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UNPAID INTERNSHIPS & THE DEPARTMENT OF LABOR: THE IMPACT OF UNDERENFORCEMENT OF THE FAIR LABOR STANDARDS ACT ON EQUAL OPPORTUNITY

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The U.S. Department of Labor's failure to use its full authority to enforce the Fair Labor Standards Act with respect to unpaid internships has a detrimental impact on young Americans and especially young Americans from less privileged backgrounds. The Fair Labor Standards Act minimum wage provisions prohibit the typical unpaid internship. Despite this, unpaid internships are a large and growing segment of the job market and are increasingly a prerequisite to a successful career. As a result, young Americans from less privileged families who cannot afford to work for free are shut out of countless job opportunities. By not using its full authority under the Act to pursue claims against the employers of unpaid interns, the Department of Labor is allowing companies to violate the law without consequence, to the detriment of the interns involved and generally to equal opportunity in society.

I. INTRODUCTION TO UNPAID INTERNSHIPS

In a segment on his television show *The Colbert Report*, comedian Stephen Colbert satirized unpaid internships, calling them "the lifeblood of modern business" and an "American business tradition."¹ Colbert reminded viewers that "[t]his country was built by unpaid interns," and then displayed a picture of a black man in chains.² He continued in his trademark satirical style, "[a]nd, in exchange, I assume they got college credit."³

The tasks that unpaid interns perform vary widely depending on the employer. For example, at Viacom Inc.'s MTV Networks, unpaid interns spend their time researching, clipping, filing, and prepar-

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1. *The Colbert Report* (Comedy Central broadcast Apr. 12, 2010), available at <http://www.colbertnation.com/the-colbert-report-videos/270709/april-12-2010/unpaid-internship-crackdown>.

2. *Id.*

3. *Id.*

ing mailing lists.⁴ As an unpaid intern for a professional sports team, a senior at the University of Nebraska at Kearney “drafted news releases, clipped newspaper articles, helped with community relations programs,” and assisted with the production of a 75-page media guide.⁵ The team did not reimburse her for gas or mileage for the errands she ran on their behalf.⁶

An unpaid intern at a cable television station answered phones and watched television for commercials the station produced.⁷ Before accepting the position, the station had told her that she would learn about news writing and production.⁸ Another intern felt “used and dirty” during an unpaid internship at a record label where she “put stickers on thousands of CDs.”⁹ An Ivy League student working as an unpaid intern at a magazine packaged and shipped “twenty to forty apparel samples per day back to fashion houses that provided them for photo shoots.”¹⁰ Unpaid interns at a vintage clothing e-commerce website spent their days steaming, hanging, and straightening clothing.¹¹ An intern at a midsize law firm had to make coffee and sweep out bathrooms without pay, even though the firm had promised him an educational paid internship.¹²

A senior at New York University made photocopies, filed, and responded to routine email messages for her boss during an unpaid internship at a company that books musical talent.¹³ Another N.Y.U. student hoped to work in animation in an unpaid internship at a Manhattan children’s film company.¹⁴ Instead the company assigned her to the facilities department.¹⁵ Her duties included wiping door handles daily to prevent the spread of H1N1.¹⁶

4. Wendy Bounds, *All Work and No Pay: Internships Promise Long Hours, No Money and Menial Work. So Why Are Internships So Popular*, WALL ST. J., Feb. 27, 1995, at R7.

5. Dawn Gilbertson, *Earning It: Glamorous Internships With a Catch: There’s No Pay*, N.Y. TIMES, Oct. 19, 1997, § 3, at 16.

6. *Id.*

7. *Id.*

8. *Id.*

9. Dana Harada, Letter to the Editor, *The Work Interns Do, and the Pay They Don’t Get*, N.Y. TIMES, Apr. 8, 2010, at A30.

10. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 3, 2010, at B1.

11. Neal Conan, *Questioning the Ethics of Unpaid Internships*, NATIONAL PUBLIC RADIO, (Jul. 13, 2010), <http://www.npr.org/templates/story/story.php?storyId=128490886>.

12. Greenhouse, *supra* note 10.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

An unpaid intern for a fashion designer ran errands all over New York City and was not reimbursed for her subway fare.¹⁷ Someone burned a cigarette into her arm during one of her errands, and when she returned to the office, she was scolded for taking too long.¹⁸

A senior print journalism major at the University of Southern California spent an unpaid internship at a local magazine as a fact-checker.¹⁹ At the time she reported, “[t]here is never a moment’s rest during my days at the office. Today . . . I didn’t take a lunch break. I called and talked and searched on the computer until my voice cracked and my vision blurred.”²⁰

Job advertisements also provide insight into what unpaid internships entail. For example, the duties of an unpaid Promotions Department intern at New York radio station Z100 “include interacting with listeners, assisting with station concerts and events, data entry, internet research projects, and a host of other responsibilities.”²¹ Jack in the Box Inc. instructs potential unpaid research and development interns that “you will support product evaluation by assisting kitchen staff with execution of product showings and sensory panels. You will perform physical analysis, cook studies, hold studies and yield studies.”²²

These individual stories are only part of the mosaic of internships, which are a large and growing segment of the job market. In 1981, according to a National Society of Experiential Education study, one in 36 college graduates, less than three percent, had participated in an internship.²³ In 1992, a Northwestern University study found that 17 percent of graduating students had held unpaid internships.²⁴ A more recent study by the National Association of Colleges and Employers found that half of graduating college students had participated in internships.²⁵

The estimates of how many of these internships are unpaid vary widely. On the low end, some say that one-fourth of internships

17. Conan, *supra* note 11.

18. *Id.*

19. Connie Sung, *Are Unpaid Internships Exploitive?*, L.A. TIMES, Dec. 30, 2000, at B9.

20. *Id.*

21. *Intern*, Z100, <http://www.z100.com/pages/info/intern.html> (follow Promotions/Marketing tab) (last visited Oct. 30, 2011).

22. *Research and Development Internship*, JACK IN THE BOX, <https://jackinthebox.tms.hrdepartment.com/jobs/2068/Research-and-Development-Internship-in-San-Diego-CA> (last visited Jan. 28, 2011).

23. Gilbertson, *supra* note 5.

24. Greenhouse, *supra* note 10.

25. *Id.*

are unpaid.²⁶ Others say that half of internships are unpaid.²⁷ In some fields like entertainment and politics, nearly all internships are unpaid.²⁸ Around one-fifth of for-profit corporations with over 5,000 employees hire unpaid interns.²⁹

Whether internships are paid or unpaid, the consensus is that they are an important, if not a necessary, experience for college students pursuing white-collar jobs. Career experts call them “the gateway into the white-collar work force,”³⁰ “a rite of corporate passage,”³¹ “almost a must for any college student,”³² “an essential stepping stone to career success,”³³ “almost a requisite of success,”³⁴ and “increasingly critical.”³⁵ Internships are “the way you break into the work world in America.”³⁶

Internships are often a probationary employment period that lets a business try someone out before committing to hiring them into a more permanent position.³⁷ Indeed, a survey of the undergraduate class of 2001 found that 57 percent of those who were interns were offered full-time positions by the organizations they worked for.³⁸

Internships also make students more marketable to other employers.³⁹ The survey of the class of 2001 found that those who had experiential education on their resumes were paid an average of nine percent more than those who did not.⁴⁰

With these benefits, unpaid internships run the risk of turning the American dream, “in which life should be better and richer and fuller for every man, with opportunity for each according to his ability

26. *Id.*

27. Gilbertson, *supra* note 5; Greenhouse, *supra* note 10; Anya Kamenetz, Op-Ed., *Take This Internship and Shove It*, N.Y. TIMES, May 30, 2006, at A19.

28. Gilbertson, *supra* note 5.

29. ROSS PERLIN, INTERN NATION 27 (2011).

30. Greenhouse, *supra* note 10.

31. Gilbertson, *supra* note 5.

32. Michael Croan, *They Aren't Paid, but Interns' Experience Will Pay Off*, ROANOKE TIMES & WORLD NEWS (Va.), Aug. 12, 1996, at C1.

33. Jennifer Lee, *Crucial Unpaid Internships Increasingly Separate the Haves from the Have-Nots*, N.Y. TIMES, Aug. 10, 2004, at A16.

34. Steven Ginsberg, *Soar Spot: Why Internships Are Increasingly Crucial; Workers Gain Experience and Contacts, While Employers Get a Chance to Try Before Letting Someone Fly*, WASH. POST, June 1, 1997, at H4.

35. *Learning; Internship Smarts*, BOS. HERALD, June 13, 1999, Magazine at 2.

36. Gilbertson, *supra* note 5.

37. Croan, *supra* note 32.

38. Glenn C. Altschuler, *College Prep; A Tryout for the Real World*, N.Y. TIMES, Apr. 14, 2002, §4A, at 20.

39. Croan, *supra* note 32.

40. Altschuler, *supra* note 38.

or achievement,”⁴¹ on its head.⁴² The growth in unpaid internships favors students from wealthier families and speeds their climb up the career ladder, while less affluent students often cannot afford to accept an unpaid internship.⁴³ Many have to help their parents make ends meet.⁴⁴ Many have to earn money for college expenses.⁴⁵ ABC News correspondent Cokie Roberts warned that unpaid internship programs set up a system that makes it more difficult for people without economic advantages to catch up.⁴⁶

Others like Daniel Akst are less cautious, calling unpaid internships “an ideal system for perpetuating and increasing inequality.”⁴⁷ Akst argues:

The reality is that unpaid internships are a great way of giving the children of affluence a leg up in life. If they really do help young people get permanent jobs in desirable fields, then the current internship system has the effect, however unintended, of reserving this advantage mainly for well-to-do families—families that happen to be disproportionately white.⁴⁸

Professor Robert Farley agrees, contending that “the unpaid internship effectively excludes a wide socioeconomic swath from gaining useful experience and making effective connections . . .”⁴⁹ Put another way, unpaid internships “reinforce[] the divide between ‘haves’

41. JAMES TRUSLOW ADAMS, *THE EPIC OF AMERICA* 404 (1931).

42. See ROSS PERLIN, *INTERN NATION*, at xv (2011).

43. Greenhouse, *supra* note 10.

44. Conan, *supra* note 11.

45. Lee, *supra* note 33; Ginsberg, *supra* note 34; *Internships*, NATIONAL PUBLIC RADIO, June 20, 2000, <http://www.npr.org/templates/story/story.php?storyId=1075648> (comments of host Juan Williams preceding a panel discussion on summer internships) (last visited Nov. 26, 2011).

46. Lee, *supra* note 33.

47. Daniel Akst, Op-Ed., *Unpaid Internships? File Under “Hypocrisy,”* L.A. TIMES, Jun. 15, 2010, at A15, available at <http://articles.latimes.com/2010/jun/15/opinion/la-oe-akst-internships-20100615>.

48. *Id.* Satirical blogger Christian Lander placed unpaid internships at number 105 on his list of “Stuff White People Like.” Christian Lander, #105 *Unpaid Internships*, STUFF WHITE PEOPLE LIKE (Jul. 20, 2008), <http://stuffwhitepeoplelike.com/2008/07/20/104-unpaid-internships/>. He writes, “[w]hen all is said and done, the internship process serves the white community in many ways.” *Id.* Lander also calls internships “an essential stage in white development.” *Id.* Unpaid internships also have a gender discrimination component: 77 percent of unpaid interns are female. ROSS PERLIN, *INTERN NATION* 27 (2011).

49. Robert Farley, *Unpaid Labor Illegal? In America?*, LAWYERS, GUNS AND MONEY (Apr. 3, 2010), <http://www.lawyersgunsmoneyblog.com/2010/04/unpaid-labor-illegal-in-america>.

and ‘have-nots’ among undergraduates. The rich kids take the internships and improve their prospects. Their less-well-off peers, who simply can’t afford to, end up busing tables for the summer and graduate with significantly skimpiest resumes.”⁵⁰

Not only do unpaid interns not receive any wages, they also have to bear a number of costs, further widening the divide. Interns have to pay for transportation to the workplace.⁵¹ They may have to purchase clothing appropriate for the office.⁵² If the internship is far from home, the costs go up to hundreds or even thousands of dollars to cover expenses like housing.⁵³ Many employers require unpaid interns to receive academic credit, which is another expense that the unpaid intern must bear.⁵⁴ Tuition alone can cost thousands of dollars.⁵⁵ Bringing the cost to work to new heights, internship placement services have sprouted up to place students in internships in glamorous industries in exchange for thousands of dollars.⁵⁶

Unpaid internships do have their supporters. A common argument they espouse is that the free market should set the wage for internships.⁵⁷ In this view, if interns did not want to work for free, they would not do it.⁵⁸ Rather, the intern agrees to work for free because the internship is to his or her benefit.⁵⁹ This argument is problematic because it would reject all minimum wage laws, not just those pertaining to interns. It is, in other words, an anti-minimum wage argument and not a pro-unpaid internship argument.

Minimum wage laws restrict the freedom of an employer and an employee to contract for employment at any wage to correct for labor market failures and promote social welfare. The “free market” argument challenges those wage restrictions and not how they might ap-

50. Ben Yagoda, Commentary, *Will Work For Academic Credit*, CHRON. HIGHER EDUC. (D.C.), Mar. 21, 2008, at 36.

51. Andrew M. Bennett, Letter to the Editor, *Internships for Pay, Credit, or None of the Above*, CHRON. HIGHER EDUC. (D.C.), Apr. 11, 2008, at 39.

52. *Id.*

53. Stephanie Steinberg, *All Work, No Pay for Some: Unpaid Internships Put Students Hungry for Experience in a Quandary*, USA TODAY, July 27, 2010, at 5D; Bennett, *supra* note 51.

54. *Id.*; Yagoda, *supra* note 50; Akst, *supra* note 47.

55. Yagoda, *supra* note 50.

56. *Id.*

57. Aleksey Gladyshev, *A Mushrooming Number of Unpaid Internships*, THE FOUNDRY (Apr. 22, 2010, 1:30 PM), <http://blog.heritage.org/2010/04/22/a-mushrooming-number-of-unpaid-internships>; John Stossel, *Unpaid Interns Are Exploited?*, TOWNHALL.COM (May 5, 2010), http://townhall.com/columnists/JohnStossel/2010/05/05/unpaid_interns_are_exploited.

58. Gladyshev, *supra* note 57.

59. Stossel, *supra* note 57.

ply to internships. Furthermore, unpaid internships may actually prevent the market from functioning freely. As Anya Kamenetz argues, “productivity is based on the best people finding the jobs best suited for their talents, and interns interfere with this cultural capitalism. They fly in the face of meritocracy — you must be rich enough to work without pay to get your foot in the door.”⁶⁰

Another argument supporting unpaid internships is that there is nothing wrong with an unpaid internship if the intern learns something about his or her chosen career.⁶¹ Similarly, supporters of unpaid internships argue that there is no downside when the unpaid intern gains a wealth of experience.⁶² This argument ignores the fact that the intern would learn about the career and gain experience regardless of whether he or she received pay, and therefore, these arguments really advocate internships generally rather than unpaid internships specifically. Moreover, unlike apprenticeships, internships are typically inconsistent, brief, unstructured, and barely supervised, providing a less than ideal educational environment.⁶³

II. UNPAID INTERNSHIPS UNDER THE FLSA

President Franklin Delano Roosevelt wrote to Congress in May of 1937 to urge the enactment of legislation to ensure that working Americans earn “a fair day’s pay for a fair day’s work.”⁶⁴ The President argued that there was no justification for the failure of wages to meet minimum standards of fairness and reasonableness in a nation “so richly endowed with natural resources and with a capable and industrious population.”⁶⁵

The Fair Labor Standards Act of 1938 (“FLSA”)⁶⁶ established the first federal minimum wage.⁶⁷ Through the FLSA, Congress sought “to correct and as rapidly as practicable to eliminate” the “labor

60. Kamenetz, *supra* note 27.

61. Stossel, *supra* note 57.

62. Dr. Marcia Cantarella, Letter to the Editor, *Big, if Not Quick, Rewards From College Internships*, N.Y. TIMES, Nov. 2, 1997, at §3, at 42.

63. ROSS PERLIN, *INTERN NATION* 44 (2011).

64. H.R. DOC. NO. 75-255, at 2 (1937).

65. *Id.*

66. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2006).

67. WILLIAM G. WHITTAKER, *THE FAIR LABOR STANDARDS ACT* 7 (2003). This article does not consider the “plethora of state legislation on wages, hours, and child labor which may be controlling in a given situation insofar as it establishes standards of employment higher than those promulgated by the [FLSA].” CHARLES H. LIVENGOOD, JR., *THE FEDERAL WAGE AND HOUR LAW* 1–2 (1951).

conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”⁶⁸ Congress found that these conditions burden commerce and the free flow of goods, constitute an unfair method of competition, lead to labor disputes, and interfere with the fair marketing of goods.⁶⁹ Congress enacted the FLSA because it believed that establishing a minimum wage would curb deflationary forces, increase the purchasing power of many of the nation’s workers, and improve many workers’ standard of living.⁷⁰

Substantively, the FLSA is an umbrella statute mandating a range of labor standards for minimum wage, overtime pay, and child labor.⁷¹ The original statute limited the applicability of the federal minimum wage to industrial workers engaged in interstate commerce.⁷² Since then, the basic framework of the minimum wage provisions has remained intact.⁷³ However, the scope of coverage and exemptions has changed considerably.⁷⁴

With certain limited exceptions, every employer must pay every employee the federal minimum wage.⁷⁵ Thus, if interns are employees, they must be paid the minimum wage.

The key legal issue is this: is an unpaid intern an “employee” within the meaning of the FLSA? Employees are defined as those who employers “suffer or permit to work.”⁷⁶ The most common test to determine whether someone is an employee is the economic reality test.⁷⁷ Courts consider various sets of factors, which include the degree of control exercised by the employer, the employee’s opportunity for profit or loss, the relative investments of the employee and employer, the permanency of the relationship, the required level of skill, and whether the service rendered is an integral part of the employer’s business.⁷⁸

68. Fair Labor Standards Act, 29 U.S.C. § 202.

69. *Id.*

70. LIVENGOOD, *supra* note 67, at 6 (citing SEN. REP. NO. 75-884, at 1–3 (1937); H.R. REP. NO. 75-2182, at 6 (1937)).

71. WHITTAKER, *supra* note 67, at 3.

72. *Id.* at 7.

73. ELLEN C. KEARNS ET AL., THE FAIR LABOR STANDARDS ACT 15 (1999).

74. *Id.* at 15. For a discussion of the changes to the minimum wage laws over time see WILLIS J. NORDLUND, THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM (1997).

75. Fair Labor Standards Act, 29 U.S.C. § 206.

76. 29 U.S.C. § 203(g) (2006).

77. KEARNS, *supra* note 73, at 81.

78. *Id.* at 81–82.

If unpaid interns are employees, the subsequent legal issue is whether any of the FLSA exceptions apply to unpaid interns. The FLSA minimum wage provisions do not apply to “trainees” or “volunteers.”⁷⁹ Volunteering is not permitted in the private sector, where all work must be paid.⁸⁰ In the public sector, the economic reality test determines whether someone is a volunteer.⁸¹ The factors considered include whether the activity is less than a full-time occupation and whether the activity is of a kind typically associated with volunteer work.⁸²

Both interpretations by the Department of Labor and judicial decisions provide guidance on whether and how the FLSA applies to unpaid internships.

A. Interpretations by the Department of Labor

The Department of Labor established a six-part test to determine whether the minimum wage requirements of the FLSA apply to internships.⁸³ Whether interns are employees within the meaning of the FLSA depends on all the circumstances surrounding their activities.⁸⁴ Interns are employees covered by the FLSA minimum wage requirements unless all of the following conditions are met:

- (1) the internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
- (2) the internship experience is for the benefit of the intern;
- (3) the intern does not displace regular employees, but works under close supervision of existing staff;

79. *Id.* at 93, 95.

80. *Id.* at 95.

81. *Id.* at 96.

82. *Id.*

83. WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2010) [hereinafter *Fact Sheet No. 71*]; WAGE AND HOUR DIV., U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK, § 10b11 (1993) [hereinafter *Handbook*].

84. *Handbook*, *supra* note 83.

- (4) the employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
- (5) the intern is not necessarily entitled to a job at the conclusion of the internship; and
- (6) the employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁸⁵

The Department of Labor has issued a series of opinion letters analyzing the applicability of the FLSA to various types of interns.⁸⁶ These letters apply the six-part test to factual situations posed by potential employers. In one letter, the Department found an employment relationship sufficient to bring the internship within the scope of the FLSA minimum wage provisions.⁸⁷ Interns who would assist in the daily operation of a youth hostel, including checking hostellers in and out, performing maintenance and administrative work, and establishing and designing programming, were employees under the FLSA.⁸⁸ The internship program did not meet element four of the test because “the employer derived an immediate advantage from the duties performed by the interns.”⁸⁹

In three cases, the Department determined it did not have enough information to determine whether there was an employment relationship. In 1995, the Department of Labor could not determine whether particular interns were employees under the FLSA because the inquiring party did not submit enough information on actual train-

85. *Fact Sheet No. 71*, *supra* note 83; *see also*, *Handbook*, *supra* note 83.

86. Administrator’s Opinion Letter, Non-profit Organization Internship Program (Dep’t of Labor Mar. 25, 1994); Administrator’s Opinion Letter, College Interns/Employment Status (Dep’t of Labor Mar. 13, 1995); Administrator’s Opinion Letter, College Student Interns (Dep’t of Labor July 11, 1995); Administrator’s Opinion Letter, Interns/Employee Status (Dep’t of Labor May 8, 1996); Administrator’s Opinion Letter, No. FLSA2002-8 (Dep’t of Labor Sept. 5, 2002); Administrator’s Opinion Letter, No. FLSA2004-5NA (Dep’t of Labor May 17, 2004); Administrator’s Opinion Letter, No. FLSA2004-16 (Dep’t of Labor Oct. 19, 2004); Administrator’s Opinion Letter, No. FLSA2006-12 (Dep’t of Labor Apr. 6, 2006).

87. Administrator’s Opinion Letter, Non-profit organization internship program (Dep’t of Labor Mar. 25, 1994).

88. *Id.*

89. *Id.*

ing or amount of supervision to determine if the work performed by interns would be offset by the burden to the employer.⁹⁰

In 2002, the Department of Labor considered whether 11 through 15-year-old participants in a mentoring program with an internship component were employees under the FLSA.⁹¹ The internship component involved performing “entry-level administrative or clerical tasks for local businesses”⁹² The program involved twelve hours per week for six weeks.⁹³ The Department could not make a definite determination.⁹⁴ There was not enough information on the administrative and clerical duties or the amount of supervision provided to the mentees while they performed those duties “to ascertain whether productive work performed by the mentees would be offset by the burden to the employers (local businesses) from the training and supervision provided.”⁹⁵

In 2004, the Department did not have sufficient information to find that a marketing internship program did not establish an employer-employee relationship under the FLSA.⁹⁶ The interns worked a flexible schedule of seven to ten hours per week performing the work of a marketing representative on their campus.⁹⁷ The program structure was similar to a college marketing course with a program description, outline, syllabus, and assignments.⁹⁸ Interns “assume[d] the role of regular staff members of the company,” which included “wearing items of clothing embossed with the company logo while distributing stickers and flyers and evaluating the response of other students,” collecting population data, utilizing online chat rooms, obtaining detailed contact information for popular shops, and surveying the campus population.⁹⁹ The Department found that there was not enough information provided on the closeness of the supervision to meet the third element of the six-part test.¹⁰⁰ Nor was there enough information provided on whether the internship program would impede the companies’ operations or wheth-

90. Administrator’s Opinion Letter, College Interns/Employment Status (Dep’t of Labor Mar. 13, 1995).

91. Administrator’s Opinion Letter, No. FLSA2002-8 (Dep’t of Labor Sept. 5, 2002).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Administrator’s Opinion Letter, No. FLSA2004-5NA (Dep’t of Labor May 17, 2004).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

er the companies derived an immediate benefit from the interns' activities to meet the fourth element.¹⁰¹

The Department of Labor twice determined that interns were not employees, emphasizing the educational nature of the experiences. In 1996, the Department concluded, "where certain work activities are performed by students that are but an extension of their academic programs, we would not assert that an employer-employee relationship exists for the purposes of the FLSA."¹⁰² There is no employment relationship in situations where unpaid interns receive college credit in a college internship program that puts students in real-life situations and provides them with educational experiences they cannot find in a classroom.¹⁰³

In 2006, the Department found that students in a university's externship program were not employees of the sponsoring companies.¹⁰⁴ In the program, which had a purely educational purpose, students spent one week shadowing an employee at the sponsoring company.¹⁰⁵ Students did not receive any compensation or college credit.¹⁰⁶ While the students might perform small office tasks or assist with a project, they generally did not perform work for the companies.¹⁰⁷ The companies invested "significant effort into designing experiences" for the students.¹⁰⁸

The legal theory that seems to underlie the six-part test and these opinion letters is that the existence of an employment relationship depends on whether the company is giving its time to educate students or whether the students are giving their time to perform tasks for the company. Based on the internships discussed in Part I, the Department would likely conclude that the majority of internships violate the FLSA's minimum wage provisions.

B. Interpretations by the Courts

Courts have analyzed issues parallel to the question of whether an unpaid intern is an employee within the meaning of the FLSA. Like

101. *Id.*

102. Administrator's Opinion Letter, Interns/Employee Status (Dep't of Labor May 8, 1996).

103. *Id.*

104. Administrator's Opinion Letter, No. FLSA2006-12 (Dep't of Labor Apr. 6, 2006).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

the Department of Labor's opinion letters, the courts' analyses seem to revolve around whether the alleged employer is giving its time to educate the alleged employees or whether the alleged employees are giving their time to perform tasks for the alleged employer.

The courts have not defined a single clear test to determine whether a person is an employee. The relevant string of precedent runs back to the 1947 Supreme Court case *Walling v. Portland Terminal Co.*,¹⁰⁹ in which the Court applied an "immediate advantage" test.¹¹⁰ The Second Circuit relies on the common law concept of agency to determine whether there is an employment relationship.¹¹¹ The Fourth Circuit asks which party is the "primary beneficiary of the trainees' labor."¹¹² The Fifth Circuit avoided choosing a single test and instead applied more than one.¹¹³ The court first applied a three-part test, which considers "(1) whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee's work."¹¹⁴ The court then applied the Department of Labor's six-part test as further support for the same conclusion.¹¹⁵ The Tenth Circuit applied the Department of Labor's "six-part test criteria as relevant but not conclusive" to determine the existence of an employment relationship.¹¹⁶ Where federal courts apply the six-part test, they apply the six parts as factors to consider in a totality of the circumstances analysis rather than the all-or-nothing approach applied by the Department of Labor.¹¹⁷ Trial courts have also struggled to choose the appropriate test. In one case a district court applied an "economic reality" test and considered whether the employer received an immediate benefit and the nature of the tasks performed.¹¹⁸

The courts' decisions applying these tests place a heavy, but not impossible, burden on interns to show they are employees within the meaning of the FLSA. In *Portland Terminal Co.*, the Supreme Court applied the immediate advantage test to hold that railroad brakemen

109. 330 U.S. 148 (1947).

110. *Id.* at 153.

111. *O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997).

112. *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989).

113. *Donovan v. Am. Airlines*, 686 F.2d 267, 271-73 (5th Cir. 1982).

114. *Id.* at 271-72 (citing *Wirtz v. Wardlaw*, 339 F.2d 785 (4th Cir. 1964)).

115. *Id.* at 273.

116. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (concluding the six-part test should not receive the high level of *Chevron* deference.).

117. KEARNS, *supra* note 73, at 94.

118. *Bailey v. Pilots' Ass'n for the Bay and River Del.*, 406 F. Supp. 1302, 1306 (E.D. Pa. 1976).

trainees were not employees.¹¹⁹ The week-long training, a prerequisite to employment, provided trainees the opportunity to learn first by observation and later by doing under close supervision.¹²⁰ The trainees' work did not help the company complete its work and sometimes even impeded it.¹²¹

In *O'Connor v. Davis*,¹²² the Second Circuit applied the common law of agency and held that a social work student placed at a hospital by her school to complete her required 200 hours of field work was not an employee of the hospital.¹²³ The intern received federal work-study funds through her school but, as the court emphasized, did not receive pay or benefits from the hospital.¹²⁴

In *Donovan v. Am. Airlines*, the Fifth Circuit, applying the three-part and six-part tests, held that participants in two- to five-week flight attendant and sales agent training programs at the airline's training school are not employees of the airline.¹²⁵ The court found that the trainees do not displace regular employees; the trainees gain the greater benefit from the experience; and the airline did not immediately benefit from the trainees activities.¹²⁶

In *Reich v. Parker Fire Prot. Dist.*, the Tenth Circuit applied the six-part test to find that firefighter trainees are not employees, even though they have an expectation of employment upon successful completion of the training course.¹²⁷ Trainees attend a firefighting academy, maintain equipment, and staff a truck for a few weeks.¹²⁸

In contrast to the cases above, the Fourth Circuit, applying the primary beneficiary test in *McLaughlin v. Ensley*, held that a snack food distributor's trainees were employees within the meaning of the FLSA.¹²⁹ The training consisted of five days where the trainee shadowed an experienced employee.¹³⁰ Alongside the instructive aspects of the training, trainees helped load and unload the delivery truck and re-

119. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947).

120. *Id.* at 149–50.

121. *Id.* at 150.

122. 126 F.3d 112 (2d Cir. 1997).

123. *O'Connor v. Davis*, 126 F.3d 112, 113, 116 (2d Cir. 1997). Notably, the court only held the intern was not an employee of the hospital but did not consider whether she was an employee of the college.

124. *Id.* at 116.

125. *Donovan v. Am. Airlines*, 686 F.2d 267, 268–70 (5th Cir. 1982).

126. *Id.* at 272.

127. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1029 (10th Cir. 1993).

128. *Id.* at 1025.

129. *McLaughlin v. Ensley*, 877 F.2d 1207, 1208 (4th Cir. 1989).

130. *Id.*

stock stores.¹³¹ The very limited and narrow training was of little benefit to the trainee.¹³² Meanwhile, the distributor obtained employees who performed at a higher level, had the free opportunity to review job performance, and received aid to regular employees in performing their normal duties.¹³³ Under these circumstances, the employer received the primary benefit of the training, and therefore the trainee was an employee.¹³⁴

Unpaid internships are generally distinguishable from the cases in which there is no employment relationship on at least three grounds. First, the training in those cases did not immediately benefit the alleged employer, while the typical unpaid internship centers on the production of work product for the alleged employer's immediate benefit. Second, the training programs in those cases were shorter in duration than the typical summer-long unpaid internship. Third, *Am. Airlines* and *Parker Fire Prot. Dist.* are distinguishable in that they involved school-based training programs.

Indeed, unpaid internships appear much closer to the facts in *Ensley*, where an individual shadows a more experienced employee and assists that employee with job responsibilities. Even that description may be generous; Ross Perlin reports that "the vast number of unpaid internships [have] no educational component whatsoever."¹³⁵

This factual analysis may be premature; courts might hold that unpaid interns are not employees as a matter of law because the relationship between intern and employer never contemplated compensation. The purpose of the FLSA, the Court explained in *Portland Terminal Co.*, is to ensure that "every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage."¹³⁶ The language could, with some indiscretions of logic, set a trigger in the FLSA such that minimum wage requirements do not attach until the employer agrees to pay some compensation to the employee.¹³⁷ Then again, un-

131. *Id.*

132. *Id.* at 1210.

133. *Id.*

134. *Id.*

135. ROSS PERLIN, *INTERN NATION* 24 (2011).

136. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

137. *See O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997). The Second Circuit is firm on this point: compensation from an employer to an employee is an essential condition before the minimum wage requirements apply. *Id.*

paid internships could be distinguished in that their existence is an attempt by employers to evade the minimum wage requirement.¹³⁸

The bottom line is, while it remains to be seen how the courts will rule, there is considerable support for the argument that unpaid interns are employees under the FLSA.

III. THE DEPARTMENT OF LABOR AND THE UNDER-ENFORCEMENT OF THE FLSA

Congress granted the Department broad powers to enforce and interpret the FLSA.¹³⁹ Among the Department's powers is discretionary authority to pursue claims against employers for violations of the FLSA.¹⁴⁰ The Department has not used its discretionary authority to pursue claims against employers of unpaid interns for the widespread violations of the Fair Labor Standards Act. While it is unclear how the courts will eventually rule, it is clear that the Department understands the FLSA to prohibit most unpaid internships.¹⁴¹

Within the Department, the Wage and Hour Division administers and enforces the FLSA.¹⁴² Regional offices, field and territorial offices, and cooperating state and local agencies carry out inspection and compliance procedures under the FLSA.¹⁴³ Staff attorneys of the U.S. Solicitor of Labor represent the Administrator of the Wage and Hour Division in litigation.¹⁴⁴ The Administrator has the authority to issue non-binding interpretive bulletins on the application and requirements of the law, releases as to enforcement policies, and opinions.¹⁴⁵ Certain provisions of the FLSA authorize the Secretary of Labor and the Administrator to issue regulatory rulings with the force and effect of law.¹⁴⁶

138. See *Portland Terminal Co.*, 330 U.S. at 153. Jeffrey Tucker explains unpaid internships as a "workaround to government regulations." Jeffrey Tucker, *War On Internships: Should Unpaid Internships Be Regulated?*, THE CHRISTIAN SCIENCE MONITOR, Apr. 7, 2010, available at <http://www.csmonitor.com/Business/Mises-Economics/2010/0407/War-on-internships-Should-unpaid-internships-be-regulated>.

139. KEARNS, *supra* note 73, at 40.

140. 29 U.S.C. § 216 (2006).

141. See *supra* Part II.A.

142. LIVENGOOD, *supra* note 67, at 21.

143. *Id.* at 22.

144. *Id.*

145. *Id.* at 22–23.

146. *Id.* at 24.

The Wage and Hour Division operates on a “worst-first” basis to provide the greatest benefit to workers.¹⁴⁷ Complaints alleging violations that affect employee safety and welfare deserve priority.¹⁴⁸ The Division also looks at “the seriousness of the violations, the extent of the violations, and the commitment of investigation resources required in light of the benefits expected.”¹⁴⁹

Despite the very serious and widespread impact of unpaid internships on the welfare of young Americans, the Department has done almost nothing to enforce the FLSA against employers of unpaid interns.¹⁵⁰ There was not a single investigation of unpaid internships between 2002 and 2010, according to Ross Eisenbrey.¹⁵¹ Ben Yagoda, a journalism professor, found only one company that the Department has sanctioned for not paying interns.¹⁵² Not only does this lack of enforcement fail to pursue past violators of the law, it is “the most important factor by far in the rise of illegal internships.”¹⁵³

Only recently has the Department started to pay attention to unpaid internships.¹⁵⁴ The Department claims to be “cracking down.”¹⁵⁵ Nancy J. Leppink, the acting administrator of the Wage and Hour Division, warned employers, “[i]f you’re a for-profit employer or you want to pursue an internship with a for-profit employer, there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.”¹⁵⁶ These

147. KEARNS, *supra* note 73, at 47.

148. *Id.*

149. *Id.*

150. Conan, *supra* note 11.

151. Jett Wells, *Young, Educated and UNPAID*, YOUTUBE (Jul. 22, 2010), <http://www.youtube.com/watch?v=VCDeriE6Mzw>.

152. Yagoda, *supra* note 50. In 1995 the Department fined A. Brown-Olmstead Associates, an Atlanta-based public-relations firm. “A. Brown Olmstead . . . was forced by the U.S. Department of Labor after a lengthy investigation to pay its interns \$31,520 in back pay and to agree to pay current and future interns the federal minimum wage. The sanctions were imposed on grounds that billing clients for work performed by interns gave the company an ‘immediate advantage’ in conflict with guidelines set out in provision 106.11 of the Labor Department’s Wage and Hour Field Operations Manual (1990).” Donald T. O’Connor, *The Price of Free Labor*, 83 A.B.A. J. 78, 78 (1997).

153. ROSS PERLIN, *INTERN NATION* 71 (2011). The Department’s failure to enforce the FLSA with respect to unpaid internships, according to Perlin, has pushed the FLSA into irrelevance. *Id.* at 72.

154. Wells, *supra* note 151; Conan, *supra* note 11.

155. Greenhouse, *supra* note 10. What this means is not entirely clear. The Wage and Hour Division reports that they will investigate claims thoroughly and that they are focusing their resources on industries employing vulnerable workers, such as construction, agriculture, and janitorial workers. Telephone Interview with Michael Kravitz, Wage and Hour Division, U.S. Dep’t of Labor (Oct. 5, 2010).

156. Greenhouse, *supra* note 10.

small steps that the Department has taken thus far, combined with increased media scrutiny of unpaid internships, have already had an effect on some companies, which have converted their unpaid internships into paid internships.¹⁵⁷

In addition to the lack of enforcement, the Department has not fully used its interpretive authority to promulgate clear regulations governing unpaid internships.¹⁵⁸ The Department has the power to interpret the FLSA through regulation.¹⁵⁹ To be fair, the Department has issued opinion letters, as previously discussed, interpreting the FLSA with respect to internships. But the courts have disagreed about the weight that those letters carry, assigning them weights between none at all and *Chevron* deference.¹⁶⁰ In 2000, the Supreme Court held that the opinion letters lack the force of law and do not warrant *Chevron* deference.¹⁶¹ The letters are entitled to respect, but only to the extent they are persuasive.¹⁶² Perhaps clear regulations would still be unnecessary if the courts had elucidated a clear standard, but as previously discussed, the courts have not agreed on the proper test.¹⁶³ Through regulation, the Department could fix the confusion surrounding the applicability of the FLSA to unpaid internships.¹⁶⁴

The guidelines that the Department has issued have had the unintended consequence of requiring interns to actually pay money to work. Misunderstanding the six-part test, employers often require unpaid interns to pay their colleges tuition for academic credit for the hours spent working, thinking that credit will be sufficient to show that the experience benefited the interns.¹⁶⁵ The practice only results in increased inequity by making it even harder for those from less wealthy families to afford an unpaid internship.¹⁶⁶

157. ROSS PERLIN, *INTERN NATION* 166–67 (2011).

158. 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) (“urg[ing] the Wage and Hour Division of the Department of Labor to promulgate a rule that will create an explicit ‘intern-learner’ exemption to the FLSA, similar to the current ‘learner’ exemption.”).

159. KEARNS, *supra* note 73, at 40.

160. *Id.* at 27–34. Under *Chevron* deference, courts accept an agency’s reasonable interpretation of a statute if the statute is silent or ambiguous on the particular issue. *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

161. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

162. *Id.*

163. *See supra* Part II.B.

164. Curiale, *supra* note 158, at 1548.

165. Steinberg, *supra* note 53.

166. Akst, *supra* note 47.

Additionally, the Department has not taken enough proactive steps to prevent students from accepting illegal unpaid internships. In April 2010, the Department took its biggest proactive step yet in issuing a fact sheet explaining the law on unpaid internships and the FLSA.¹⁶⁷ But a fact sheet only goes so far; the Department can do more. The Department should make contact with universities to investigate potential problems with the work that students are doing at their internship sites.¹⁶⁸ And the Department should collaborate with the Department of Education to prevent the granting of academic credit for illegal unpaid internships.¹⁶⁹

The Department's failure to pursue claims and promulgate clear regulations allows widespread class discrimination to continue and grow. First, unpaid interns have significant obstacles to overcome to file complaints or lawsuits themselves. Unpaid interns do not want to ruffle feathers in their industry just as they are getting started.¹⁷⁰ They are scared, insecure, worried about offending their employer, worried about getting fired, and worried about creating a bad name for themselves.¹⁷¹ Becoming a troublemaker in one's chosen field endangers one's chances with potential future employers.¹⁷² An intern's reluctance to complain when worrying about finding a permanent job after graduation is only natural.¹⁷³ In addition, the limitations on class actions under the FLSA make bringing a claim all the more difficult.¹⁷⁴ Second, particularly with the limitations on class actions, employers

167. *Fact Sheet No. 71*, *supra* note 83.

168. David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J. L. ETHICS & PUB POL'Y 227, 262 (1998).

169. Yagoda, *supra* note 50; ROSS PERLIN, *INTERN NATION* 217 (2011). The complicity of colleges and universities in perpetuating unpaid internships should not be underestimated. In April 2010, thirteen college presidents wrote the Department of Labor to discourage further regulation of unpaid internships, calling them a "huge success." Letter from Joseph E. Aoun, President, Northeastern University, et al., to Hilda L. Solis, United States Secretary of Labor (Apr. 28, 2010), *available at* http://chronicle.com/items/biz/pdf/FINAL_US%20Department%20of%20Labor%20letter.pdf.

170. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002) (noting that "student interns have little incentive to blow the whistle on employers that do not pay them" and that "an intern or applicant for an internship is taking a significant risk by raising a harassment or discrimination complaint"). *Id.* at 232, 257.

171. Conan, *supra* note 11 (quoting Steven Greenhouse).

172. Greenhouse, *supra* note 10.

173. Harvey Mackay, *Interns Mustn't Be Exploited*, DENV. POST, Sept. 4, 1994, at H4.

174. Craig Becker and Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1320 (2008). The FLSA's class action provision is fundamentally different from Fed. R. Civ. P. 23 in that "employees seeking to enforce their rights under the FLSA must affirmatively opt into a pending action." *Id.* at 1320-22.

do not have any incentive not to continue their unpaid intern programs.¹⁷⁵

IV. CONCLUSION

Unpaid internships are a prevalent phenomenon that seriously disadvantages young Americans, particularly those of lesser economic means. Under the FLSA, these unpaid internships are generally illegal. Until recently, the Department has done almost nothing about it. There are indications that the situation is changing. Because interns have strong disincentives against standing up for their rights, the Department of Labor should become a strong advocate on their behalf in pursuing claims. Because the courts have struggled for a consistent interpretation of the relevant law, the Department should promulgate regulations making clear that unpaid internships are not legal.

One concern repeatedly voiced is that if the Department of Labor launches a vigorous enforcement campaign to end illegal unpaid internships, internships will disappear because employers will not be able to afford them. To the contrary, it is likely that the vast majority of unpaid internships will convert into paid internships. Economists have found that minimum wages laws do not necessarily result in a decrease in the number of jobs.¹⁷⁶ But even if internships disappeared, the typical unpaid internship is unlawful, and the law must be followed. To say we should not follow the law because of its negative consequences is to invite anarchy.¹⁷⁷

As the Court noted in *West Coast Hotel v. Parrish*, this employment relationship affects us all:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.¹⁷⁸

175. *Id.* at 1332. “Employers concerned only with profits, particularly in highly competitive, labor-intensive sectors of the economy, may rationally conclude that it pays to violate the FLSA.” *Id.*

176. See David Card and Alan B. Krueger, *Minimum Wage & Employment: A Case Study of the Fast-Food Industry in NJ and Pennsylvania*, 90 AM. ECON. REV. 1397, 1398 (Dec. 2000).

177. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

178. *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937).

If employers do not pay their interns, their interns will have to turn elsewhere to pay for life's necessities. The community, especially parents, must take on the responsibility ignored by employers. Unpaid internships are in this way a subsidy for unconscionable employers, and the community is warranted in correcting the abuse resulting from their selfish disregard of the public interest.¹⁷⁹

Unpaid internships threaten fundamental American values. There can be no equality of opportunity when unpaid internships are as prevalent as they are. The Department of Labor should step in as a champion of the rights of young Americans. The Department should vigorously pursue claims against those who unlawfully fail to pay minimum wage; issue strong and clear regulations interpreting the applicability of the FLSA to internships; undertake robust efforts to educate the public; and collaborate with the Department of Education to restore the American Dream to reality.

179. See *id.* at 399–400.