THE UNPAID INTERNSHIP: A STEPPING STONE TO A SUCCESSFUL CAREER OR THE STUMBLING BLOCK OF AN ILLEGAL ENTERPRISE?

FINDING THE RIGHT BALANCE BETWEEN WORKER AUTONOMY AND WORKER PROTECTION

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INTRODUCTION

The modern workplace is constantly experimenting with creative approaches to working arrangements, such as flex-time, part-time, and job-share programs. At the same time, employees are encouraged to take charge of their own careers, to seek out opportunities to learn new skills, or retrain on entirely new jobs in an effort to make themselves more marketable in the future. In this environment, many employees or job seekers are searching for or accepting unpaid internships as a means to career advancement. There is a balance to be struck, however, between allowing employees to set and shape their own career trajectories and preventing employers from taking advantage of such employees' desires to learn new skills. Even though employees may be willing to trade off such opportunities for lower wages or to forgo payment for a period of time, society must find the right balance between worker autonomy and worker protection. This balance is based upon the one we strike as a society at the intersection of the employment at-will doctrine and wage and hour laws.

Over the last few years, with the rise in the number of unpaid internships, the workplace has seen a shift away from worker protection due to a number of factors:

- a deep economic recession;
- an unemployment rate hovering between 8 and 10 percent for years;[1]
- workers' low expectations for the future;

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[1] *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS.(Nov. 25, 2013, 11:46 AM), http://data.bls.gov/timeseries/LNS14000000.

- the increased importance of internships as a means of retraining, taking advantage of unemployment time, building skills, and the like; and
- schools' complicity in questionable unpaid internship practices.

This article explores the internship relationship, with a focus on unpaid internships in white-collar industries; recommends the appropriate balance between worker autonomy and worker protection with respect to internships; and suggests a structure for internship programs to provide more beneficial, fulfilling, and balanced experiences for interns.

Parts I and II discuss the interplay between employment-at-will and wage and hour laws. Part III explores the current federal regulation of employment, its impact on internships, and the approaches of the federal courts to defining an internship relationship. Part IV reviews the causes of the rise of unpaid internships and analyzes the negative consequences of uncontrolled internship practices. Part V posits some recommendations to make internships a practical opportunity for workers with appropriate protections of their rights.

I. Employment At Will

In most employment relationships, employees, if asked, would describe their employment relationship as having a "two weeks' notice requirement." That is, either party can terminate the employment relationship–the employer can let the employee go or the employee can quit—with two weeks' notice to the other party. In reality, the two-weeks' notice requirement is customary but not legally required. Instead, most indefinite-term employment relationships (that is, employment relationships not governed by contracts) are governed by the employment-at-will doctrine, which allows an employer or employee to end their working relationship with the other without any sort of compensation or notice required.[2]

To date, the United States is the only country in the industrialized world that adheres to the employment-at-will doctrine,[3] although some exceptions to the doctrine have evolved over the years.

A. The History of the Employment-At-Will Doctrine

The employment-at-will doctrine is often credited to Professor Horace Gay Wood, who described the rule in his 1877 treatise on master-servant relations.[4] According to Wood, the employment-at-will doctrine was:

> . . . inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month or year, no time being specified, is

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[2] Kenneth M. Casebeer, *At-Will Employment*, *in* 1 Encyclopedia of U.S. Labor and Working-Class History 136, 136 (Eric Arnesen ed., 2007).

[3] *Id.*

[4] Richard A. Bales, Explaining the Spread of At-Will Employment as an Inter-Jurisdictional Race-to-the-Bottom of Employment Standards 3 (July 17, 2007) (unpublished manuscript), *available at* http://works.bepress.com/richard_bales/1.

> an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.[5]

Courts began to adopt Wood's description of the employment-at-will doctrine as authoritative and, eventually, nearly all states adopted the doctrine's framework.[6] While employment at will remains largely impermeable, statutory and judicially-created exceptions to it have emerged. Three major exceptions to employment at will are the "public policy" exception, the "implied-contract" exception, and the exception due to a "lack of good faith and fair dealing."[7]

B. Development of the Employment At-Will Doctrine at the State and Federal Level

Forty-nine of the fifty states recognize the ability of an employer or employee to terminate a working relationship without notice or compensation due from one party to the other.[8] In forty-eight of these States, the employment-at-will doctrine is grounded in common-law.[9]

For reasons set out below in Section I.D., the employment-at-will doctrine does not exist at the federal level.[10]

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[5] Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880, 886 (Mich. 1980) (citing WOOD, MASTER & SERVANT § 134, at 272 (1877)).

[6] *See The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx (last visited Nov. 25, 2013) [hereinafter *The At-Will Presumption*] (stating that employment relationships are presumed to be "at-will" in all U.S. states except Montana).

[7] Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, at 4. In fact, no exception to the employment at-will doctrine existed until 1959, when a California court held that the employment at-will doctrine did not apply to an at-will employee who was fired when he "refused to perjure himself for the benefit of the company." Casebeer, *supra* note 2, at 136. Exceptions to the employment at-will doctrine are further explored in Sections C & D of this Part.

[8] *The At-Will Presumption*, *supra* note 6. *See also* Muhl, *supra* note 7, at 11 n.3. The lone state that does not recognize the employment at-will doctrine is Montana. Montana passed the Wrongful Discharge from Employment Act in 1987, which prohibits an employer from discharging an employee after a predetermined probationary period if the discharge:

> (a) . . .was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (c) the employer violated the express provisions of its own written personnel policy.

MONT. CODE. ANN. § 39-2-904 (2013).

[9] Arizona has statutorily codified the employment at-will doctrine, and Montana has not adopted the doctrine in any form. *See* Muhl, *supra* note 7, at 11 n.3; *see also The At-Will Presumption*, *supra* note 6. While Arizona has statutorily codified the employment at-will doctrine, its doctrine is much like the other forty-eight states common-law based doctrine. *See generally* Ingrid Murro Botero, *'At-Will Employment' Law Made More Clear*, PHX. BUS. J. (Sept. 1, 1996, 9:00 PM), http://phoenix.bizjournals.com/phoenix/stories/1996/09/02/newscolumn8.html.

[10] In addition to the exceptions listed below, at-will relationships cannot be terminated when the dismissal would be a civil rights violation. Muhl, *supra* note 7, at 3. What constitutes a civil rights violation is a question that is outside the scope of this article.

C. The Primary Exceptions to the Employment-At-Will Doctrine

1. Public Policy Exception

Currently, forty-two states and the District of Columbia recognize that an employee in an at-will relationship is "wrongfully discharged when the termination is against an explicit, well-established public policy of the State."[11] As one court has noted, the public policy exception allows for a "proper balance . . . between the employer's interest in operating a business efficiently and profitably, the employee's interest in earning a livelihood, and society's interest in seeing its public policies carried out."[12] It should be noted, however, that what is considered against "public policy" varies from one state to another.[13]

2. Implied Contract Exception

Thirty-seven states and the District of Columbia recognize that an employment-at-will relationship does not exist when an employment contract is implied.[14] "A common occurrence in the recent past involved courts finding that the contents and representations made in employee handbooks could create an implied contract . . . ."[15] For example, employment "handbook provisions, which state that employees will be disciplined or terminated only for 'just cause,' [or] under [other] specified circumstances, or that require an employer to follow specific procedures before disciplining or terminating an employee" have been held to abrogate the employment-at-will relationship and create an implied employment contract.[16] In addition, an implied employment contract has also been found when "hiring official[s] [made] oral representations to employees . . . that [their] employment w[ould] continue as long as the[ir] performance [was] adequate."[17] However, employers can avoid this situation completely by having a "clear and express waiver that the guidelines and policies in such handbooks did not create contract rights."[18]

3. Good Faith and Fair Dealing Exception

An exception to an at-will-employment relationship can occur when the employer did not act in good faith or deal with the employee fairly. Courts have interpreted this exception to mean that employer personnel decisions are subject to a " 'just cause' standard or that terminations made in bad faith or moti-

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[11] *Id.* at 4. The seven states that have not adopted this exception are: Alabama, Georgia, Louisiana, Maine, Nebraska, New York, Rhode Island, and Florida with exceptions. *Id. See also* FLA. STAT. § 448.102 (2013).

[12] Muhl, *supra* note 7, at 6.

[13] *Id.* at 7. Some public policy exceptions are: (1) refusal to commit perjury, (2) willful and malicious injuring of another in his or her reputation, trade, business, or profession, and (3) the use of threats, intimidation, force, or coercion to keep a person from working. *Id.* at 6.

[14] *Id.* at 4. The thirteen states that do not recognize this exception are: Delaware, Florida, Georgia, Indiana, Louisiana, Massachusetts, Missouri, Montana, North Carolina, Pennsylvania, Rhode Island, Texas, and Virginia. *Id.*

[15] *Id.* at 7.

[16] *Id.* at 8.

[17] *Id.*

[18] *Id*. at 7–8. For an excellent illustration of how employee handbooks may create an implied contract, see Pine River State Bank v. Mettille, 333 N.W.2d 622 (Minn. 1983).

vated by malice are prohibited."[19] Although this statute "represents the most significant departure from the traditional employment-at-will doctrine," it has been adopted in eleven states.[20]

D. Other Exceptions to the Employment-At-Will Doctrine

1. Federal, State, and Municipal Employees

Federal, state, and municipal employees are not subject to the employment-at-will doctrine because their interests are protected by the Fifth and Fourteenth Amendments to the Constitution.[21] These employees are "considered to have a property interest in their jobs, and the right to due process [offered] places significant restrictions on arbitrary dismissals unrelated to job performance."[22]

2. Collective Bargaining Agreements

If a collective bargaining agreement exists, the agreement's terms determine when an employee can be discharged. This type of exception is often seen with unions.

3. Independent Contractors

Independent contractors are not subject to the employment-at-will doctrine because they are not considered to be employees. Whether a worker is considered an employee or an independent contractor requires a complex analysis based, in part, on the extent of autonomy that a worker has over his or her job with regard to the time, place, and manner of performance.[23]

II. WAGE-HOUR LAWS

A. Overview

Although determining whether a person is an employee or independent contractor may be a complex analysis, wage-hour laws are straightforward. Wage-hour laws are promulgated under the Fair Labor Standards Act (FLSA or the Act),[24] and are enforced by the Wage and Hour Division (WHD) of the United States Department of Labor (DOL). In addition to establishing wage minimums, the FLSA also outlines requirements pertaining to overtime pay,

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[19] Muhl, *supra* note 7, at 10.

[20] *Id.* at 10. The eleven states that have adopted this exception are: Alabama, Alaska, Arizona, California, Delaware, Idaho, Massachusetts, Montana, Nevada, Utah, and Wyoming. *Id.* at 4.

[21] American Civil Liberties Union, ACLU Briefing Paper #12: Rights of Employees, *available at* http:\www.lectlaw.com/files/emp08.htm.

[22] *Id.*

[23] For more on whether a worker is an employee or an independent contractor, *see Independent Contractors*, U.S. DEP'T OF LAB., http://www.dol.gov/elaws/esa/flsa/scope/ee14.asp (last visited Nov. 25, 2013). *See also* Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751–52 (1989) (seminal case outlining the factors to consider in an analysis on whether a worker is an employee or independent contractor).

[24] 29 U.S.C. §§ 201, 206, 207 (2012).

recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments.[25]

B. FLSA Guarantees

The following is a current overview of the FLSA "floor standards"[26] in minimum wage, overtimes, hours worked, recordkeeping, and youth employment:

> FLSA Minimum Wage: The federal minimum wage is $7.25 per hour. . . . Many states also have minimum wage laws. In cases where an employee is subject to both state and federal minimum wage laws, the employee is entitled to the higher minimum wage.
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> FLSA Overtime: Covered nonexempt [(i.e., "white-collar")] employees must receive overtime pay for hours worked over [forty] per workweek (any fixed and regularly recurring period of 168 hours—seven consecutive [twenty-four]-hour periods) at a rate not less than one and one-half times the regular rate of pay. There is no limit on the number of hours employees [sixteen] years or older may work in any workweek. The FLSA does not require overtime pay for work on weekends, holidays, or regular days of rest, unless overtime is worked on such days.
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> Hours Worked: Hours worked ordinarily include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace.
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> Recordkeeping: Employers must display an official poster outlining the requirements of the FLSA. Employers must also keep employee time and pay records.
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> Child Labor: These provisions are designed to protect the educational opportunities of minors and prohibit their employment in jobs and under conditions detrimental to their health or well-being.[27]

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[25] *Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/Flsa/index.htm (last visited Nov. 25, 2013) [hereinafter *Compliance Assistance*]. Contrary to what some believe, the FLSA does not require employers to pay "double time" wages, mandatory pay raises, mandatory meals and breaks, or "night differential." *See Wages, Pay and Benefits*, U.S. DEP'T OF LAB., http://www.dol.gov/elaws/faq/esa/flsa/toc.htm (last visited Nov. 25, 2013).

[26] Of course, states are free to ensure that their citizens receive more than what the WHD-DOL prescribes. For example, in New York, employers are required to give their workers a meal break for a length of time that depends on the industry or workplace environment of the employee. *See Meal Period Guidelines*, N.Y. ST. DEP'T OF LAB., http://www.labor.state.ny.us/workerprotection/laborstandards/employer/meals.shtm (last visited Nov. 25, 2013).

[27] *Compliance Assistance*, *supra* note 25. If an employee is disabled, then he/she is entitled to a different minimum wage known as a "commensurate wage rate," which is often less than the standard minimum wage. *See Wages and Hours Worked: Workers with Disabilities for the Work Being Performed*, U.S. DEP'T OF LAB., http://www.dol.gov/compliance/guide/flsa14c.htm (last visited Nov. 25, 2013). Three questions are often asked to arrive at the commensurate wage rate: (1) What is the minimum wage for nondisabled workers? (2) What is prevailing wage rate to nondisabled workers? (3) What is the productivity of the disabled worker in question? *Id.* If the employee is a student, "[s]ection 14(a) of the [FLSA] authorizes the payment of subminimum wages—at rates not less than 75 percent of the applicable minimum wage under section 6(a) of the FLSA—to a student-learner after the employer has applied for an authorizing certificate from the U. S. Department of Labor." *Instructions for Form WH-205: Application to Employ Student-Learners at Subminimum Wages*, U.S. DEP'T OF LAB., http://www.dol.gov/whd/forms/fts_wh205.htm (last visited Nov. 25, 2013).

C. The Reasonable Accommodation & Family Medical Leave Act (FMLA) Exceptions

Although wage-hour earners are only entitled to the rights guaranteed by the FLSA, they are allowed "reasonable accommodations" for religious or health-related breaks, if needed, unless such accommodation would prove to be an "undue hardship" on the employer.[28] In addition, under the FMLA, all employees are entitled to twelve weeks of unpaid, job-protected leave for the "1) birth and care of the eligible employee's child, or placement for adoption or foster care of a child with the employee; 2) care of an immediate family member (spouse, child, parent) who has a serious health condition; or 3) care of the employee's own serious health condition."[29] An employer must also maintain the employee's health benefits during the leave.[30]

D. Wage Garnishment Protection for Wage-Hour Workers

Wage-hour earners are also protected from being discharged when their wages are garnished for "any one debt."[31] For child support, bankruptcy, or federal or state tax payments, a creditor may garnish "up to 50 percent of an employee's disposable earnings . . . for child support if the employee is supporting a current spouse or child, who is not the subject of the support order . . . ."[32] This goes "up to 60 percent if the employee is not doing so."[33] All other garnishments must be done at the "lesser of 25 percent of disposable earnings or the amount by which disposable earnings are greater than [thirty] times the federal minimum hourly wage."[34]

E. Minimum Guarantees

Although forty-nine of fifty states recognize the employment-at-will doctrine, there is no uniformity among the states in applying exceptions to the doctrine. The determination of an exception in a given circumstance is fact-specific, highly jurisdictional, and shaped by common-law rules and precedent. What may be an exception in one state may not be in another. In addition, whether a worker is an employee or an independent contractor (and thus subject to the employment at-will doctrine) requires a fairly complex analysis.

In contrast, wage-hour laws promulgated under the FLSA are clear in what they require. Although states (and employers themselves) are free to expand upon the laws in the FLSA, Congress has decided what "minimum guarantees" employers must provide. Accordingly, employers must follow these "floor

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[28] *What Breaks (Rest, Snack, Meals, Smoking, Health, Etc.) Am I Entitled To Under FLSA (the Fair Labor Standards Act)?*, ENV'T, HEALTH & SAFETY ONLINE, http://www.ehso.com/cssdol/dolbreaks.php (last visited Nov. 25, 2013).

[29] *See The Family Medical and Leave Act (FMLA)*, U.S. DEP'T OF LAB., http://www.dol.gov/compliance/laws/comp-fmla.htm (last visited Nov. 25, 2013).

[30] *Id.*

[31] *Wages and Hours Worked: Wage Garnishment*, U.S. DEP'T OF LAB., http://www.dol.gov/compliance/guide/garnish.htm#BasicPro#BasicPro (last visited Nov. 25, 2013).

[32] *Id.*

[33] *Id.* An additional 5 percent may be garnished for support payments over twelve weeks in arrears. *Id.*

[34] *Id.*

minimums" or be subject to penalties, fines, and in some cases, imprisonment.[35]

III. Federal Regulation of Unpaid Internships

The FLSA does not reference unpaid internships. Whether an unpaid internship is legally valid under the FLSA turns on the Act's definition of "employee."[36] If an intern is not an employee under the FLSA, the Act does not apply. But if the intern qualifies as an "employee," he or she must be paid according to the minimum wage and overtime provisions of the Act.[37] The primary source of interpretation of the word "employee" in the FLSA comes from a 1947 Supreme Court case, *Walling v. Portland Terminal Co.,*[38] and its companion case *Walling v. Nashville, Chattanooga & St. Louis Railway*.[39] Following this set of cases the WHD has weighed in on the issue, as have the federal courts.

A. Walling v. Portland Terminal Co.

In *Portland Terminal*, a group of "trainees" participated in a railroad-run program designed to provide them with the skills necessary to become yard brakemen.[40] The program generally lasted seven or eight days, and although trainees were not immediately hired after undergoing training, the program was a prerequisite to employment.[41] The Supreme Court held that these trainees were not employees under the FLSA and were therefore not entitled to wages.[42] In doing so, the Court famously noted that the definition of "employ" in the act—"to suffer or permit to work"[43]—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."[44]

A few factors appear to have been relevant to the Court's determination.[45] For one, the trainees did not replace regular paid employees.[46] In fact, the railroad's paid employees did most of the actual work and had to supervise the work performed by the trainees.[47] Also, rather than expediting the railroad's business, hiring trainees often impeded it, in part because of the significant

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[35] *Filing a Wage and Hour Claim*, Workplace Fairness, http://www.workplacefairness.org/complaintpay (last visited Nov. 25, 2013) (accept terms to proceed).

[36] The FLSA defines an employee as "any individual employed by an employer." 29 U.S.C. § 203(e)(1) (2012).

[37] *See Compliance Assistance*, supra note 25.

[38] Walling v. Portland Terminal Co., 330 U.S. 148, 151–52 (1947).

[39] Walling v. Nashville, Chattanooga & St. Louis Ry., 330 U.S. 158, 160 (1947).

[40] *See Portland Terminal Co.*, 330 U.S. at 149.

[41] *See id.*

[42] *Id.* at 153.

[43] 29 U.S.C. § 203(g) (2012).

[44] *Portland Terminal Co.*, 330 U.S. at 152.

[45] As we will soon see, the WHD essentially adopts these factors verbatim.

[46] *See Portland Terminal Co.*, 330 U.S. at 149–50.

[47] *Id.* at 150.

effort expended to supervise them.[48] In reviewing these facts, the Court concluded that the employer railroad received no "immediate advantage" from the trainees' work.[49] Moreover, the agreement between the railroad and the trainees did not contemplate compensation,[50] and the trainees were not immediately hired, but formed a pool of qualified potential employees.[51] As the Court noted, the FLSA's purpose is to ensure that persons "whose employment contemplated compensation should not be compelled to sell [their] services for less than the prescribed minimum wage."[52] Since the trainees' employment in *Portland Terminal* did not contemplate compensation and the railroad received no "immediate advantage" from the trainees' work, the Court concluded that the FLSA did not apply.[53]

B. Department of Labor Guidelines and Federal Court Interpretation

Following *Portland Terminal*, the WHD issued its own guidelines that limit when private sector employers can utilize the service of unpaid interns.[54] It supplied six criteria that must be met before a for-profit employer can hire interns to work without compensation: (1) the internship must be similar to training that would be given in an educational environment; (2) the internship must be "for the benefit of the intern"; (3) the intern cannot displace regular employees and must work under the close supervision of existing staff; (4) the employer must derive "no immediate advantage" from the intern's activities and in some cases may actually be impeded by such activities; (5) the intern must not automatically be entitled to a job at the conclusion of the internship; and (6) the employer and intern must understand that the intern is not entitled to wages.[55] If any of these six criteria is not met, the internship is subject to the FLSA's minimum wage requirements.[56]

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[48] *Id.*

[49] *Id.* at 153.

[50] *Id.* at 150. A retroactive allowance was later given to successful trainees who were available to work as brakemen pursuant to a collective bargaining agreement signed by the railroad. *Id.*

[51] *Id.*

[52] *Id.* at 152.

[53] *Id.* at 153.

[54] U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.htm [hereinafter FACT SHEET #71]. These guidelines apply only to employers who engage in a business for profit. Non-profits may hire unpaid interns as volunteers and are not subject to the WHD's six-point test. *See id.* Congressional interns are also exempted from the FLSA definition of "employee." 29 U.S.C. § 203(e)(2)(A) (2012).

[55] FACT SHEET #71, *supra* note 54.

[56] The WHD has strictly construed the FLSA to require that all six factors be met in every case. This has resulted in some strange decisions in which the WHD shoots down seemingly beneficial internship programs based on its hardline approach. *See* Bernice Bird, *Preventing Employer Misclassification of Student Interns and Trainees*, CORNELL HR REV. (Feb. 28, 2012), http://www.cornellhrreview.org/preventing-employer-misclassification-of-student-interns-and-trainees/.

C. Factor One: Training

The more an internship program is structured to provide a "classroom or academic experience," the more likely it is to be viewed as an extension of the intern's education[57] and thus satisfy the requirement of the first criterion of the WHD guidelines — that the experience be similar to training that would be given in an educational environment. It is not necessary, however, that the internship be tied to an academic institution, or that the internship program even be structured similarly to the curriculum of an academic program.[58]

Nevertheless, the WHD looks favorably upon internship programs associated with colleges or universities, especially when those institutions exercise some oversight responsibility over the internship program and offer the students educational credit[59] for participation.[60] The DOL recognizes that:

> [i]n situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, . . . an employment relationship [does not exist] between the students and the facility providing the instruction.[61]

Similarly, the more the internship program is structured to provide the intern with transferrable skills—rather than skills specific to the employer's operation—the more likely the intern will be considered to be receiving training useful to the intern beyond the particular employment experience.[62] Nevertheless, complete fungibility is not required and employers may emphasize their own policies and procedures.[63]

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[57] FACT SHEET #71, *supra* note 54.

[58] *See* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993) (upholding unpaid firefighter training program despite the fact that only one vocational school in the country offered a similar curriculum).

[59] Academic credit is not a prerequisite for upholding a university run internship program. *See* Wage & Hour Division Opinion Letter, 2006 DOLWH LEXIS 15, at *1 (Dep't of Labor Apr. 6, 2006).

[60] *See* FACT SHEET #71, *supra* note 54. Ties to a college or university and academic credit standing alone, however, are insufficient to pass the WHD six-point test. *See, e.g.*, Wage & Hour Division Opinion Letter, 2004 DOLWH LEXIS 9, at *1, *5–6 (Dep't of Labor May 17, 2004) (for-credit marketing internship programs sponsored by a university are potentially subject to FLSA where interns worked up to ten hours a week and collected and analyzed potentially useful marketing data); Wage & Hour Division Opinion Letter, 1995 DOLWH LEXIS 20, at *1–3 (Dep't of Labor Mar. 13, 1995).

[61] Wage & Hour Division Opinion Letter, 1996 DOLWH LEXIS 13, at *3 (Dep't of Labor May 8, 1996).

[62] *See, e.g.*, *Reich*, 992 F.2d at 1027–28 (noting that a training program may be similar to a vocational school if skills taught are fungible within the industry).

[63] *See id.*; Donovan v. Am. Airlines, Inc., 686 F.2d 267, 270 (5th Cir. 1982). *But cf.* McLaughlin v. Ensley, 877 F.2d 1207, 1210 (4th Cir. 1989) (citing focus on the employer's own business as a reason for determining that plaintiffs were employees under the FLSA). Note: the Fourth Circuit in *Ensley* did not apply the WHD six-factor test but their analysis is still pertinent. *But see id.* at 1211 (Wilkins, J., dissenting) (citing *Donovan* in rejecting the majority's analysis).

D. Factor Two: Benefit of the Intern

The second criterion—that the internship be primarily for the benefit of the intern—is intimately tied to the education and training requirement discussed above.[64] To that end, education, training, experience, and other benefits that inure to the intern should be the primary concern of the internship arrangement. If the intern is merely performing the routine business of the employer and not receiving valuable experience, then the internship is not for the benefit of the intern.

In fact, even if the intern receives some benefit—for example, learning a new skill—this does not preclude a finding that the internship fails to meet this criterion in circumstances where the intern is "engaged in the operations of the employer" or is "performing productive work."[65] For this reason, the courts often consider factor two alongside factor four and weigh the benefit to the intern in context with the benefit to the employer as discussed more fully *infra*.[66]

E. Factor Three: Displacement of Regular Workers

The third criterion—that the interns not displace regular employees—is perhaps the easiest to understand but the hardest to enforce. In no case should interns be used as substitutes for regular employees or to augment the existing workforce. An intern is considered an employee—and must be paid in accordance with the FLSA—if the employer would have had to hire additional employees or require existing staff to work more hours but for the intern. Again, this criterion reiterates the requirement that the internship experience be for the benefit of the intern rather than for the benefit of an employer wishing to cut costs by hiring unpaid workers. Interns should be engaged in activities meant to further their educational training—such as, for example, job shadowing—supervised by existing staff.[67] If existing staff are replaced by interns, this is evidence that the interns are engaged in the wrong sort of activity.

F. Factor Four: No Immediate Advantage to the Employer

The fourth criterion—that the employer derives no "immediate advantage" from the intern's activities—is a continuation of the ideas expressed in the previous three. Of all six factors, factor four is the most important, but also the most confusing. There are a couple things to note:

First, the word "immediate" is not mere surplusage. Many internship programs will benefit employers in the future by creating a labor pool of skilled employees. Internships are often used specifically for that purpose. In fact, in

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[64] Harris v. Vector Mktg. Corp., 753 F. Supp. 2d 996, 1007 (N.D. Cal. 2010) (FLSA class action).

[65] The DOL guidelines include the following examples of "productive work": filing, performing clerical work, and assisting customers. FACT SHEET #71, *supra* note 54.

[66] *See infra* Section III.F.

[67] FACT SHEET #71, *supra* note 54. If the intern receives the same level of supervision as regular employees, this is evidence of an employment relationship. *Id.*

Portland Terminal, the railroad's program was designed primarily to create such a pool of potential employees.[68]

Second, even taking into account only immediate benefits to the employer, the guidelines are somewhat misleading. Interns often do work that directly benefits the employer. In addition to mere résumé building, workers primarily become involved in internships to gain hands-on experience in an effort to meaningfully enhance their résumés. If interns were not allowed to perform any work that benefits the employer, the internship experience would be impaired. In *Atkins v. General Motors*, appellants argued that, as trainees, they immediately advantaged GM by debugging GM's production lines and cleaning the production plant.[69] In denying the appeal, the Fifth Circuit noted that the debugging of the production lines was "an integral part of the training experience,"[70] suggesting that benefits arising from the training itself may be discounted when performing the "immediate advantage" analysis.

Moreover, given the costs associated with supervising and training interns, only the most altruistic employers would hire interns if there were no offsetting benefits unrelated to training.[71] Perhaps for this reason, both the WHD and courts have routinely considered this factor in conjunction with factor two, the requirement that the internship primarily benefit the intern. The result is a balancing test that requires weighing the burden of training and supervision against the benefit of productive work performed by interns.[72]

In addition, the courts have created a *de minimis* exception to the "immediate advantage" factor. In *Atkins*, for example, the court noted two instances of productive work unrelated to training, but found that the compensable work performed was so minimal that any "immediate advantage" was deemed excused.[73]

If the employee completes substantial productive work, however, this factor is not met.[74] In *Wardlaw*, the defendant employer argued that he was exempted from FLSA minimum wage requirements because he was teaching his interns—two high school students—about the insurance business so that they could determine if they would be interested in careers in that industry.[75]

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[68] *See supra* note 51. There are numerous other similar cases. *See, e.g.*, *Donovan*, 686 F.2d at 269; Ulrich v. Alaska Airlines, Inc., No. C07-1215, 2009 WL 364056, at *13–14 (W.D. Wash. Feb. 9, 2009) ("The law presumes that Alaska will derive 'some' benefit from offering training to prospective employees, and the relevant question is whether that benefit is 'immediate.' ").

[69] Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983). *Atkins* turned on the "immediate advantage" factor. *Id.*

[70] *Id.* The court also noted that the trainees frequently damaged or incorrectly repaired equipment, and that in any case GM had regular employees on site capable of performing this task. *Id.*

[71] *See Donovan*, 686 F.2d at 271 (quoting approvingly the district court's analysis that: "the operation of the school is 'by definition in the financial interest of American,' . . . for companies generally have 'little interest in creating a labor pool for their competitors' ").

[72] *See, e.g.*, *id.* at 271–72.

[73] *See Atkins*, 701 F.2d at 1129.

[74] *See, e.g.*, Wirtz v. Wardlaw, 339 F.2d 785, 787–88 (4th Cir. 1964) (although the Fourth Circuit did not apply the WHD six-factor test, its holding clearly turns on this factor).

[75] *Id.* at 787. Essentially he was arguing that the employment arrangement was that of an internship.

The Fourth Circuit concluded that the interns were an integral part of his promotional activities, however, and Wardlaw benefited at least as much as the employees from their labor.[76] Similarly, in an opinion letter dated March 25, 1994, the WHD concluded that interns at a youth hostel, who assisted in daily operations,[77] immediately advantaged the hostel.[78]

G. Factor Five: No Job Entitlement

The fifth requirement—that the intern not be entitled to a job at the end of the internship period—changes gears a little. It is probably a vestige of the specific facts of *Portland Terminal,* though it may also address a concern that interns may be induced to work for free for the promise of future work. This guideline precludes any use of an unpaid internship as a trial period for potential employees and provides that internships should have a fixed duration established prior to the beginning of the internship.

In any case, this factor is rarely relevant in practice because an employer may routinely hire substantially all of his interns without there being any job entitlement so long as he or she was not required to do so. Only one Court of Appeals case really touches on this factor. In *Reich v. Parker Fire Protection District*,[79] the Tenth Circuit held that no employment relationship existed despite the fact that trainees were entitled to a job at the end of their training period.[80]

Still, as *Hallissey v. America Online* illustrates, job entitlement may be an important consideration under the right circumstances.[81] In *America Online*, unpaid volunteers worked as "community leaders" for AOL.[82] Although community leaders were not *per se* entitled to a future paid position, the court noted that acting as an unpaid volunteer was essentially a prerequisite to obtaining such employment, and volunteers were encouraged to work more hours in order to increase their chances of obtaining paid positions.[83] The court took issue with the inducement of free labor for the promise of future paid employment.[84]

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[76] *Id.* at 788. The interns duties included the following: "(1) cutting newspaper clippings and mailing them to persons mentioned in them, (2) folding and addressing for mailing monthly newsletter. . . , and (3) addressing and mailing birthday greetings on business cards of the defendant to his business and social 'contacts.' " *Id.* at 786–87.

[77] Wage & Hour Division Opinion Letter, 1994 DOLWH WL 1004761, at *1 (Dep't of Labor Mar. 25, 1994). The interns were charged with checking hostellers in and out, performing some maintenance and administrative work, and assisting with the design and implementation of educational and interpretive programming for the hostel. *Id.*

[78] *Id.* at *2. Interns would have completed a Hostel Management Training Course prior to the internship, and there was no evidence that the interns would receive training or supervision above that which would be given to a regular employee. *Id.* at *1.

[79] Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993).

[80] *Id.* at 1029. It is not surprising that the Tenth Circuit rejects the WHD's all-or-nothing approach to the six-factor test in a case where the job entitlement factor is not met. This factor is easily the least relevant of the bunch.

[81] *See* Hallissey v. Am. Online, No. 99-CIV-3785, 2006 U.S. Dist. LEXIS 12964, at *19 (S.D.N.Y. Mar. 10, 2006).

[82] *Id.* at *3.

[83] *See id.* at *19, *21.

[84] *Id.* at *23. The court analyzed the issue both in terms of job entitlement and expectation of future employment. *Id.*

H. Factor Six: No Compensation

The sixth and final requirement merely confirms that if the employer and employee understand that the employee is to be paid wages, such wages must be paid regardless of whether the employment relationship otherwise resembles a legally valid unpaid internship.[85] Certain non-pecuniary benefits, such as health and dental insurance, pension plans and discounted or free goods and services,[86] may create an expectation of compensation that will subject an internship to the minimum wage and overtime provisions of the FLSA.

I. Circuits Split in Interpretation: All or Nothing?

Understanding how to apply the WHD factors is only half the battle. Not all courts rigidly follow the structure of the six-factor test, and not all courts require that all six factors be met.[87]

The circuits are split on the issue of how much deference should be given to the WHD six-factor test, and in particular whether that test should be applied in an all-or-nothing fashion. The Fifth Circuit in *Atkins* held that the WHD guidelines are due substantial deference as the WHD, as an administrator of the FLSA, is charged with enforcing and interpreting statutory commands.[88] The Tenth Circuit, on the other hand, has held that the six-factor test and the Labor Secretary's interpretation thereof are not due the same high level of deference given to agency regulations.[89] In *Reich*, the Tenth Circuit concluded that, as a non-regulatory guideline, the WHD six-factor test was only to be given weight appropriate to the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ."[90] Thus, while the court found the WHD's guidelines useful in determining whether a person is an employee under the FLSA, it did not treat the WHD guidelines as controlling.[91]

Reich involved a fire district that was in the process of replacing volunteer firefighters with trained professionals.[92] After undergoing a rigorous interview process, top applicants were selected to attend the district's firefighting academy.[93] Successful completion of the academy's ten-week training course was a

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[85] FACT SHEET #71, *supra* note 54.

[86] The New York State Department of Labor identifies these benefits as those that may qualify an intern for the minimum wage. *See Labor Standards Fact Sheet: Wage Requirements for Interns in For-Profit Businesses*, NYS DEP'T OF LABOR, http://www.labor.ny.gov/formsdocs/wp/P725.pdf/ (last visited Nov. 25, 2013). To determine whether an employment relationship exists, the New York Labor Department uses six criteria from the U.S. Department of Labor and five criteria of its own. *Id.*

[87] Bird, *supra* note 56.

[88] *See* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1127–28 (5th Cir. 1983). *Atkins* turned on factor four of the WHD six-factor test. The relevant facts are discussed *supra* Part III.F.

[89] Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993).

[90] *Id.*

[91] *Id.*

[92] *Id.* at 1025.

[93] *Id.* The training program included classroom lectures, tours of the district, and demonstrations, as well as physical training and simulations. *Id.* Trainees also maintained the district's equipment. *Id.* During the training process, the firefighter trainees were not compensated, though they could obtain loans from the district. *Id.*

prerequisite to becoming a firefighter for the district.[94] The court held that, considering the totality of the circumstances, the firefighter trainees were not employees.[95] The five main factors of the WHD six-factor test all pointed to a relationship that fell short of that of employer and employee.[96] Only the fifth factor, requiring that there be no expectation of future employment, was not met.[97] Given the nature of a totality of the circumstances inquiry, however, a single, relatively insignificant factor was not enough to tip the scales.[98]

J. Primary Beneficiary Test

Other courts have ignored the WHD guidelines altogether and formulated their own tests. The Fourth Circuit in *McLaughlin v. Ensley* explicitly rejected the WHD six-factor test and devised its own "primary beneficiary" test.[99] *Ensley* involved a snack food distribution business that required potential job candidates to do a week of orientation before starting work.[100] During their orientation period, potential "routemen" were required to shadow current employees and assist in simple tasks, such as unloading the delivery truck and restocking store shelves.[101] They were also taught basic maintenance skills and occasionally assisted in preparing orders.[102] The court, applying the primary beneficiary test, held that an employment relationship existed because Ensley received a greater advantage from the orientation period than the workers did.[103] Ensley received the advantage of servicing routes of his snack food distribution business with unpaid labor, while prospective employees received only marginal training that was largely specific to this particular employer.[104]

K. Economic Reality Test

Finally, some courts have relied heavily on *Portland Terminal* and the subsequent Supreme Court decision in *Tony & Susan Alamo Foundation v. Secretary of Labor*[105] in examining the "economic reality" of the situation.[106]

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[94] *Id.* Even certified and experienced firefighters were required to attend the academy in order to build a sense of teamwork and cooperation with fellow incoming firefighters. *Id.*
[95] *Id.* at 1029.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] McLaughlin v. Ensley, 877 F.2d 1207, 1209 n.2 (4th Cir. 1989). The dissent in *Ensley* vigorously challenged the majority's adoption of a test that includes only one of the six factors of the WHD test. *Id.* at 1212 (Wilkins, J., dissenting) ("[T]he majority opinion focuses its inquiry on one of the underlying factors and re-characterizes it as the 'proper legal inquiry' in the case.").
[100] *Id.* at 1208.
[101] *Id.*
[102] *Id.*
[103] *Id.* at 1210.
[104] *Id.* Interestingly, the court characterized the training as not rising to the level of instruction that students would receive in a vocational course, even though the form of training provided is not an explicit factor under the primary beneficiary test. *Id.*
[105] Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).
[106] *See, e.g.*, Rodriguez v. Twp. of Holiday Lakes, 866 F. Supp. 1012, 1017 (S.D. Tex. 1994); Krause v. Cherry Hill Fire Dist. 13, 969 F. Supp. 270, 274 n.5 (D.N.J. 1997).

In *Tony & Susan Alamo Foundation*, the Supreme Court revisited its interpretation of the word "employee" in *Portland Terminal*.[107] In this case, a nonprofit religious organization hired persons undergoing drug or criminal rehabilitation as "associates" in its commercial businesses.[108] These associates were considered volunteers rather than employees,[109] and were not paid wages but were provided food, shelter, clothing, and other benefits.[110] Although the associates were not paid as employees, the Court, looking to the "economic realit[ies]" of the situation, held that the associates were employees because they worked in contemplation of compensation.[111] Distinguishing *Portland Terminal*, the Court noted that, unlike the weeklong training program in that case, the foundation's associates were "entirely dependent upon the Foundation for long periods . . . ."[112] Given the extended nature of the associates' relationship with the foundation, the Court found that the associates expected to receive implied compensation in the form of in-kind benefits.[113] Because of these findings, the Court held that the foundation was subject to the wage, overtime, and recordkeeping provisions of the FLSA.[114]

Courts applying the *Tony & Susan Alamo Foundation* "economic reality" test to the trainee context focus on whether the service arrangement contemplated compensation, and whether the employer was immediately advantaged by the services performed.[115]

L. Picking the Right Approach

Courts in other jurisdictions have had trouble dealing with the myriad of tests that have been applied. In *Archie v. Grand Central Partnership*, for instance, then-district judge for the Southern District of New York, Sonya Sotomayor, applied a "cover your bases" approach in determining that homeless persons hired by a non-profit organization were employees.[116]

First, the court considered the guidance of *Portland Terminal* and the WHD six-factor test, concluding that program failed to meet virtually every factor.[117] Training received was minimal and not similar to that which would be provided in a vocational school.[118] The program participants worked largely

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[107] *Tony & Susan Alamo Found.*, 471 U.S. at 300–01.
[108] *Id.* at 292.
[109] *Id.* at 293. Associates testified at trial that they were volunteering for the foundation. *Id.* One associate, for instance, testified that she considered her work for the foundation to be part of her ministry and found the idea that she worked for material rewards to be "totally vexing to [her] soul." *Id.* at 300–01.
[110] *Id.* at 292.
[111] *Id.* at 301.
[112] *Id.* (quoting Donovan v. Tony & Susan Alamo Found., 567 F. Supp. 556, 562 (W.D. Ark. 1982)).
[113] *Id.*
[114] *Id.* at 306.
[115] Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1542–43 (2010). For an example of a court applying the economic reality test see discussion *infra* Part III.L.
[116] Archie v. Grand Cent. P'Ship, 997 F. Supp. 504, 524 (S.D.N.Y. 1998).
[117] *Id.* at 531–33.
[118] *Id.* at 533.

unsupervised, displacing regular employees.[119] Also, even though the participants benefitted from the program, the employer gained "an immediate and greater advantage" from their labor.[120] Finally, "the participants did not understand that they were not entitled to wages."[121]

Analyzing the six factors, the court found that the program failed the WHD test.[122] But the court was not content merely to analyze the case under this test. After noting that the six-factor test was only "a factor to be weighed in the analysis," the court moved to the economic realities test, looking at whether there was an expectation of compensation and whether the employer was immediately advantaged by the participants' efforts.[123] The result of the application of the economic realities test naturally followed that of the WHD test since the relevant considerations of the economic realities test overlap with the six-factor test.[124]

So, given the complexity of the WHD six-factor test and a variety of court interpretations, both employers and workers are faced with significant challenges in determining whether a position qualifies as an internship, as well as in maintaining a balance between worker protection and autonomy.

IV. Current Situation With the Internship Market

While internships have always been an important tool for vocational training and job-vetting, the dynamics and the balance of internships has changed in recent years. The economic recession placed thousands of people out of jobs, constrained employers' financial resources, and put extra pressure on interns hoping to obtain jobs. Unpaid internships were seen as a way to break into fields such as politics, fashion, journalism, and book publishing.[125] Now, however, unpaid internships have spread beyond those "glamorous" fields.[126]

In addition to the economic factors, ambiguity surrounding the law related to internships contributes to the current situation in which many employers do not pay their interns even if their internship would not qualify for an exemption under the WHD six-prong test. In fact, two of the top ten internships of 2011 posted by Vault.com[127] are questionable. Nickelodeon Animation Studio's unpaid internship may not qualify under the WHD six-prong test because it may violate the fifth prong by giving the impression that interns may qualify

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119 *Id.*

120 *Id.*

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 533–35.

125 Ross Perlin, Op-Ed., *Unpaid Interns, Complicit Colleges*, N.Y. Times, April 3, 2011, at WK11, *available at* http://www.nytimes.com/2011/04/03/opinion/03perlin.html?pagewanted=all.

126 *Id.*

127 Vault Educ. Editors, *Vault's Top 10 Internships 2011*, Vault (Mar. 10, 2011), http://www.vault.com/blog/admit-one-vaults-mba-law-school-and-college-blog/vaults-top-10-internships-2011/.

for employment at the end of the internship.[128] And, although Northwest Mutual Financial Network offers a "stipend" to its interns, it cites the number of interns that get hired at the end of the internship, which also may violate the fifth WHD factor.[129] As can be understood from *Hallissey v. America Online*, job entitlement can be important in defining an internship under certain circumstances.[130]

A. Rise of Unpaid Internships Among Students

Numerous studies suggest that the number of internships, particularly unpaid internships, has been growing for more than a decade. According to a study conducted by the National Association of Colleges and Employers, 50 percent of graduating students had held internships in 2008, a rise from the 17 percent shown in a 1992 study by Northwestern University.[131] Experts estimate that between one-quarter and one-half of the internships could be unpaid.[132] Moreover, given the economic recession of the recent years, the employers' desire to cut costs, and the workers' need to gain experience or fill résumé gaps, there has been a dramatic increase in the number of unpaid internships. The Director of the Career Development Center at Stanford University, Lance Choy, noted that "[e]mployers posted 643 unpaid internships on Stanford's job board [during the 2010] academic year, more than triple the 174 posted two years" before.[133] Trudy Steinfeld, director of the Office of Career Services at New York University, reports that she increasingly has to remind employers to make sure their unpaid internships are educational.[134] Given the current economic realities, this trend is likely true for many, if not most, schools and job sites.

Other studies on the issue confirm the trend. The College Employment Research Institute found that "[t]hree-quarters of the [ten] million students enrolled in America's four-year colleges and universities will work as interns at least once before graduating . . . ."[135] A study by the research firm Intern Bridge found that between one-third and one-half of those students will get no compensation for their efforts.[136]

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[128] *Nickelodeon Animation Studio Internship Program*, VAULT, http://www.vault.com/internship_program/animation/nickelodeon-animation-studios/overview (last visited Nov. 25, 2013).

[129] *Northwestern Mutual Internship*, VAULT, http://www.vault.com/internship_program/commercial-banking-and-financial-services/northwestern-mutual/overview (last visited Nov. 25, 2013).

[130] Hallissey v. Am. Online, Inc., No. 99-CIV-3785, 2006 U.S. Dist. LEXIS 12964, at *19–23 (S.D.N.Y. Mar. 10, 2006). *See supra* Part III.G. for a discussion of relevant facts.

[131] Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, April 3, 2010, at B1, *available at* http://www.nytimes.com/2010/04/03/business/03intern.html. This article was revised on April 10, 2010, to correct the misstated results of the surveys. *Id.*

[132] *Id.*

[133] *Id.*

[134] *See id.*

[135] Perlin, *supra* note 125.

[136] *Id.*

B. Schools' Complicity in Questionable Internship Practice

One of the reasons for the seeming boom in unpaid and questionably legal internships appears to be that many schools are complicit in helping employers avoid a murky area of labor law rather than helping students obtain the best opportunities and teaching them to value their work. According to a survey of more than 700 colleges by the National Association of Colleges and Employers, 95 percent of the surveyed colleges "allowed the posting of unpaid internships in campus career centers and on college web sites," and "only 30 percent [of those colleges] required that their students obtain academic credit for [such] unpaid internships . . . ."[137] Based on these numbers, many schools promote unpaid internships that could potentially violate labor law and the rights of prospective interns.

Further, federal regulators state that providing academic credit alone does not necessarily free employers from paying interns, or provide assurance that the internships comply with law, especially when an internship involves little training and mainly benefits the employer.[138] In spite of that, to satisfy the requirement of academic experience, schools increasingly require that all interns receive academic credit, especially in the areas of politics, film, fashion, and journalism.[139] This brings about debate between those students who find such courses worthwhile and others who "detect a paradox" in the arrangement— that such arrangement essentially pushes students to pay what is often a "hefty price" in tuition in order to work for free.[140] For example, an intern at NBC Universal had to pay over $2,700 to the University of Pennsylvania for a one credit-unit seminar.[141] Another intern at "The Daily Show" had to pay New York University $1,600 for credits he did not need in order to meet the eligibility requirements for the internship.[142] While charging tuition may justify an institution's promotion of unpaid internships by creating an academic experience, it has been criticized because internships are a cheaper way for universities to provide credit, where they don't need to provide faculty, equipment, or space.[143]

Instead of protecting their students from questionable unpaid internships, some schools seem to have become advocates and enablers of the unpaid internship boom. In 2010, thirteen college presidents sent a letter to the DOL discouraging further regulation of unpaid internships.[144] The schools asserted that unpaid internships are viewed as a "huge success."[145] While sharing the DOL's "concerns . . . for exploitation," the schools pledged their dedication to

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[137] *Id.*

[138] *See* Greenhouse, *supra* note 131; *see also* Perlin, *supra* note 125.

[139] Sara Himeles, *Paying a Hefty Price for Summer*, DAILY PENNSYLVANIAN (Feb. 19, 2008 5:00 AM), http://thedp.com/index.php/article/2008/02/paying_a_hefty_price_for_summer.

[140] *Id.*

[141] *Id.*

[142] Tom A. Peter, *Unpaid Interns Struggle to Make Ends Meet*, CHRISTIAN SCI. MONITOR Mar. 5, 2007, at 13, *available at* http://www.csmonitor.com/2007/0305/p13s01-wmgn.html.

[143] Perlin, *supra* note 125.

[144] Letter from Joseph E. Aoun, President, Ne. Univ. et al., to Hon. Hilda L. Solis, U.S. Labor Sec'y, U.S. Dep't of Labor (Apr. 28, 2010), *available at* http://www.northeastern.edu/president/pdfs/US_Department_of_Labor_letter.pdf.

[145] *See id.*

ensure "secure and productive environments" that further education.[146] In a countering letter to the DOL, the Economic Policy Institute warned that if unpaid internships are left unregulated, employers may simply replace their paid workers with unpaid interns, and universities may face a "conflict of interest when the student 'intern' is paying for college credits while placed off-campus in a private business."[147] In contrast with the position taken in the schools' letter, some news stories report that campus career centers are "swamped" and deny being able to "monitor and reassess" all internship placements or postings.[148]

C. Rise of Unpaid Internships Among Experienced Professionals

While unpaid internships have usually been a realm for students to get academic credit in lieu of getting paid, the recession and high unemployment rate are pushing more and more experienced workers turn to unpaid internships to avoid gaps in their résumé, to train in an area with potentially more opportunities, to gain experience, or to find new connections. The number of postings on Monster.com for internships increased 91 percent from April 2009 to April 2010.[149] One internship specialist noted that unpaid internships are now available to recent graduates, and even to people who have been in the job market for years.[150]

Private employers who are forced to lay off paid workers to cut costs are eager to bring in unpaid interns as a cost-saving mechanism. In addition, employers may prefer hiring adult unpaid interns who already have workplace knowledge, certain sets of skills, and mature senses of responsibility and schedule.[151] According to some forecasts, it will be "years, not months, before employees regain any semblance of bargaining power."[152]

Even though labor law does not cover unpaid internships for experienced adults, Nancy Leppink, the DOL's wage and hour deputy administrator, stated that the legal requirements for adult internships are no different from those for student internships.[153] This means that employers hiring adult interns must also

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[146] *Id.*

[147] Ross Eisenbrey, *EPI Responds to University Presidents on Internship Regulations*, ECON. POL'Y INST. (May 5, 2010), http://www.epi.org/publication/epi_responds_to_university_presidents_on_internship_regulations/.

[148] *See, e.g.*, Perlin, *supra* note 125.

[149] Jesse Harriott, *Great Expectations? – College Grads Face New Challenges*, MONSTERTHINKING (Apr. 21, 2010), http://www.monsterthinking.com/2010/04/21/great-expectations-–-college-grads-face-new-challenges/.

[150] Kristi Eaton, *The Rise of the Unpaid Internship*, GENERATION PROGRESS (Jan. 20, 2010 12:23 AM), http://campusprogress.org/articles/the_rise_of_the_unpaid_internship/.

[151] Lauren Berger, *Adult Internships Increase In Tough Economy*, EXAMINER.COM (Apr. 20, 2009), http://www.examiner.com/internships-and-entry-level-jobs-in-los-angeles/adult-internships-increase-tough-economy.

[152] Peter Coy et al., *The Rise of the Permanent Temporary Workforce*, NBCNEWS.COM (Jan. 10, 2010, 1:10 PM), http://www.msnbc.msn.com/id/34769831/ns/business-careers/t/rise-permanent-temporary-workforce/.

[153] Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME MAG. (Apr. 12, 2010), *available at* http://www.time.com/time/magazine/article/0,9171,1977130,00.html#ixzz1ZMeE2eNa.

satisfy the WHD six-factor test requirements. The problem still is that internship-related law is vague and obsolete.

D. Disincentive to Report Violations

Internships increasingly play an important role for prospective employees seeking to get a foot in the door to obtaining employment. In light of this, "the highly competitive market for placement" has created a situation where "no one [intern] has an incentive to report their employer, even in cases of blatant abuses," because another intern will readily work for free in hopes to obtain experience, permanent position, or contacts.[154]

Even though "violations are widespread," this fear of ruining one's reputation in the field makes law enforcement difficult because interns are often afraid to file complaints.[155] Thus, unpaid interns describing their experiences with internships often decline to give their names or the names of their employers due to the concern about their future job prospects.[156] In addition, a "perceived value" of experience, which is often lacking in many internships, explains weak "resistance to unpaid internships in the U.S."[157]

V. Outcomes of Ineffective Internship Regulation

Unclear regulation of internships, ambiguity of the DOL's guidance on whether interns are eligible for wage protection, and ineffective enforcement of existing guidance has led to negative consequences not only for interns, but also for paid workers, the labor market, and society in general. Another negative outcome of ineffective regulation and the difficult economic situation is the uncontrolled rise of unpaid internships, which only deepens socioeconomic disparities. Many employers are disguising real jobs as unpaid internships, ignoring the fact that asking talented people to work for free could be viewed not only as unethical, but as illegal.

A. No Real Training for Interns

Many internships are not only unpaid, but also provide no explicit academic or training experience, or involve menial work. Lack of training and absence of real benefits to an intern are in direct violation of the two very first prongs of the six-factor test. A review of the internships posted on Craigslist and company websites, however, reveals that many internships are purely administrative and others are simply full-time jobs with no pay. For example, an unpaid public relations internship advertised on a communications company website includes a list of public relations duties, including writing press releases, client research, and media relations, but also provides an equal list of

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[154] Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection—Reforming the Regulation of Student Internships*, Econ. Pol'y Inst., Apr. 9, 2010, at 2, *available at* http://www.epi.org/publications/entry/pm160/.

[155] Greenhouse, *supra* note 131.

[156] *Id.*

[157] Tahmincioglu, *supra* note 153.

administrative duties, including "general office work such as phoning, faxing and filing."[158]

B. Interns Replacing Workers

Vague and unenforceable internship-related labor law also poses a danger to the labor market and paid workforce. In current conditions, employers have incentives to substitute regular workers with unpaid interns, even though it runs counter to factor three of the six-factor test. This disadvantages workers who are squeezed out of employment as well as to college students, recent graduates, and those who seek to requalify, all of whom are forced into unpaid work that may be below their qualifications.[159] Effects of recession, including a high unemployment rate, the "increasingly competitive labor market," and the rising costs of providing employee benefits, contribute to "the trend of replacing full-time workers with unpaid interns."[160]

C. Lack of Legal Protection for Interns

Discrimination and harassment laws, such as the Civil Rights Act, the Americans with Disabilities Act, and the Age Discrimination in Employment Act, do not protect unpaid interns. The Second Circuit Court of Appeals confirmed the notion in a leading case, *O'Connor v. Davis*.[161] In that case, plaintiff Bridget O'Connor was required to complete an internship for her college degree and chose to work at a local psychiatric center.[162] While interning there, O'Connor was subject to repeated sexual harassment by one of her supervisors, Dr. James Davis.[163] The Second Circuit upheld the district court's decision that O'Connor did not qualify for protections under Title VII because, as an unpaid intern, she did not receive compensation from the center, and thus did not fall within a definition of an employee.[164]

Similarly, interns cannot look to the internship providers, such as placement agencies or universities, as responsible parties because the courts have found that such internship intermediaries are not liable for harassment that the intern may experience in the course of his or her work. In *Evans v. Washington Center for Internships and Academic Seminars,* an unpaid intern brought an action against her supervisor, the internship placement organization, the chiropractic office where she worked, the office's owner, and the office's trade name, alleging her supervisor committed battery and sexual harassment against her in violation of the District of Columbia Human Rights Act (DCHRA).[165] The court held that the intern at a chiropractic office was not an "employee"

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[158] *Public Relations Internship*, REGAN COMM. GROUP, http://regancomm.com/contact/internships/ (last visited Nov. 25, 2013).
[159] Edwards & Hertel-Fernandez, *supra* note 154, at 3–4.
[160] *Id.* at 4.
[161] O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998).
[162] *Id.* at 113.
[163] *Id.* at 113–14.
[164] *Id.* at 116.
[165] Evans v. Wash. Ctr. for Internships & Academic Seminars, 587 F. Supp. 2d 148, 149 (D.D.C. 2008).

within the meaning of DCHRA, and thus she was not entitled to relief under DCHRA on her sexual harassment claim.[166]

Moreover, murky laws and regulations related to internships create a situation where interns, as opposed to wage and hour workers and at-will workers, do not qualify for workers' compensation, health insurance, retirement benefits, sick days, vacation, severance, or access to unemployment insurance. Such treatment of interns contributes heavily to imbalance between worker autonomy and worker protection, as it provides no protection to interns.

D. Deepening Socioeconomic Gap

Unpaid internships may further deepen socioeconomic differences by limiting participation to students or professionals who can afford to live without getting paid, or who can afford to pay for college credit to obtain an internship where they work for free. Low- and moderate-income students often lack financial resources and personal connections necessary to secure a prestigious unpaid internship.

The National Association of Colleges and Employers reported that more than three-quarters of employers responding to a recent survey "said they prefer candidates with the kind of relevant work experience gained through an internship."[167] Given the critical importance of internships in securing employment after graduation, especially in fields that require a high degree of training, low-income students find themselves pigeonholed in a lower level of society. This vicious cycle prevents social mobility.

VI. Recommendations to Reform Internship Regulatory Framework

The experiences of interns vary, but many unscrupulous employers are exploiting current economic conditions, the disproportionate amount of employment supply versus demand, vague and unclear regulations, and weak enforcement. Given the imbalance created by unpaid internships, the current system of regulations governing internships must be reformed, both to protect interns' rights and to maintain a strong labor market that compensates all workers fairly. There is no need to abolish all internships, of course, as internships provide a great way to gain experience, change or improve qualifications, or open the door into a new career. What is needed is reform and effective enforcement.

Some states, like California and Oregon, have already begun investigations into unpaid internships, on the grounds that they violate minimum wage laws. These investigations are resulting in fines for employers in violation.[168] In 2009, "New York's labor commissioner . . . ordered investigations into sev-

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[166] *Id.* at 151.

[167] Daniel Akst, *Will Work for Free;* Unpaid *Internships Give the Children of Affluence a Leg Up, Helping to Perpetuate Inequity*, L.A. Times, June 15, 2010, at A15, *available at* http://articles.latimes.com/2010/jun/15/opinion/la-oe-akst-internships-20100615.

[168] Greenhouse, *supra* note 131.

eral firms' internships."[169] More recently, the DOL has begun "stepping up enforcement nationwide."[170]

A. *New Metric Test*

To help employers comply with the regulations and to bring the autonomy-protection balance into interns' lives, the six-factor test needs to be clarified and updated. Exploring ways to improve the regulation of student internships, the representatives from the Economic Policy Institute suggested a new quantitative test for the two most ambiguous factors of the six-prong test: the second, which asks whether the experience primarily benefits the intern, and the fourth, which asks whether the employer derives immediate benefit from the training or internship.[171] Under the proposed new test, the "*per-hour cost to the employer of an intern* (through supervision and training)" would be compared to the "*per-hour benefit to the employer of an intern* (through an intern's production)."[172] "If the cost exceeds the benefit, . . . the student would qualify as an intern and FLSA wage protections would not apply."[173] While this is an "indirect metric," it still should provide a better way to measure the benefit derived by an intern.[174]

An exception could be established for an educational institution that fails the test, but provides internships of an explicitly educational nature and coordinates closely with the employer, when the institution explicitly makes the match, and when it provides academic credit or other recognition of student's work. In order to qualify for the exception, a school would have to "show that it is actively monitoring the employer's internship program to maintain certain previously determined standards for education and training."[175]

This new test may be adopted through the WHD guidelines, or Congress may amend the FLSA to include specific laws for student workers and unpaid interns. We are reminded that "[s]uch a change is not unprecedented, as Congress has repeatedly amended the FLSA over the years to update employment law to a changing labor market."[176]

B. *Decentralized Enforcement*

The federal government will not be able to provide effective centralized monitoring of compliance. It should cooperate with universities and educational institutions to raise awareness among student workers of their rights in employment and internship situations. The government could also require educational institutions and employers hosting interns to post "intern's rights" bulletins in public places, and to instruct interns on their rights and protections prior to the beginning of the internship. "[T]he Bureau of Labor Statistics and Census Bureau should include questions on their employment surveys to classify

169 *Id.*
170 *Id.*
171 Edwards & Hertel-Fernandez, *supra* note 154, at 4.
172 *Id.*
173 *Id.*
174 *Id.*
175 *Id.* at 5.
176 *Id.*

interns and their demographic and socioeconomic characteristics."[177] This would help to get a better picture of the distribution of interns and internships, areas in the nation that need closer supervision, and the effects of internships on interns and employment in general.[178]

C. Schools' Participation

Given the increasing amount of school involvement in promoting unpaid internships, the schools themselves should be the leaders in promoting real educational internships, instead of pushing students towards unpaid internships that offer few, if any, educational benefits. Ross Perlin, the author of the book *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*, suggested the establishment of cooperative education programs, in which students alternate between tightly integrated classroom time and paid work experience.[179] Educational institutions "shouldn't publicize unpaid internships at for-profit companies," and should encourage meaningful internship opportunities, such as those offered in fields like communications, psychology, social work, and criminology where internships are often more integrated into the curriculum.[180] "They should stop charging students to work without pay" in jobs that offer little academic value and "ensure that the currency of academic credit" maintains its value through meaningful internship opportunities.[181]

D. Proposed Legislative Reform

To ensure unpaid interns obtain equal protection from harassment and discrimination, "Congress ought to concurrently amend Title VII of the Civil Rights Act and other relevant legislation (such as the Americans with Disability Act, the Equal Pay Act, and the Age Discrimination Act) [to extend protection] to all student workers" and unpaid interns.[182] Congress should amend the definition of an employee in the relevant legislation to ensure that it covers interns who perform work for an employer. In addition, Congress should consider legislation that creates a system of financial supports or subsidies for low-income students who pursue public service internships in government agencies or nonprofit organizations.[183]

CONCLUSION

The laws governing the rights of interns have not kept pace with the growing number and importance of internships. The challenge may be that universities, employers, and more affluent students may be content with the status quo. Economic conditions may also present a challenge by leaving workers with no choice but to accept unpaid internships. The government, thus, plays a vital role

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[177] *Id.* at 6.
[178] *Id.*
[179] Perlin, *supra* note 125; *see also,* Interview by Brian Lehrer with Ross Perlin, Author (June 1, 2011), *available at* http://www.wnyc.org/shows/bl/2011/jun/01/intern-nation/.
[180] Perlin, *supra* note 125.
[181] *Id.*
[182] Edwards & Hertel-Fernandez, *supra* note 154, at 6.
[183] *Id.*

in updating the law and pushing reform to ensure that those who engage in substantive work are fairly compensated, that employers do not have an incentive to substitute paid workers with unpaid interns, and that all workers, including unpaid interns, have equal protection from harassment and discrimination. Educational institutions should also participate in such reform by ensuring meaningful internship opportunities for their students. Proper legislative reform, the DOL's updated regulations, and rigorous enforcement will help overcome any challenges, and strike the right balance between worker autonomy and worker protection that interns—and society—deserve.