. *See Conditions of Use, supra* note 61.

<sup>65</sup> Turk Nation is one such forum which corresponds to AMT experiences. *See* TURK NATION, <http://turkernation.com/forum.php?s=b7b9c24dbc0940c879cdd8f969f4dde8>.

<sup>66</sup> *See Conditions of Use, supra* note 48.

<sup>67</sup> *See* Cherry, *supra* note 6.

completing them.<sup>68</sup> Due to gamification, the current approach is not well-suited to an activity that many regard as play but certainly benefits an employer. In crowdsourcing, the work relationship is not likely apparent to most clickers. Crowdsourcing is still in its developmental stages and as such, courts may struggle to understand the specific nature of crowdsourcing. For example, the benefit that employers enjoy from the combined efforts of clickers reaches far wider than would an employee answering a quick email after hours. Without meaningful legal protections, clickers are vulnerable.

In crowdsourcing, there is an army of workers for whom an employer need not provide an office building, electricity, healthcare, a retirement fund contribution, or even the more basic protection of minimum wage. Accordingly, this is an issue that courts or the legislature must face in order to ensure that workers in virtual work forums are given the same or similar protections. Whether a worker goes to an office building or logs onto a home computer to complete a Human Intelligence Task on Amazon Mechanical Turk, they are still workers just the same.

### **III. THE FLSA AND OTHER RELEVANT ISSUES**

Before seeking to classify crowdsourcing as work or leisure, it is important to briefly encapsulate some of the predicate or tangential issues that may arise in a fuller application of the FLSA. Again, the Fair Labor Standards Act (FLSA) is the federal law of broad application governing minimum wage, overtime pay, youth employment, and record keeping.<sup>69</sup> In order to avail oneself of these protections, a worker must be considered an employee and not an independent contractor.<sup>70</sup> The Wage and Hour Division of the U.S. Department of Labor

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<sup>68</sup> Post by P.J. Rey, *Gamification, Playbor and Exploitation*, THE SOCIETY PAGES (Oct. 15, 2012), <http://thesocietypages.org/cyborgology/2012/10/15/gamification-playbor-exploitation-2/>.

<sup>69</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>70</sup> *Id.*

enforces the FLSA.<sup>71</sup> Specifically, the FLSA provides for a forty hour workweek that an employer is responsible for paying an employee.<sup>72</sup> Anything over that time is paid at one and one half times the amount paid for an hour of work.<sup>73</sup> Additionally, the FLSA provides for a minimum wage, that is, a floor for the amount of money a worker must be paid.<sup>74</sup>

The first pivotal issue is whether clickers are employees or independent contractors.<sup>75</sup> On a basic level, if a worker is deemed an independent contractor, the protections of the FLSA do not attach and there is little protection to the worker under these laws.<sup>76</sup> The worker would instead be bound by contractual arrangements which do not necessarily provide legal protection.<sup>77</sup> Courts have framed this analysis to examine the nature of the work relationships and the Department of Labor encapsulated the factors accordingly:

1. the extent to which the services rendered are an integral part of the principal's business;
2. the permanency of the relationship;
3. the amount of the alleged contractor's investment in facilities and equipment;
4. the nature and degree of control by the principal;
5. the alleged contractor's opportunities for profit and loss;
6. the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor;
7. the degree of independent business organization and operation.<sup>78</sup>

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<sup>71</sup> U.S. Dept. of Labor, Fair Labor and Standards Act Presentation, accessed September 7, 2012, available at <http://www.dol.gov/whd/flsa/>.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* While the FLSA sets the minimum wage and overtime pay standards, it does not require: (1) vacation, holiday, severance or sick pay; (2) meal or rest periods; (3) premium pay for weekend or holiday work; (4) pay raises or fringe benefits; (5) a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees; or (6) limitations on the number of hours in a day or days in a week an employee may be required to work, including overtime hours (if the employee is at least 16 years old). 29 U.S.C. §§ 201–219 (2006).

<sup>75</sup> See Felstiner, *supra* note 44, at 172.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> U.S. DEPT. OF LABOR, WAGE AND HOUR STANDARDS DIV., FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA), 1 (last updated July 2009), [www.dol.gov/whd/regs/compliance/whdfs13.pdf](http://www.dol.gov/whd/regs/compliance/whdfs13.pdf).

Some speculate that these workers will fall into a “grey area” between the independent contractor and employee.<sup>79</sup> To date, this question as it pertains to clickers manifests itself in academic literature outside of the scope of the legislature or court system. The importance of this issue should not be underestimated as it is a first hurdle in navigating the application of the FLSA to cyber work. The courts or legislature will need to address this issue and dispel any doubts as to the general status of these workers.<sup>80</sup> Even if the solution is an entirely new legal scheme under which these workers are classified, the question of employee status is a predicate to the issue discussed in this Comment—the work-leisure distinction with respect to crowdsourcing.

Another issue that would certainly impact other analyses is the FLSA requirement of minimum wage.<sup>81</sup> Due to the nature of crowdsourcing, it is very difficult to earn a minimum wage while being paid pennies for the completion of a task.<sup>82</sup> Further, the small payment would only be from one employer out of the many for which a clicker completed tasks during an hour. For example, suppose a clicker manages to earn minimum wage in an hour by completing fifteen tasks. As is the nature of crowdsourcing, suppose also that those fifteen tasks were completed for fifteen different employers using the platform site. Under the FLSA, the multiple employers may be forced to make up the difference between their payment and the minimum wage.<sup>83</sup> Another issue is the status of the hosting platform.<sup>84</sup> While platforms are not posting work, they do in fact take a percentage of the payments; in this respect, the question of a joint-employer relationship arises.<sup>85</sup>

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<sup>79</sup> Joan T. A. Gabel & Nancy R. Mansfield, *The Information Revolution and its Impact on the Employment Relationship: An Analysis of the Cyberspace Workplace*, 40 AM. BUS. L.J. 301, 303 (2003).

<sup>80</sup> See Felstiner, *supra* note 44, at 187-97.

<sup>81</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>82</sup> See Felstiner, *supra* note 44, at 162.

<sup>83</sup> 29 U.S.C. §§ 201–219 (2006); see also Felstiner, *supra* note 44, at 162.

<sup>84</sup> See Felstiner, *supra* note 44, at 162.

<sup>85</sup> See *id.*

These are some ancillary issues with regard to applying the FLSA to crowdsourcing. While these issues will bear heavily on courts and the legislature in the future, they work hand in hand with a classification of the type of work or play being performed that is the subject of this Comment. If crowdsourcing is simply deemed a leisure activity, the preceding issues are moot. Likewise, if the courts find clickers to be independent contractors, the question of whether actions are work or leisure is never reached. Clearly, the courts and legislature will have much to do in parsing out the problematic issue of crowdsourcing with respect to labor and employment laws.

#### IV. DEFINING “WORK”

A point of confusion in applying the law, the FLSA does not include a particularly useful definition of work.<sup>86</sup> The words “work” or “employment” within maximum hour provisions of the FLSA mean “physical or mental exertion, whether burdensome or not, controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”<sup>87</sup> Instead, interpretation was left open for the courts. This void enables employers to stretch the benefit they receive from their employees, particularly with respect to wait-time or other grey areas.<sup>88</sup>

Under the FLSA, an individual is either working or he is not.<sup>89</sup> As one scholar aptly phrased the definitional quandary, “[w]hile the FLSA thus establishes certain guidelines for compensating employees for their work, it neither defines the term ‘work’ nor indicates when on-call time might be considered ‘work.’”<sup>90</sup> Accordingly, a worker’s time is necessarily forced

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<sup>86</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>87</sup> Fair Labor Standards Act of 1938, §§ 3(g), (j), 7(a), 29 U.S.C.A. §§ 203(g), (j), 207(a).

<sup>88</sup> 29 U.S.C. §§ 201–219 (2006).

<sup>89</sup> There are certain exemptions that the FLSA contemplates, but they are not relevant enough to warrant discussion here. 29 U.S.C. §§ 201–219 (2006).

<sup>90</sup> See Loren Schwartz, *Reforming the Fair Labor Standards Act: Recognizing on-Call Time As A Distinct Category of Compensable Work*, 40 U.S.F. L. REV. 217, 221 (2005).

into either the “work” box or the “leisure” box. In one sense, it is a binary categorization that bodes well on legal clarity, creating a legal distinction between work and leisure time.<sup>91</sup> At the same time, practical application in closer calls has long been a source of confusion for courts.<sup>92</sup> For instance, it is easy to distinguish between answering work emails at the workplace and playing in the company softball league, but what about a worker responding to a series of work emails on a Blackberry, or smartphone, before going to bed?<sup>93</sup> Crowdsourcing presents one of those situations akin to the blurry line of Blackberries, that is, not everything is so easily labeled as work or leisure.<sup>94</sup> Herein lies one of issues for crowdsourcing. In one respect, clickers are comprised of individuals who are trying to fill their down time with tasks while another group of clickers may use crowdsourcing as a viable means of income.

Furthermore, “the Portal-to-Portal Act that amended the FLSA also omits any definition of the word ‘work.’”<sup>95</sup> The Department of Labor (DOL) does not provide any additional guidance by defining compensable time as time during which an employee is “on duty on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer.”<sup>96</sup> This lack of administrative and regulatory guidance adds to the perplexity of understanding this work/leisure gap, a gap into

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<sup>91</sup> Put another way, people get paid to work. They do not get paid to “not work.” 29 U.S.C. § 206(a) (requiring that “[e]very employer . . . pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce” a minimum wage).

<sup>92</sup> See Gretchen Fuss, *Refining the Tenth Circuit's Stance on Employee Rights: The ADA, Free Speech in the Workplace, and the Fair Labor Standards Act*, 79 DENV. U. L. REV. 433, 448 (2002).

<sup>93</sup> *Id.* (indicating that “the definition of ‘work’ becomes key to the issue of on-call time).

<sup>94</sup> *Id.*

<sup>95</sup> See Eric Phillips, Note, *On-Call Time Under the Fair Labor Standards Act*, 95 MICH. L. REV. 2633, 2634 (1997).

<sup>96</sup> *Id.*

which crowdsourcing likely falls.<sup>97</sup> Accordingly, the current definition of work has largely been driven by court decisions.<sup>98</sup>

Clicking is a very novel concept as is much of the work that takes place in virtual worlds.<sup>99</sup> Perhaps due this novelty, many clickers do not conceive of clicking as “work.”<sup>100</sup> Many Americans who use AMT “state that their interest in Mechanical Turk is solely motivated by the novelty of the experience. This fact could be explained by the seemingly negligible amount of income that can be earned through AMT for a U.S.-based worker.”<sup>101</sup> Instead, it is regarded as a play or leisure time.<sup>102</sup> Conversely, that is not the case for all, especially the 33% of Amazon Mechanical Turk’s workforce that are located in India relying on AMT to “make basic ends meet.”<sup>103</sup> This group of workers in India and even those in China “appear to be mostly interested in Mechanical Turk as a primary income source, though some of them find that AMT undervalues their labor.”<sup>104</sup> Studies bolster the position that many view this type of virtual work as leisure.<sup>105</sup> In some respect, companies that are using crowdsourcing enjoy the benefit of this leisure disguise.<sup>106</sup> If many who are giving companies real work value through clicking feel that they are in fact on their own leisure time, it gives the employer a veil of clicker enjoyment under which they can continue to capitalize on a work force that does not realize the very fact that they are a work force.

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<sup>97</sup> See Cherry, *supra* note 6.

<sup>98</sup> *Id.*

<sup>99</sup> See SCHOLZ, *supra* note 2, at 2.

<sup>100</sup> See Cherry, *supra* note 6.

<sup>101</sup> See SCHOLZ, *supra* note 2, at 99 (2012).

<sup>102</sup> See Felstiner, *supra* note 44.

<sup>103</sup> See SCHOLZ, *supra* note 2, at 81 (2012).

<sup>104</sup> See SCHOLZ, *supra* note 2, at 99 (2012). Many foreign AMT clickers are not particularly pleased with the payscale. For a discussion on criticisms, see Rajesh Mago, “Review of Mturk after Working with Them as Worker | PC Tips and Tricks,” <http://www.pctipstricks.com/my-review-of-amazon-mturk-after-workingpart-time-as-worker-for-few-months/>.

<sup>105</sup> See, e.g., Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261 (2007) (describing players who use online games for entertainment and artistic expression).

<sup>106</sup> See Cherry, *supra* note 6.

Without classifying crowdsourcing as work, there is a real fear that companies will be able to exploit a virtual crowd and secure nearly free labor.<sup>107</sup> One parallel example of a blurred work-leisure distinction is an online game for children called Club Penguin discussed by Professor Miriam Cherry. Cherry writes that Club Penguin could be conceived as work in that

[t]hey are on the computer—which is, after all, a machine—repetitively clicking the mouse, typing, and performing tasks that comprise some element of “work” in the professional white-collar world—for long stretches of time. And the tasks that they perform do have value to other players in the game.<sup>108</sup>

Conversely, the online tasks performed by users are done purely out of intentions of leisure.<sup>109</sup> As will be discussed below in the area of unpaid internships, this is what makes crowdsourcing a very difficult area to regulate—the great employer benefit from an activity regarded as leisure.

To complicate matters further, the thoughts and intentions of clickers are influenced by gamification. Gamification is a highly studied concept today with an entire field of study devoted to its understanding.<sup>110</sup> One entrepreneur defines gamification as “the application in non-game domains (health & wellness, education, finance, etc.) of mechanics and dynamics evolved from games. It’s...cool (when successful) because it creates a completely different and highly motivating context for a user’s experience. Rather than feeling like they have “to jump through hoops,” the user discovers compelling challenges, and reaps psychological rewards when those challenges are completed. The net result is the holy grail of interactive product design: sustained engagement.”<sup>111</sup> One well-known example of gamification is Fruit Ninja, the

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<sup>107</sup> See Posting of Mike Yamamoto, *Can “Crowdsourcing” Be Slave Labor*, CNET MEDIA BLOG, [http://news.com.com/2061-10802\\_3-6095563.html](http://news.com.com/2061-10802_3-6095563.html) (July 18, 2006, 12:47 PDT).

<sup>108</sup> See Cherry, *supra* note 6.

<sup>109</sup> *Id.*

<sup>110</sup> Gamification Defined, DAILYTEK, (Jan. 14, 2013), <http://dailytekk.com/2013/01/14/gamification-defined/>.

<sup>111</sup> *Id.* This entrepreneur is Scott Dodson, a serial entrepreneur, UX consultant, and gamification guru. He is a Founder and CPO of Bobber Interactive, and a Professor of Game Design at Digipen. Gamification Defined, DAILYTEK, (Jan. 14, 2013), <http://dailytekk.com/2013/01/14/gamification-defined/>.

popular smart phone game.<sup>112</sup> Just from the advertising revenue, Fruit Ninja makes about \$400,000 per month.<sup>113</sup> In this simple way, a person who is seemingly playing a game, enjoying themselves, is actually creating monetary revenue for a firm on the other side of the “game.”

In one regard, gamification presents an opportunity for innovation, but for some it is a chance for worker exploitation, a position adopted here. Not surprisingly, businesses are at the forefront of the gamification strategy: “In short, gamification is promoted and championed—not by game designers, those interested in game studies, sociologists of labor/play, or even computer-human interaction researchers—but by business folks.”<sup>114</sup> With “business folks” leading the gamification trend, “[g]amification cannot be understood apart from the mode of capitalist production and all the power relations and inequalities that implies. Like tools, tactics/techniques are never neutral.”<sup>115</sup> It is in this perception, away from the trendiness of gaming and enjoyment, that gamification can be understood as the exploitative mechanism of companies, turning labor into “playbor.”<sup>116</sup> One sociologist, P.J. Rey, writes, “[l]ike the paradigmatic factory workers, playborers only come to possess a small fraction of the value they create. Often, playborers obtain none of the monetary value they have created. And, of course, this is exactly how the playbor’s capitalist promoters want it.”<sup>117</sup> Some AMT clickers responded to this criticism by saying that they enjoy the novel trendiness of the site, pointing to the nominal income made from the tasks as evidence.<sup>118</sup> Regardless of a clicker’s enjoyment, that rationale does not negate the fact of exploitation and ought not to be used to completely subjugate an emerging issue.

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<sup>112</sup> Adam Swan, *Gamification Comes of Age*, FORBES BRAND VOICE (July 16, 2012), <http://www.forbes.com/sites/gyro/2012/07/16/gamification-comes-of-age/>.

<sup>113</sup> *Id.*

<sup>114</sup> *See Rey, supra* note 68.

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See id.*

<sup>118</sup> *See id.* “Turkers” is a term used to describe the clickers who complete tasks on AMT.

The implications of gamification for crowdsourcing are troublesome. With access to an immense and growing mass of clickers, companies are prone to capitalize on the notion of “playbor.” As one professor writes, “[f]irms may try to use game-like experiences as a substitute for meaningful work or appropriate compensation. The legal and ethical questions deserve thoughtful consideration, and perhaps public policy responses.”<sup>119</sup> Gamification of work presents the courts with a difficult situation: navigating a novel online work-scape that is being manipulated to seem like play time.

With gamification and a virtual world without regulation, “there is a strong incentive to innovate around prohibited or disadvantaged transactions. These innovations are commonly referred to as regulatory arbitrage.”<sup>120</sup> Regulatory arbitrage is defined as “the shifting of activity to the least stringent regulatory regime...” and “...occurs when an entity reclassifies, relocates, or slightly alters its activity in order to avoid legal scrutiny traditionally associated with that activity.”<sup>121</sup> For example, “[i]n the finance field, attorneys characterized credit default swaps as ‘protection buying’ and ‘protection selling’ rather than insurance or gambling, thus evading capital requirements (in the case of insurance law) or the outright bans that might apply to gambling.”<sup>123</sup> Further, “[w]hile the transactions were essentially identical to traditional insurance—where the buyer had an insurable interest in the entity whose default it was protecting against—or gambling—where there was no such insurable interest and a ‘naked credit default swap’ was arranged—their legal characterizations allowed large financial institutions to

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<sup>119</sup> Kevin Werbach, *Let's Play a Game*, WHARTON MAGAZINE (May 24, 2011), <http://whartonmagazine.com/blogs/let%E2%80%99s-play-a-game/>.

<sup>120</sup> Michael S. Knoll, *The Ancient Roots of Modern Financial Innovation: The Early History of Regulatory Arbitrage*, 87 OR. L. REV. 93 (2008).

<sup>121</sup> Danielle Keats Citron & Frank Pasquale, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. 1441, 1484 (2011). There are two types of regulatory arbitrage: “(1) formalistic recharacterization, which occurs when entities at the boundary between regulation and non-regulation slightly alter or rename their activities in order to avoid regulation, and (2) jurisdiction shopping, when entities switch the location of their activity to avoid more stringent regulatory regimes.” *Id.*

<sup>123</sup> *Id.* at 1485.

sidestep traditional regulatory limits on risky transactions.”<sup>124</sup> Similarly in the crowdsourcing context, employers can take advantage of a loosely regulated virtual world where work is considered play and benefit tremendously by avoiding substantial cost that would otherwise be associated with the completion of their projects.

Such circumvention may not always be deliberate either. In the fusion center context, for example, “there may be no clear way for a Florida fusion center to know that it should not be receiving information provided by the Mississippi fusion center.”<sup>125</sup> The circumvention may be intentional, but it may certainly be the case that employers are innocently seeking innovation. Here, one non-intentional explanation could be the familiar case of technology out-pacing the law. When the internet was first formed, it was hailed as a dreamscape away from government intervention, a new sovereign.<sup>126</sup> While that notion has been abandoned, the government has yet to meaningfully rebut it in regulatory action. Employers may be making the next logical, innovative step to capitalize on the internet’s work force before the law can evolve to promote fairness for the clickers.

This section will proceed to understand how courts thus far have grappled with defining “work.” It will begin with the broad issue of compensable time—the time for which an employee must be paid. Sections dealing with on-call time and unpaid internships will follow. Ultimately, the court embraces specific factors by which to judge nebulous instances of the work-leisure distinction. The factors themselves would not reach crowdsourcing directly as they are applied on a case-by-case basis depending on the area at issue: compensable time, on-call time, or internships. Instead, these factors—especially those used for analyzing unpaid

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Renato Mariotti, *Cyberspace in Three Dimensions*, 55 SYRACUSE L. REV. 251, 280 (2005).

internships— may inform what factors ought to be included in approaching the issue of work or leisure in virtual work forums.

#### A. *Compensable Time Cases*

Over the years, the Court has expanded and contracted the definition of compensable time. The Supreme Court first began to explore this void in *Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123*.<sup>127</sup> The Court inquired as to whether time spent by iron ore miners in traveling underground in mines to and from the workplace constituted work or employment for which compensation must be paid.<sup>128</sup> The Court opined that “[i]ron ore miners travelling underground are no less engaged in a ‘process or occupation’ necessary to actual production.”<sup>129</sup> The Court went on to say that “[h]ence employees engaged in such necessary but not directly productive activities as watching and guarding a building, waiting for work, and standing by on call have been held to be engaged in work necessary to production and entitled to the benefits of the Act.”<sup>130</sup>

Subsequent cases continued to broaden the definition of a work day. For example, the Court expanded on *Tennessee Coal* in *Anderson v. Mount Clemens Pottery Co.* In that case, the Court stated that “[i]t follows that the time spent in walking to work on the employer’s premises, after the time clocks were punched, involved ‘physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.’”<sup>131</sup> Congress then passed a regulation which stated

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<sup>127</sup> 321 U.S. 590 (1944).

<sup>128</sup> *Id.* at 599.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691–92 (1946) (citing *Tenn. Coal, Iron & R. Co. v. Muscoda Local*, 321 U.S. 590, 598 (1946)).

that hours within a “workday” include “the period between the commencement and completion” of the “principal activity or activities.”<sup>132</sup>

Later, Congress passed the Portal to Portal Act, which excepted from FLSA coverage walking on the employer's premises to and from the location of the employee's “principal activity or activities,” and activities that are “preliminary or postliminary” to “said principal activity or activities.”<sup>133</sup> The Act did not otherwise change this Court's descriptions of “work” and “workweek” or define “workday.” The Act was intended in part to curb the liability of employers after the worker-generous rulings in *Tennessee* and *Anderson*. Congress acted again by adding another section to the FLSA which limited the employers’ obligation to pay employees for time spent changing clothes, an issue that was becoming thematic in litigation.<sup>134</sup> The Court later explained that the “term ‘principal activity or activities’ . . . embraces all activities which are ‘an integral and indispensable part of the principal activities,’” including the donning and doffing of specialized protective gear “before or after the regular work shift, on or off the production line.”<sup>135</sup>

For crowdsourcing, there is no time spent donning a specific uniform, waiting in line, or even walking up the steps to an office building, but perhaps there is something that does warrant compensation given the difference between a manufacturing or office setting and a digital work forum. Consider one version of a clicker that wakes up in the morning, remains in pajamas, boots up his home desktop, and begins crowdsourcing tasks. Superficially, one is tempted to say that clickers get paid for the tasks they complete, but what about the time spent booting up the

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<sup>132</sup> 29 C.F.R. § 790.6(a) (1947).

<sup>133</sup> 29 U.S.C.A. § 254 (1947).

<sup>134</sup> “In determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee.” 29 U.S.C. § 203(o).

<sup>135</sup> *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956).

computer? Is this compensable time? This is arguably an analog to booting up the computer in the office building, which the court has held to be part of the workers' compensable time. Using the Court's "principle activity or activities" language, it is clear that the principal activity is the clicking itself. The "integral and indispensable part of the principal activities" could very well constitute turning on the computer in this context. All too obvious a statement, clicking could not take place without booting up the computer. Accordingly, it would make sense to reflect the employer's savings on workspace and technology in the clickers' earnings.

Conversely, the virtual nature of this work may be seen as a blessing in disguise to the work force that no longer needs to worry about a commute, unsatisfactory workspace conditions, or time spent preparing for the workday so long as the compensation is fair. It is true that virtual work gives the worker better control and access to work by using his self-provided work spaces and computers. In line with this theory, the problem of these start-up activities may fall into the category of *de minimus* activities that do not warrant compensation, as they are too insignificant to support a claim under the FLSA.<sup>136</sup> The Court noted that some periods of compensable time may be so small "as to be negligible" and when time consists of "only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."<sup>137</sup> The *de minimus* doctrine works in favor of the employer to curb suits regarding miniscule amounts of time, especially since the FLSA and courts left the definition of work open for interpretation.<sup>138</sup> For the clicker, preparing a computer probably takes a few minutes at most between turning on the power, getting to the crowdsourcing platform, and beginning a task. While virtual work is largely the same as traditional work, this may constitute one of the meaningful differences

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<sup>136</sup> Sean L. McLaughlin, *Controlling Smart-Phone Abuse: The Fair Labor Standards Act's Definition of "Work" in Non-Exempt Employee Claims for Overtime*, 58 U. KAN. L. REV. 737 (2010).

<sup>137</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

<sup>138</sup> See McLaughlin, *supra* note, at 136.

between the work forums, that is, compensable time is complicated by self-provision of workspace and conditions. Crowdsourcing further complicates this in that payment is per task and not for a cognizable work day. It remains to be seen whether this will be an issue or simply falls under the *de minimus* doctrine.

### *B. On-Call Time*

Another informative source of litigation is the court's handling of "on-call" time. One example of this is when an employee may leave the work premises to go home, but is on call to return at a moment's notice to work. Put another way, "[a]t the same time, their employers obtain a substantial benefit by being able to keep their workforces lean, knowing that if extra work arises, they may simply call on an off-duty, on-call employee."<sup>139</sup> If a leisure activity, the employer receives a windfall from having the benefit of a worker on-call without having to tender any compensation for having the benefits received. In such a case, the law would fail to equitably account for the burdens imposed on the worker and the concomitant benefits that flow to the employer.<sup>140</sup> Conversely, considering an employee's on-call time as work, and thus compensable at his regular rate of pay, may provide the employee with a windfall, since he will be compensated at the same rate as if he were actively working.<sup>141</sup> For the clicker, it is clear that they are not "on-call." In fact, with regard to clicking, at least for now, it is up to the clicker when he works. As such, they are never really on-call while not conducting click-work, only that they are online performing a task.<sup>142</sup> Nevertheless, the analysis that the courts undertake is helpful as consideration is later given to a potential scheme for classifying crowdsourcing.

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<sup>139</sup> See Schwartz, *supra* note 90 at 222–23.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 223.

<sup>142</sup> That is not to say that click-work will never raise on-call issues in the future. The trend is still relatively young. As this becomes a more viable option for employers, perhaps it would not be all too far-fetched for a worker to have a smartphone where they would receive tasks.

Specifically, the Court first addressed this issue in the 1940s in *Skidmore v. Swift & Co.*<sup>143</sup> *Skidmore* involved a group of firemen who were asked to remain at or near the firehouse should a fire alarm go off.<sup>144</sup> The men were allowed to use this time as they saw fit, sleeping or for enjoyment, provided that they were required to stay in or close by the fire hall and be ready to respond to alarms.<sup>145</sup> The Court wrote that the inquiry was whether an employee is “engaged to wait” or “waiting to be engaged” or, whether the on-call time is spent predominantly for the benefit of the employer or the employee.<sup>146</sup> As the Court indicated, an employee whose on-call time is spent predominantly for his own benefit or who is “waiting to be engaged” is not entitled to compensation.<sup>147</sup> “For example, a secretary who reads a book while waiting for dictation or a fireman who plays checkers while waiting for an alarm” is “engaged to wait.”<sup>148</sup> Ultimately, the court concluded that there was not a workable legal standard by which these arrangements ought to be viewed, but rather that “[t]he law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was. In summary, an employee whose on-call time is spent predominantly for the employer's benefit and who is thus ‘engaged to wait’ is entitled to compensation.”<sup>149</sup> The Court directed lower courts to consider “all the circumstances of the case” in making their determinations.<sup>150</sup> The *Skidmore* Court preserved the strict divide drawn by the FLSA between work and leisure time. Largely, in following *Skidmore*, courts faced with this choice have chosen to side with the employer, deeming many on-call time situations that of the employee’s leisure.

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<sup>143</sup> 323 U.S. 134, 136 (1944).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*; see Schwartz, *supra* note 90 at 223.

<sup>147</sup> *Skidmore*, 323 U.S. at 136.

<sup>148</sup> U.S. DEP'T OF LABOR, FACT SHEET #22: HOURS WORKED UNDER THE FAIR LABOR STANDARDS ACT (FLSA), U.S. WAGE & HOUR DIV., 1 (last updated July 2008), <http://www.dol.gov/whd/regs/compliance/whdfs22.pdf>.

<sup>149</sup> *Skidmore*, 323 U.S. at 136.

<sup>150</sup> *Id.*

With little guidance from the Supreme Court after *Skidmore*, some circuits have adopted more encompassing approaches.<sup>151</sup> The Ninth Circuit, for example, has adopted a list of seven factors, which is a compilation of factors used by other circuits and the Supreme Court:

1. whether the employee was required to remain at the employer's place of business;
2. whether there were excessive geographical restrictions placed on the employee;
3. whether the frequency of calls was restrictive;
4. whether a fixed time limit for response was unduly restrictive;
5. whether the on-call employee could easily trade on-call responsibilities;
6. the method used to communicate a call to the employee; and
7. whether the employee actually engaged in personal activities while on-call.<sup>152</sup>

Other circuits, however, have fewer factors, but all progress from *Skidmore*'s attempt to understand the FLSA's nebulous work-leisure divide.<sup>153</sup>

This line of cases continues a trend in the FLSA litigation, that is, the Court's attempt to determine the reality of work relationships. In this regard, the Court seems to recognize the unhelpfulness of a bright-line approach to these issues.<sup>154</sup> For clicking, the difficulty of categorization presents the same kind of blurry divide that prompted courts to use a case-by-case approach for on-call time cases. The same kind of practical thinking must be incorporated into an analysis of the work-leisure divide of crowdsourcing. It would only perpetuate the deficiency of the FLSA's "work" definition if crowdsourcing was categorically classified as either work or leisure.

### C. Unpaid Internships

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<sup>151</sup> Maria L. Barbu, *The Ubiquitous Blackberry: The New Overtime Liability*, 5 LIBERTY U. L. REV. 47, 56 (2010).

<sup>152</sup> See *Miner v. B & C Equip., Inc.*, No. 93-35401, 1994 WL 198692, at \*2-5 (9th Cir. 1994).

<sup>153</sup> For example, the Third Circuit uses a four factor test. "First, whether the employee may carry a beeper or leave home; second, the frequency of calls and the nature of the employer's demands; third, the employee's ability to maintain a flexible on-call schedule and switch on-call shifts; and fourth, whether the employee actually engaged in personal activities during on-call time. If these factors reveal onerous on-call policies and significant interference with the employee's personal life, [c]ourts have held that on-call time is compensable." *Cannon v. Vineland Hous. Auth.*, 627 F. Supp. 2d 171, 176-77 (D.N.J. 2008).

<sup>154</sup> The FLSA left courts with little direction in moving forward. See *Cherry*, *supra* note 6.

Of the issues addressed above, the difficulty of classifying crowdsourcing is most akin to unpaid internships. Here, interns are certainly working and generate a company benefit, but they do so on what is considered their own leisure time.<sup>155</sup> In many cases of unpaid internships, the leisure categorization may not be entirely accurate. Again, while it is easy to write off an unpaid internship as experience and a leisure activity, further analysis may reveal worker exploitation on the part of employers, a similar phenomenon that is occurring in click-work.<sup>156</sup>

In increasing numbers, students have been seeking out real-world positions without pay in the form of an unpaid internship.<sup>157</sup> Recently, studies show that there has been a drastic rise in the number of students who avail themselves of this arrangement without receiving compensation.<sup>158</sup> It should be noted that internship programs certainly benefit interns. For example, interns are afforded the opportunity to make key networking connections, to understand a particular field, and to learn what goes into making a prudent career decision.<sup>159</sup> In some cases, interns may even be offered full time employment with the employer with which they interned. Among a host of issues in the realm of competitive unpaid internships,<sup>160</sup> the case of an

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<sup>155</sup> Jessica L. Curiale, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531 (2010).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> The New York Times reported findings that, in 2008, eighty-three percent of graduating students had interned, with experts estimating that up to one-half of these interns were not paid. See Steven Greenhouse, *Looking for Experience, Providing Free Labor*, N.Y. TIMES, Apr. 2, 2010, at B1.

<sup>159</sup> Glenn C. Altschuler, *A Tryout for the Real World: Interning Is Good for the Resume. Better Yet, It May Get You Hired*, N.Y. TIMES (Apr. 14, 2002), <http://www.nytimes.com/2002/04/14/education/college-prep-a-tryout-for-the-real-world.html?pagewanted=all&src=pm>.

<sup>160</sup> While not the focus of this Comment, those issues involve financial ability to take an unpaid internship and to compete with others who have the resources and means to acquire such unpaid experiences in a world where such experience is sought after on resumes. Also unpaid interns may be more susceptible to forms of discrimination. See Jessica L. Curiale, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1537 (2010).

employer capitalizing on free labor becomes a critical issue, one that sounds loudly in the crowdsourcing context.<sup>161</sup>

The law in this area has been inconsistent. Whether one is entitled to minimum wage, therefore, depends on whether that person is an “employee” for purposes of the FLSA.<sup>162</sup> The FLSA, unhelpfully, defines “employee” as “any individual employed by an employer.”<sup>163</sup> It defines “employ” as “to suffer or permit to work” which leaves much room for interpretation.<sup>164</sup> The first influential case to set forth a cognizable standard was *Walling v. Portland Terminal Co.*, a case involving railroad training for new hires.<sup>165</sup> Specifically, the Court held that:

[t]he definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another. . . . Such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit.<sup>166</sup>

Two approaches have emerged to discern whether a position is a proper unpaid internship. The first is the agency promulgated six factor approach asking if:

1. the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. the training is for the benefit of the trainee;
3. the trainees do not displace regular employees, but work under [their] close observation;
4. the employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer’s operations may actually be impeded;
5. the trainees are not necessarily entitled to a job at the completion of the training period; and

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<sup>161</sup> Bernadette T. Feeley, *Examining the Use of For-Profit Placements in Law School Externship Programs*, 14 CLINICAL L. REV. 37, 47 (2007).

<sup>162</sup> 29 U.S.C. § 203(e)(1) (2006).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> 330 U.S. 148 (1947).

<sup>166</sup> *Id.*

6. the employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.<sup>167</sup>

An application of the agency test to crowdsourcing is more difficult considering it is specifically tailored to internship situations, but its intent may be informative in gathering factors for the court to examine in the crowdsourcing context.<sup>168</sup> In particular, this framework mentions the advantage derived by the employer as a result of the work relationship. Accordingly, the courts have attempted to deduce, *inter alia*, the benefit derived by the employer from the intern.<sup>169</sup> This factor could be a particularly helpful one in the crowdsourcing context. By looking at the benefit to the employer, at least as a factor among others, courts would be in a better position to determine the extent to which click-work constitutes “work.” Crucially, not all clicking may in fact be FLSA “work.” An employer-benefit test would help to reach those that need to be covered and separate out a clicker who performs minimal tasks—that minimal worker is not the worker in need of FLSA protection. It also sidesteps the issue of how the clicker views the clicking, which often times would be as leisure.

The Supreme Court chose a different approach, however, establishing the economic realities test.<sup>170</sup> It noted that “[t]he test of employment under the [FLSA] is one of ‘economic reality.’”<sup>171</sup> To determine whether a worker is an employee under the economic realities test, courts “focus on whether, as a matter of economic reality, the worker is economically dependent

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<sup>167</sup> U.S. Dep’t of Labor, Wage & Hour Div., Op. Letter No. FLSA2004-5NA (May 17, 2004).

<sup>168</sup> For example, the test specifically references trainees, training, and observation, all terminology associated with interns.

<sup>169</sup> This is also true in the context of on-call time, that is, courts seek to establish the extent to which the employer is receiving the predominant benefit.

<sup>170</sup> See *Martin v. Selker Bros., Inc.*, 949 F.2d 1286, 1293 (3d Cir. 1991) (quoting *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1382 (3d Cir. 1985) (action under FLSA)).

<sup>171</sup> *Id.*

upon the alleged employer or is instead in business for himself.”<sup>172</sup> In the context of determining whether a trainee or volunteer is an employee, courts examine the “underlying economic facts,” especially whether the trainees or interns expect to receive payment for their services.<sup>173</sup> If circumstances indicate that an individual engages in activities expecting compensation, the individual is an employee within the meaning of the FLSA. This test focuses on the “circumstances of the whole activity.”<sup>174</sup>

These two approaches seek to espouse the different cases of internships: one that offers an educational experience and opportunity for the intern as opposed to one that is more of acquiring unpaid labor for an employer. Some programs are intricately crafted to afford experience and a taste of what it is like to work in a particular industry, while others seem to take advantage of the free work.<sup>175</sup> With this in mind, it is important to consider the applicability of the two tests in examining click-work. It would seem that the economic realities test is helpful if coupled with a conception of the employer’s benefit. This combination would allow courts to understand the economic relationship within the microcosm of crowdsourcing and not just in general terms of financial dependence.

## V. WORK OR LEISURE: AN ANALYTICAL FRAMEWORK FOR CLICK-“WORK”

Courts have yet to apply traditional labor and employment laws to a crowdsourcing context.<sup>176</sup> A court-based solution for crowdsourcing need not start from scratch as the FLSA

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<sup>172</sup> See Sara Witt, *The Status of Graduate Students and That of Medical Residents Under the National Labor Relations Act As A Starting Point for Crafting A Statutory Definition of "Employee"*, 59 CASE W. RES. L. REV. 1221, 1236 (2009).

<sup>173</sup> *Id.*

<sup>174</sup> *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961)).

<sup>175</sup> Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613 (1998).

<sup>176</sup> See Cherry, *supra* note 6.

litigation in other areas is helpful.<sup>177</sup> Overall, the identifiable trend of court approaches was to adopt a case-by-case, fact-sensitive approach.<sup>178</sup> Courts seek to determine the reality of the situation and understand the nuances of various employer-employee relationships. The fact that crowdsourcing takes place in a virtual work forum does not change this premise. By drawing on current court-imposed analyses and crafting factors specific to an online environment, the courts will be aided in getting to the reality of the situation.

While the labor struggles of the past are carried forward in the digital age through crowdsourcing, not every instance necessarily mandates FLSA protection. For this reason, it does not suffice to say that crowdsourcing, in all forms, is either work or leisure. It is important to identify the exact type of clicker that is in need of FLSA coverage and avoid capturing *de minimus* instances of click-work.<sup>179</sup> It is a matter of properly constructing the drag-net. For example, it is not the goal of fairness to regulate the crowdsourcing activity of a psychology professor using crowdsourcing to conduct a study. To properly screen, the court should begin with the goal of regulation in this instance: achieving fairness for clickers. With that goal in mind, the court should embark on the kind of factor-based approach seen in other areas of employment law—of course, these factors would be tailored to virtual work.

In applying a set of factors, courts should divide the analysis into two prongs, one approaching the situation from that of the worker and another from that of the employer. The implications on each actor will help the court come to an objective decision as to the work-leisure distinction. The third actor, the platform vendor, likely does not have a tremendous

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<sup>177</sup> See *supra* Part IV.

<sup>178</sup> This is the intent behind the various court imposed tests examined in the preceding section, including the economic realities test and the agency promulgated factors.

<sup>179</sup> See Phillips, *supra* note 95.

impact on the work relationship. The vendor’s involvement could change in the future, but as it stands, the vendor takes a profit and provides a means.<sup>180</sup>

Lastly, Ohio labor and employment attorney Sara Witt adds an interesting catch-all factor: consider the policy implications and the legislative history support.<sup>181</sup> In other words, Witt asks whether or not the consequences of granting “employee” status are favorable from a policy standpoint, and whether the consequences serve the underlying purpose of the relevant legislation.<sup>182</sup> While intended for the NLRA, this factor works in an FLSA analysis. It gives the court leeway in assessing the situation while keeping a watchful eye on the larger public good. Thus, the court would be able to look at the extent to which an employer is exploiting clickers from a policy perspective which may be helpful considering there is no other litigation on crowdsourcing.

*A. The Clicker’s Perspective:*

Under this category, the court places itself in the shoes of the clicker, but does so cautiously as many clickers view their activities as leisure. The court should first consider the amount of money earned through clicking. This is not to say that wealth is a sign of “work” in all situations, but in click-work, it is less important to protect the penny-earners unless the clicker’s financial situation dictates otherwise. The court should not craft its dragnet to capture negligible amounts.<sup>183</sup> At the same time, with small amounts of compensation attached to clicking tasks, clickers are not able to make their first million as a clicker no matter how much effort they put into the clicking endeavor.<sup>184</sup> The next factor—time—takes this into account.

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<sup>180</sup> See discussion *infra* Part V.B.

<sup>181</sup> See Witt, *supra* note 172.

<sup>182</sup> *Id.*

<sup>183</sup> This idea is taken from the theory behind the *de minimus* doctrine, that is, some work efforts are so minimal so as not to be counted towards compensable time. See McLaughlin, *supra* note 136.

<sup>184</sup> See Cherry, *supra* note 6.

Next, courts should consider the amount of time spent click-working by clickers. For now, the going payment rates for these tasks are considerably low—pennies in many instances. By including time as a clarifying factor to the amount earned, a fuller picture can be ascertained. It may be that a clicker earned \$10 in a day conducting click-work. With just that fact, a court may not give it a second thought for protection as definable “work” under the FLSA. Nevertheless, suppose it took that worker upwards of five hours to earn that \$10.00. Now the court is able to tell that this worker earned \$2 per hour while devoting significant time to the task. A reasonable arbiter would be able to deduce a notion of unfairness in this situation.<sup>185</sup> This is the type of clicker whose value needs protection. Thus, time as a factor gives the court a measuring stick by which it can contextualize the amount earned performing click-work. Again, the key is cautious contextualization when approaching the issue from the side of the clicker.

Time spent click-working and income earned as a result cannot be viewed in a vacuum. This is the crux of the analysis and the factor that gets to the core of this Comment. Courts should contextualize click-work time and income with income derived from other sources such as a traditional “desk job.” This inquiry will help the court ascertain whether clicking is being used to meaningfully support one’s livelihood. In line with this factor, courts should consider the subjective intentions of the clicker. Do the clickers themselves consider it work or play? While gamification may influence the answer to that question, it is worth it for the court to inquire. Of course, the other factors are used to contextualize the subjective intentions of a clicker. For example, an attorney making \$160,000 per year who completes crowdsourcing tasks for what he claims is to supplement his income does not come off as very genuine. That attorney’s next meal is not premised on the day’s take in crowdsourcing.

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<sup>185</sup> This is similar to the Chinese gold farmer: very little monetary return for a disproportionate amount of time spent at work. See Dibbel, *supra* note 20.

Consider two scenarios where differently situated individuals earn the same amount of money through click-work. Suppose that same attorney makes \$160,000 per year at a law firm and earns \$500 per year through click-work. Further suppose that a secretary earning \$35,000 per year also earns \$500 per year through click-work. Both spent the same amount of time to earn the \$500. To the attorney, the click-work income is only .031% of total income. To the secretary, the click-work income represents 1.42% of total income. The \$500 to the attorney may be the difference in flying coach or first class on his vacation while to the secretary it may very well be the case that \$500 is a needed bump to help make the rent at the end of the month. Even if that attorney thinks of it as work, the law need not be triggered to provide a fairer value for his time and efforts. Even if the secretary regarded the clicking as play, it is in the interest of the law to protect that class of worker from exploitation since the income is being used for necessities. In this way, this approach embraces the financial dependence factor.<sup>186</sup>

A tempting factor taken from the law on unpaid internships is whether the intern has displaced a regular employee. In the crowdsourcing context, this factor would manifest itself as whether a task would normally be distributed to an already employed member of a company. This factor is on point in understanding work exploitation, but it runs the risk of delving too far into the private decisions of businesses. Further, clicker tasks are relatively simple in that they could theoretically always be distributed to already paid employees. As such, this inquiry provides no enlightenment for courts at this time and should not be considered in the analysis.

#### *B. Focusing on the Employer: A Benefits Test*

Another indicator of “work” could be the benefit received by the employer.<sup>187</sup> If an employer posts a task that is highly beneficial in the amalgam, that is, it carries great worth

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<sup>186</sup> See *supra* note 167.

<sup>187</sup> This is taken from the law on unpaid internships. See Witt, *supra* note 172.

compared to what the employer is paying a clicker, this would suggest an injustice. In keeping with the goal of protecting clickers, these uneven equations would serve as red flags. Especially in the case of gamification strategies by businesses, the employer benefit can help strip some layers of manipulation to reach the underlying profit-making, exploitative motives.

Suppose company X needs a necessary but tedious project completed. The project involves no particular skillset and can be easily divided into pieces. Keeping the project in-house would tangle valuable personnel resources and outsourcing the project would cost upwards of \$50,000. Instead, the company posts five thousand tasks on a crowdsourcing platform. Each task would take approximately 45 minutes and pay \$0.20 for completion. In total, the project's completion would cost the company \$1,000. By availing themselves of clickers, company X has effectively circumvented labor and employment laws while saving themselves a heap of money. In this situation, there seems to be a great injustice based on the enormous benefit received to the company compared to the clicker's return. If there is little benefit to a company, the task is less likely to sound in "work" and more likely to function as leisure. For example, suppose a psychology professor is conducting an experiment and requires 1,000 participants. The professor uses crowdsourcing to gain quick access to a participant pool and pays each person fifty cents for the fifteen minutes it took to complete his survey. Here, the benefit received by the professor is merely the fulfillment of his study. Clickers conducting tasks of this sort may be less likely to fit into the "work" classification due to the small benefit derived from the clicker's input. Nevertheless, the case of small employer benefit does not necessarily construe a leisure activity. It could simply be the nature of the project, a necessary part of a greater scheme for a company. This is where the clicker focused factors might add needed meaning to the relationship of a small benefit click-work relationship.

It is important to be wary of extending the benefits received factor into unreasonable attenuation.<sup>188</sup> The courts would need to limit this factor to the somewhat immediate benefits of utilizing clickers. Suppose the project enabled Company X to move forward with a larger initiative where they would ultimately profit \$2 million in a one year period. This kind of benefit might be too disconnected from the click-work to warrant consideration. For this reason, the benefit received may need to be tempered by what the employer would need to otherwise outlay had crowdsourcing not been used.

As for the platform vendors, crowdsourcing has not yet evolved enough so as to find a proper place for platform vendors in this analysis of “work.” As it stands, crowdsourcing cannot take place without the vendor, but they have little bearing on the work relationship that the court needs to discern. Vendors provide the means. That is not to say this will not change as crowdsourcing continues to grow and vendor interests are further reflected in their operation of platform sites. If platform sites become more involved in the work-leisure distinction, perhaps more emphasis can be placed on their existence. Notably, vendors do set the terms of use vis-à-vis a user agreement.<sup>189</sup> Until the law can catch up to these largely one-sided boiler plate agreements, it is not yet worth considering their language for purposes of determine whether crowdsourcing constitutes FLSA “work.” In many instances, the agreements dispel liability and any kind of employer-employee relationship between parties. The language has yet to be tested and is considered controversial along with shrink-wrap agreements in general.<sup>190</sup> Largely, platform vendors and their user agreements will become very relevant in a discussion on the application of other provisions of the FLSA, that is, the employee versus independent contractor

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<sup>188</sup> This is similar to the proximate cause principle of torts.

<sup>189</sup> *See supra* note 61.

<sup>190</sup> *Id.*

dispute and the minimum wage issue discussed earlier, to name a few.<sup>191</sup> As for the work versus leisure distinction of the FLSA, the vendors provide the means of task accessibility and completion and do not affect the nature of the tasks.

### *C. Applying the Test*

Returning to the Chinese gold farmers for purposes of this analysis, the clicker's perspective is first examined. First, considering the amount of money earned and time spent earning it, a typical gold farmer earns about 30 cents per hour and works approximately 84 hours per week.<sup>192</sup> Keeping in mind that China has no national minimum wage system, a gold farmer's take is \$25.20 per week for working over twice as long as the typical forty hour work week. Given the time spent on this activity, it is clear that this is intended as a means of primary income. Moving to personal intent, many of these gold farmers enjoy the job as they get to play a computer game for a living— one farmer even stated that it appeals to his “playful attitude.”<sup>193</sup> But enjoyment aside, it would seem a job, even a lifestyle, more than anything else to these gold farmers. Further, considering the other circumstances surrounding the gold farming, they have no other sources of income. They even live on-site and work long twelve hour shifts.

Switching perspectives to the employer benefit test, businesses of this sort take in approximately \$80,000 per year.<sup>194</sup> The boss to whom a gold farmer reports will make about \$3.00 for every \$1.25 the farmer makes by selling them to a retailer.<sup>195</sup> That retailer will then pass on those hundred coins to an American and European market where they will be sold for

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<sup>191</sup> *Id.*

<sup>192</sup> *See* Dibbel, *supra* note 20. That figure is based on collecting 100 coins per hour. Recall also that there are drastically different employment laws in China then in the United States. For this reason, comments on working conditions themselves are not included.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

approximately \$20. Since it is unfair to extend a benefit analysis too far into perpetuity, the benefit inquiry will end when the coins are sold to the resellers. Assuming there are about 24 workers in this hypothetical gold farm, the business will have to pay out about \$31,450 to gold farmers, leaving \$48,550 to the business. Said another way, one worker will make about \$1,310 per year. Evidently, the employer is benefiting tremendously from the burdensome input by farmers and not giving them a fair return. As for public policy, calling this play would negate about 100,000 of these profiting operations across China and buy into the gamification of labor—here, where people labor in an actual game. Calling it work would move beyond the gamification and the enjoyment derived from playing World of Warcraft to find an environment in need of regulation.<sup>196</sup> Generally, this activity seems to be regarded as an income source by the farmers despite enjoying the gameplay on some level. Judging by the overwhelming amount of time spent at this activity and the huge benefit given to employers relative to the farmers’ return compensation, this would likely be classified as work.

The gold farmer case is similar to the full-time babysitter without other means of financial support. Similarly, the babysitter completes crowdsourcing tasks as a means of supplementing the babysitting income. To this particular clicker, clicking could mean the difference between putting something in savings at the end of each month and living pay check to paycheck. In a more extreme version, clicking may give the babysitter the last part of a hefty rent payment. Looking at the income earned, the babysitter makes \$15.00 per hour for 8 hours per day—\$30,000 per year. She is a clicker for 20 hours per week, usually making about \$9.00 during each hour spent clicking—that is another \$9,000 per year, nearly one third of the

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<sup>196</sup> In fact, some prisons in China forced inmates to gold farm during the night hours of their detention. Prison bosses would pocket the money and profit off of the free labor. See Danny Vincent, *China Used Prisoners in Lucrative Internet Gaming Work*, THEGUARDIAN (May 25, 2011), <http://www.guardian.co.uk/world/2011/may/25/china-prisoners-internet-gaming-scam>.

babysitting salary. As for the employer benefit, the pennies the babysitter makes completing a task is minute compared to the benefit received to Company X, especially when there are hundreds or thousands of clickers under their short-lived but profitable employ. Finally, the public policy and legislative intent factor dictate that it is in the public good to have this particular person protected from a “play” classification. She is clearly using crowdsourcing to acquire the most basic necessities—food, shelter, clothing, and even the ability to take an unpaid day off. The internet could potentially be a place where those who otherwise would be limited to traditional income earning opportunities would be able to make a better life for themselves without more schooling, training, or self-investment other than time and a computer. Like the gold farmer, this clicker too is in need of a better return for her work.

Finally, consider the high school student who babysits and uses crowdsourcing for enjoyment. While all expenses are paid for by her parents, she makes \$15 per hour two days per week watching an infant for five hours until the child’s mother or father returns home from work. At the end of most weeks, she had earned approximately \$150 to spend recreationally. Aside from the babysitting job, she uses crowdsourcing recreationally—about 10 hours—to earn another \$10 per week. In this case, she does not earn very much money from babysitting and her crowdsourcing income, putting aside its intended purpose as entertainment, is 1/16 of her total income. The firm receiving the benefit here is clearly profiting disproportionately by paying the babysitter about \$1 per hour for her efforts. This case is different, however, than the gold farmers. In the gold farm case, workers relied on that gaming income for their livelihoods. If they did not perform, they did not have a place to live or something to eat. Here, the babysitter could forgo all income earning activities, and aside from a slap on the wrist from her parents, she

still lives comfortably under her parents' care. The test is crafted to catch this kind of user in the dragnet of individuals who do not require legal intervention as would the gold farmer.

## VI. CONCLUSION

Crowdsourcing is a way for firms to access thousands of workers via the internet in a fast and inexpensive way. Firms break down a project into thousands of tasks and distribute it to clickers using a crowdsourcing platform such as Amazon Mechanical Turk. The clickers then complete simple tasks that will later be collected and pieced together by a computer. These clickers are paid pennies for their time. As it stands, an employer can utilize this virtual work forum to acquire labor without the cost of hiring a laborer. An instance regulatory arbitrage, firms are able to circumvent the labor and employment laws that are in place to protect against these situations. The issue is fairness to the clicker, that is, the clicker ought to get fair value back from the firm for their input of work. This is an injustice that must be ended by applying the FLSA in the crowdsourcing context and construing this activity as "work."

While the FLSA provides basic protections to workers, those protections have not been applied to clickers by courts or the legislature. In order for the FLSA to apply, crowdsourcing must be considered "work" for purposes of the FLSA. Notably, the FLSA does not provide a definition of "work" to distinguish it from "leisure." Should crowdsourcing fall into the "work" category, the protections of the FLSA would be in effect pending resolution of other FLSA issues. Nevertheless, as courts and legislatures move closer to addressing clicking, a work classification scheme must be created to meet the demands and innovations of virtual work forums.

Compensable time, on-call time, and unpaid internships, areas where the Court has considered the work/play distinction, offer a thoughtful paradigm under which to view

crowdsourcing. Importantly, not every instance of crowdsourcing should be considered “work.” There may very well be instances where clicking is a leisure activity for the clicker. Drawing on factors used in other FLSA cases, a case-by-case factor-based approach should be used to craft the dragnet. By looking at the income earned as a result of click-work, the amount of time spent conducting click-work, the clicker’s financial and living arrangements and the benefit to the employer, courts can begin to assess whether the click-work is ripe for FLSA protection beyond the complication of gamification.

As virtual work continues to gain momentum, these issues will become ever more pressing on the courts and legislature. Courts will have to navigate the complex application of traditional employment and labor laws to virtual forums. There is much legal technicality to sort through in applying these labor and employment laws to virtual work forums, but the courts and legislature should approach the issue with fairness to the worker as the foremost concern.