

SHINING THE SPOTLIGHT ON UNPAID LAW-STUDENT WORKERS

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INTRODUCTION

When President Roosevelt signed the Fair Labor Standards Act (“FLSA”)¹ into law in 1937, he stated that its purpose was to provide “a fair day’s pay for a fair day’s work.”² Law students who “intern” at for-profit law firms across the United States do a fair day’s work but do not always get a fair day’s pay. Unpaid law-student interns have long been a well-utilized labor source in the nonprofit world, public agencies, and in certain for-profit sectors, such as entertainment and media. Indeed, some unpaid internships are mutually beneficial arrangements for the student and the employer; the student gets hands-on training in an industry that might be difficult to break into, has useful work experience on her résumé, and may engage in valuable networking. The internship may also lead to a full-time paid position, either at the company where she interns or through networking opportunities that she has been able to engage in during the internship. In return, the employer gets an eager and enthusiastic newcomer, possibly with fresh ideas and a new perspective, and benefits from free labor. In fact, some nonprofits depend on unpaid internships to keep their doors open, and likely cannot function without them.

This mutually beneficial arrangement is common in the legal field. Law students across the United States can earn law school credit while undertaking supervised externships in nonprofit legal service organizations and federal, state, and local government agencies.³ Law students have become an increasingly prevalent source of free labor in for-profit law firms as well, both in credit-bearing law-school-sponsored externship arrangements⁴ and in private non-law-school-sponsored arrangements.⁵ The

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

2. 81 CONG. REC. 4,983 (1937) (statement of Pres. Franklin Roosevelt); S. REP. NO. 884-2475 at 2 (1937).

3. The terms “intern” and “extern” suffer from a nomenclature problem, complete with an inherent ambiguity of terminology and definitions. This army of unpaid workers is variously referred to as volunteers, trainees, interns, and externs, among other terms. Law schools often use the term “externship” to apply to the credit-bearing experiential work-place arrangements and this Article will adopt that term, in part because it helpfully distinguishes law-school-sponsored arrangements from non-law-school-sponsored and non-credit-bearing private arrangements between law students and for-profit law firms. This Article will adopt the term “unpaid law-student intern” to refer to the latter arrangement. The problem of definitional ambiguity is addressed in Part V, *infra*.

4. See Bernadette T. Feeley, *Examining The Use of For-Profit Placements in Law School Externship Programs*, 14 CLINICAL L. REV. 37, 41 (2007) (describing increase in law schools adopting externships at for-profit companies and law firms); see also James H. Backman, *Law School Externships: Reevaluating Compensation Policies to Permit Paid Externships*, 17 CLINICAL L. REV. 21, 22 (2010) (noting as many as half of the law schools at the time of the article’s publication were involved in externships with for-profit law firms); Sudeb Basu & J. P. “Sandy” Ogilvy, *Externship Demographics Across Two Decades with Lessons for Future Surveys*, 19 CLINICAL L. REV. 1, 19 (2012)

reasons for the uptick in the latter private arrangements are perhaps self-evident: (1) the economic downturn has led employers to adopt lean hiring practices; and (2) there is a glut of law students desperate to get a foothold in the labor market by offering their services for free.⁶ But this combination of a desperate free labor supply and lean hiring principles makes the situation ripe for abuse.

In the halcyon days of legal education, a law student could obtain a paid summer associate position after her first and second years of law school and supplement her learning and earning experiences through paid law clerk positions during the academic year. Traditionally, the rate of pay and the opportunities available were dependent upon the rank of both the student's law school and the class rank of the student herself, among other factors. Legions of law students were paid (and some still are) to engage in meaningful legal work, such as researching legal issues; drafting legal memoranda, motions, and pleadings; assisting licensed attorneys in witness and client interviews; and attending depositions and hearings as note-takers or observers. But as the legal market has changed—jobs are scarce and law students and law graduates are plentiful—today's law students are increasingly doing this same work for free. Despite the increase in unpaid law-student interns, very few legal commentators have specifically focused on this specific category of interns and none have comprehensively surveyed wage theft from this population.⁷

("[T]he number of schools known to offer placement without limitation as to type more than doubled from fifteen to thirty-three in the five years between the 2002–2003 and 2007–2009 surveys."). "From our 2007–2009 data, on average, 119 full-time students per school enroll in externship courses each academic year. Our average closely tracks the ABA-LSAC average of 118. Turning to part-time students in the 2007–2009 survey, on average, thirty-five part-time students enroll in externship courses each year. The ABA-LSAC average is close, at twenty-eight." *Id.* at 10.

5. The term "law firm" is used to encompass both multi-attorney law firms and solo practitioners, as well as the in-house legal departments of for-profit companies, since the analysis herein does not depend on the size or make-up of the for-profit law practice.

6. The increase in the number of unpaid law-student workers may also be reflective of a general increase in student internships in the United States. *See, e.g.,* Edwin Koc et al., *2013 Survey, INTERNSHIP & CO-OP SURVEY* (Nat'l Ass'n of Colleges and Emps.), June 2013, at 3, available at <https://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2013-internship-co-op-survey-executive-summary.pdf> (finding that employers responding to NACE's 2013 Internship & Co-op Survey report plan to increase internship hires by 2.7 percent in 2013). For an overview of the various types of internships and the "explosion" of internships in the U.S., see ROSS PERLIN, *INTERN NATION* (Verso 2011).

7. Some legal scholars have addressed the legal vacuum encountered by unpaid interns generally and others have reviewed various types of extern programs, including for-profit placements. *See, e.g.,* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-And-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 608 (2012) [hereinafter Rubinstein, *Employees*] (noting the problems regarding employee classification); Mitchell H. Rubinstein, *Our Nation's Forgotten Workers:*

This Article attempts to fill that gap by examining the legality of private arrangements between unpaid law-student “interns” and for-profit law firms, where the law student is not sponsored through a law school and does not earn academic credit. The Article ultimately concludes that these arrangements violate both the statutory terms and the congressional purpose of FLSA’s minimum wage and maximum hour requirements. Although this Article focuses on law firms’ wage theft of law students, it also briefly addresses other legal and ethical implications. Ultimately, the Article proposes a number of solutions, ranging from the most obvious—law firms should pay their law-student workers—to the increasingly popular expansion and utilization of law school experiential course offerings.

Under FLSA, certain volunteers are exempt from the statute’s minimum wage and overtime provisions,⁸ and the U.S. Department of Labor’s (“DOL” or “Department”) Wage and Hour Division has issued guidelines that clarify whether interns are exempt as well.⁹ The guidelines provide, *inter alia*, that unpaid internships are only lawful in the context of an educational training program, when the intern does not displace regular employees, the employer derives no immediate advantage from the intern’s work, and “the internship experience is for the benefit of the intern[.]”¹⁰ The problem is that many employers are ignoring these DOL rules governing whether law-student interns should be paid. In part, employers’ neglect of the DOL guidelines may be due to the fact-intensive, case-by-case nature of the relevant FLSA inquiry, and is also probably due to the fact that the courts do not uniformly apply the DOL rules regarding what

The Unprotected Volunteers, 9 U. PA. J. LAB. & EMP’T L. 147, 150 (2006) [hereinafter Rubinstein, *Forgotten Workers*], available at <http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1268&context=jbl> (addressing distinctions between employees and volunteers and proposing a two-step test for determining whether a volunteer is an employee under various employment laws, including FLSA: “[1] whether the putative employee was hired and [2] whether the putative employer controls the work.”); David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 215–20 (2002) (examining the legal implications of a student’s employment rights with regard to internships); David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 229 (1998) (surveying “the exploitation of labor” of the student intern). See also Feeley, *supra* note 4, at 60 (arguing that with appropriate guidelines, for-profit externships can benefit all); Backman, *supra* note 4, at 24–29 (outlining the arguments for and against ABA Rule 305, which bans law students from receiving compensation and credit for an externship).

8. 29 U.S.C. § 203(e)(4) (2006) (exempting volunteers at State public agencies). See also *id.* § 203(e)(5) (amended Aug. 7, 1998) (amendment to exempt volunteers at nonprofit food banks). These volunteer exemptions are discussed in more detail in Part II.A, *infra*.

9. *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, U.S. DEP’T OF LABOR (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.

10. *Id.* See also DOL, Wage and Hour Div., Op. Ltr. FLSA2006-12, 2006 WL 1094598, at *1 (Apr. 6, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.pdf.

constitutes an exempt internship.¹¹ On the other hand, some law firms may simply be unaware of the Department's guidelines.

In recent years, however, plaintiffs' attorneys have paid more attention to FLSA wage and hour discrepancies. Federal courts have experienced an ever-increasing volume of FLSA lawsuits alleging unpaid overtime and minimum wage violations, principally based on claims that employers have misclassified workers as exempt.¹² Presumably, these same lawyers will soon realize the untapped source of FLSA claims for the swelling ranks of unpaid law-student interns. Indeed, a recent lawsuit filed in the United States District Court for the Southern District of New York illustrates the attention that the intern issue is starting to receive in other sectors. In the case, intern Xuedan Wang represents a class of hundreds of unpaid interns at Heart Magazines, which publishes Harper's Bazaar, Cosmopolitan, Seventeen, and Good Housekeeping.¹³ Wang's law firm previously filed a class action suit in 2011 against Fox Searchlight Pictures, accusing the company of violating wage laws by using unpaid interns to work on "Black Swan," among other films.¹⁴

Part I of this Article describes the main categories of law-student workers, including law-school-sponsored "experiential" learning programs, and distinguishes law students in these programs from unpaid law students in independent (i.e., non-law-school-sponsored) "internships" at for-profit

11. See Discussion, Part II, *infra*. See also Yamada, *supra* note 7, at 252 (stating that the legal situation is unclear when an intern is not paid); Gregory, *supra* note 7, at 244 (listing the relevant factors courts take into consideration to exempt the intern as a non-employee, but noting they are not dispositive); Rubinstein, *Employees*, *supra* note 7, at 617 (pointing out the lack of uniformity in the law); Rubinstein, *Forgotten Workers*, *supra* note 7, at 157 (noting case-by-case nature of the "volunteer" inquiry). College administrators are also noticing the ambiguity in the law and attempting to advise their students accordingly (although the advice typically concludes that each situation must be reviewed on a case-by-case basis because, although the DOL has a renewed interest in unpaid internships, the courts' application of the six-factor DOL criteria is mixed). See, e.g., Seth Gilbertson & Stefan Eilts, *Internship and Externship Programs Under the Fair Labor Standards Act*, 9 NACUA NOTES 2 (May 24, 2011), available at <http://counsel.cua.edu/fedlaw/nacuanoteinternshipexternshipFLSA.cfm> (noting mixed application of the six-factor test).

12. Kevin P. McGowan, *FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth*, BLOOMBERG BNA: HUMAN RESOURCES REPORT, Aug. 6, 2012, available at <http://www.bna.com/flsa-lawsuits-hit-n12884911026/>. The American Bar Association and the DOL have joined forces to combat FLSA violations. See *Bridge to Justice: Wage and Hour Connects Workers to New ABA-Approved Attorney Referral System*, U.S. DEP'T. OF LABOR, WAGE AND HOUR DIV., <http://www.dol.gov/whd/resources/ABAREferralPolicy.htm> (last visited Apr. 12, 2014) (discussing the Department's new system to handle complaints).

13. See Outten & Golden, LLP, *The Hearst Corporation Class Action Litigation*, UNPAID INTERNS LAWSUIT, <http://unpaidinternslawsuit.com/hearst-corporation> (last visited Apr. 12, 2014) (discussing the initiation of Xuedan Wang's class action).

14. Outten & Golden, LLP, *Fox Searchlight Class Action Litigation*, UNPAID INTERNS LAWSUIT, <http://www.unpaidinternslawsuit.com/fox-searchlight> (last visited Apr. 12, 2014).

law firms. Part I also reviews attendant problems created by the rise of the unpaid intern, such as the divide between students who can afford to gain “unpaid” experience and those who cannot, further perpetuating class divisions.

Part II provides a comprehensive overview of FLSA and how the statute, regulations, and Wage and Hour Division guidelines apply to the various categories of law-student workers described in Part I. It also discusses enforcement and whether the DOL should take into account the differences between internships at for-profit firms and those at nonprofits, which typically rely on unpaid volunteer interns to provide pro bono legal services to underserved communities.

Part III considers what, if any, obligations and responsibilities law schools bear in addressing and resolving the legal ambiguities in the arrangements described in Part I, and also briefly explores other legal implications and ethical considerations.¹⁵ For example, wage violations can result in the denial of unpaid interns’ Social Security contributions and the right to receive unemployment insurance and workers’ compensation.

Finally, Part IV proposes solutions beyond the admonition that law firms should pay their law-student workers in accordance with FLSA. These solutions include: educating law students about their employment rights so they can more effectively represent their own interests, and expanding law school experiential learning programs to capture the army of willing law-student workers and funnel them into true educational and experiential programs.¹⁶ Part IV also explores the role of private class

15. The primary focus of this Article is on law student unpaid internships and the role of the law school, if any, in the relationship between the unpaid legal intern and their placements in law firms. Alongside that question, one must also explore the law school’s responsibility in guiding students into (or away from) unpaid internships. Although the focus of this Article is on law student interns, a recent advertisement by a Boston law firm may indicate an alarming new trend to expand unpaid or underpaid “internships” to lawyers who have graduated and passed the Bar. This Boston law firm offered to pay \$10,000 per annum to a recent law graduate and received over fifty applications. Martha Neil, *More Than 50 Would-Be Associates Have Now Applied for a \$10,000-a-Year Boston Law Firm Job*, ABAJOURNAL.COM (June 11, 2012), http://www.abajournal.com/news/article/more_than_50_have_now_applied_for_10000-a-year_boston_law_firm_associate_job. A law graduate is exempt from FLSA’s salary test if they have obtained their license, under the learned professional exemption, discussed in Part II.B, III.A, *infra*.

16. The Florida chapter of the National Employment Lawyers’ Association (FL NELA) has a Summer Advocacy Fellowship program that could be used as a model by other organizations. The law students selected for the fellowships work at least ten (10) weeks and receive a \$4,000 grant from FL NELA and \$1,000 is provided by the host firm. In this manner, the law student workers should meet the federal minimum wage requirement (obviously, whether this is true in each case will depend on the number of hours worked in a given work week). See *Florida NELA Advocacy Fellowship*, FLA. NAT’L EMPLOYMENT LAWYERS ASS’N., available at <https://floridanela.org/images/content/files/advocacy-fellowship-announcement-2012.pdf> (last visited Apr. 12, 2014) (describing pay in the application process).

action litigation, as well as enforcement and regulation by the DOL Wage and Hour Division. Alternative approaches might include a formal DOL regulation defining the intern exemption, or the adoption of a certification program that allows employers to seek a DOL advisory opinion or certification relating to their particular situation. These approaches may not be necessary, however, because the DOL Wage and Hour Division already has the power to enforce FLSA's prohibition on unpaid labor in these situations. Although the power of government regulation and class action litigation as tools for reform should not be underestimated, the suggested approach will track new governance principles by recognizing the role of the class action litigation "stick" (brought by the DOL or private litigants) combined with the "carrot" of self-governance initiatives.¹⁷

At the outset, it is worth acknowledging that this class of unpaid interns may not evoke much sympathy—the public may have little sympathy for lawyers in general, especially educated, professional, and "entitled" law students with the potential for high paying jobs who should have known what they were getting into. The reality is that although law students may not be as vulnerable as some other groups (because they are students of the law and because unpaid internships are not as deeply entrenched in the legal field as in other industries), they are still susceptible to exploitation and deserve protection. Moreover, the average law student graduated in 2011 with \$100,584 in debt,¹⁸ and recent statistics show that starting salaries have declined as job prospects have dwindled. Like every other group of entry-level workers, law students are desperate for work experience to display prominently on their résumés. With legions of available lateral-hire attorneys on the market, law students know that they must distinguish themselves beyond their academic achievements. Attorney-employers know this too—which is why the situation is ripe for abuse.

17. In this respect, this Article builds upon new governance arguments that the author has previously advanced in prior published articles on workplace bullying. See, e.g., Susan Harthill, *The Need For A Revitalized Regulatory Scheme to Address Workplace Bullying in the United States: Harnessing the Federal Occupational Safety and Health Act*, 78 U. CIN. L. REV. 1250, 1301–02 (2010) (analyzing other countries' governance practices in the workplace bullying context).

18. Sam Favate, *Law Students, How Much Debt Do You Want?*, WALL ST. J. L. BLOG (Mar. 23, 2012), <http://blogs.wsj.com/law/2012/03/23/law-students-how-much-debt-do-you-want/> (reviewing data from various law schools and stating "[a]mong the top 10, the average student debt was \$147,717 in 2011, while overall, law students graduated with an average of \$100,584 in debt for the year, according to the report").

I. TYPES OF LAW-STUDENT WORKERS

Law students attend law school to learn both substantive law and how to “think like a lawyer,” but their legal education increasingly teaches them how to “do.” They gain valuable work experience in a variety of law school settings, as well as through law-school-sponsored externships and non-law-school-sponsored paid and unpaid internships in law firms and other legal offices. This Part will briefly examine some of the most prevalent programs and settings.

A. Law-School-Sponsored Clinics and Other Experiential Law School Settings

The current trend in legal education is to offer experience-based learning opportunities. This is, in part, in response to criticism that legal education is not practical or useful, and that law schools need to better train and prepare law students for the actual practice of law.¹⁹ Indeed, in the 1992 MacCrate Report, the American Bar Association (ABA) recognized the gap between legal education and the legal profession, and called on legal educators and the bar to work together to narrow this gap.²⁰ More recently, the Carnegie Foundation for the Advancement of Teaching also highlighted the gap and the need for law school education to adapt by integrating knowledge, practical experience, and ethics.²¹

Consequently, law schools have developed an array of experiential learning settings to attempt to bridge the gap between knowledge and practice. Such experiential learning settings range from “shadowing programs,” where law students simply observe non-faculty attorneys at specific events, to law school clinics, where law school faculty supervise law student representation of clients. Law schools offer more opportunities and devote increasing amounts of law school building space and faculty to credit-bearing experiential programs, many of which include instruction or guidance by law school faculty. For example, in addition to their instructional roles in law school clinics, law school faculty approve

19. See Robert Hornstein, *The Role and Value of A Shadow Program In The Law School Curriculum*, 31 MISS. C. L. REV. 405, 405–06 nn.1–2 (2013) (referencing a range of scholars who criticize traditional instruction and discuss the shift toward skills-based instruction).

20. ABA, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 4, 8 (July 1992).

21. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 12 (John Wiley & Sons, Inc. 2007).

internships and match students to internships through an application process.²²

Other programs may not be credit-bearing, but the law student earns some other type of law school “credit” towards a graduation requirement or honor, such as pro bono hours. These programs can be categorized generally as “law-school-sponsored programs.” Law-school-sponsored programs typically send students to nonprofit legal service organizations and government agencies. Under the DOL’s internship six-factor test, most of these law-school-sponsored programs likely pass muster, but some programs may be on less firm ground, as discussed in Part II.A., *infra*.

1. Shadowing Programs

Shadowing programs vary but typically involve students observing judges and attorneys as they participate in specific events, such as client interviews, real estate closings, settlement conferences, mediations, depositions, and court appearances. Shadow programs can include law firms, judges, public agencies, and nonprofits. Professor Robert Hornstein has written about the benefits of law school shadow programs, discussing the various ways in which such programs support doctrinal and skills instruction and expose students to professionalism and some ethical questions.²³ Professor Hornstein described the shadow program introduced at his law school, which is likely typical of such programs, and emphasized the observational role of the law student as the core or key component of the program:

Simply put, a shadow program exposes students to the many different day-to-day facets of the practice of law by allowing students to shadow lawyers and judges in a wide array of civil and criminal judicial proceedings, as well as in other representational activities that may or may not be part of an actual contested dispute. It offers students a window into the mechanics of lawyering and exposes them to the socio-cultural norms, values, and mores of the profession. A shadow program

22. The Temple University Beasley School of Law, for example, has recently launched its “Temple Summer Professional Experience Curriculum,” consisting of a ten week program designed to combine a ten-week, four day per week internship with classroom reflection and mentoring. This program earns students five credits and in summer 2012 the tuition charge was \$3,125, plus a \$125 program fee. *Temple Summer Experience Curriculum*, TEMPLE UNIV. BEASLEY SCH. OF LAW, http://www.law.temple.edu/pages/Academics/Experiential_Learning_Programs/T-SPEC.aspx (last visited Apr. 8, 2014).

23. Hornstein, *supra* note 19, at 411.

also serves to bridge doctrinal instruction and skills instruction—again solely through observation.²⁴

In Professor Hornstein’s law school shadow program, law students are required to attend an orientation before being allowed to participate, which includes advice on appropriate professional behavior. Typically, law students do not have any formal interaction with the judge or attorney before or after the event and do not engage in anything even remotely imitating “work”—the law students simply observe the event and later report and reflect on their observations.²⁵ Any law professor who teaches civil procedure to first year law students can readily appreciate the value for law students of seeing a dry procedural rule in action, such as a deposition.²⁶ The law student is the primary, if not the sole, beneficiary of the shadowing experience; it is not only part of the law school curriculum, and can be a graduation requirement, it also enhances the student’s overall law school experience.²⁷

The participating judge, attorney, or law firm may also receive some tangential benefit from the shadow program, such as a public relations benefit or marketing tool, but does not get any direct pecuniary benefit in the form of work that would implicate FLSA. Indeed, Professor Hornstein reported that prospective attorneys are concerned that participation will detract from the attorney’s or firm’s work,²⁸ which is one of the six criteria that the DOL considers when determining whether a shadowing event constitutes an internship relationship.²⁹ Thus, provided the shadow program is solely observational, it can serve as the model example of an experiential program without potential FLSA violations. If we label the shadow program thus described as the “safe zone” in the law-school-sponsored continuum, it can provide a useful place-holder to refer back to as we describe and review other programs that start to resemble “work.”

24. *Id.* at 411–12 (citations omitted).

25. *Id.* at 418, 426 (summary reports are only required at the described program if the student wants to earn “professionalism” credits).

26. *Id.* at 416, 423 (shadowing program described is open to all students, including first year students).

27. *Id.* at 416–17, 426 (shadow program described is voluntary but participating students can earn “professionalism” credits for each observation/shadow—professionalism credits are a graduation requirement).

28. *Id.* at 418.

29. *Fact Sheet #71, supra* note 9; see *infra* Part II.B.5, for a discussion of the six-factor test.

2. Opportunities for Pro Bono Hours

Some law schools offer students opportunities to do voluntary pro bono legal or non-legal work for organizations or individuals of limited means.³⁰ The law student's pro bono work should mirror the type of pro bono work that practicing attorneys perform, and will likely not be credit-bearing if it is not part of the law school's externship program. Thus, a law student might earn pro bono hours by assisting a nonprofit with legal work, or assisting a for-profit attorney or law firm working on a pro bono matter. The advantage of doing pro bono work is touted as experiential and as having a two-fold advantage—students learn about the substantive law and “develop an awareness of their ethical and professional responsibilities to provide service to their community.”³¹ Pro bono work is typically defined as volunteer work that serves the community and is aimed at assisting the underserved population. Some law schools offer pro bono honors through certification that can be listed on their résumé, but do not offer credit.³²

3. Practitioner Clinics

Students can formalize and enhance their pro bono experience through a “practitioner clinic.” This is typically law-school-sponsored and credit-bearing volunteer pro bono work with a classroom component. A typical Practitioner Clinic program is described on a law school website as follows:

A Practitioner Clinic[] is a specialized course in which students who have already taken the associated doctrinal course work more closely on pro bono cases with a practitioner licensed to practice law in Florida. For instance, students who have already successfully completed the doctrinal Trusts and Estates course in

30. The ABA encourages law schools to offer law students the opportunity to engage in pro bono work to provide services to the needy. *See* ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOL 2013-2014 § 302(b)(2); cmt. at 302-10 (focusing “pro bono” service on service to persons of limited means or to organizations that serve such persons).

31. *Pro Bono*, FLA. COASTAL SCH. OF LAW, <http://www.fcsl.edu/pro-bono> (last visited Apr. 12, 2014).

32. The ABA has a resource describing pro bono programs throughout the country. *Directory of Law School Public Interest and Pro Bono Programs*, ABA, http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html (last visited Apr. 8, 2014) (including California Western School of Law, Howard University School of Law, Shepard Broad Law Center, Ohio State University Moritz College of Law, Saint Thomas University School of Law, and Thomas Jefferson School of Law).

a prior semester are eligible to register for the Trusts and Estates [Skills Lab].³³

Practitioner Clinics typically have a weekly classroom component to allow the professor to review substantive law that the students need to know for the types of cases on which they observe and assist.³⁴ The Practitioner Clinics emphasize the combination of education and practical experience, which together provide “experiential learning.”³⁵

4. Law School Clinics

Law school clinics are credit-bearing programs where a full-time faculty member, who is a licensed attorney in the state, guides and supervises students to represent indigent clients. In most law schools, the clinics are housed in a separate suite that provides a meeting space comparable to a law firm setting, where students can work, research, and conduct meetings and interviews. Typical clinics include family law clinics, immigrant rights clinic, criminal defense clinics, and disability and benefits clinics.

In addition to faculty-supervised client representation, which entails everything from interviewing prospective clients through resolution of the case, clinics have a classroom component wherein the student learns the

33. *Practitioner Clinics*, FLA. COASTAL SCH. OF LAW, <http://fcsl.edu/academics/practitioner-clinics> (last visited Apr. 12, 2014).

34. *Practitioner Clinics: More Information*, FLA. COASTAL SCH. OF LAW, <http://fcsl.edu/Experiential-Learning/moreinformation> (last visited Apr. 12, 2014).

Each course will be scheduled to meet for 1 hour, 50 minutes once a week. During the class periods, the professor will review doctrinal material which the students need to know to work on their cases. At the professor’s option, some class periods may be replaced with conferences for students assigned to work on the same case

Id.

35. See *Practitioner Clinics*, FLA. COASTAL SCH. OF LAW, <http://www.fcsl.edu/academics/practitioner-clinics> (last visited Apr. 12, 2014) (listing benefits of live client experience). The student benefits include:

Observing practitioners and learning professionalism from practicing attorneys; [f]ostering an awareness of the importance of pro bono work[;] [l]earning practical skills they can use upon graduation[;] [r]eceiving mentoring from the practitioner who is teaching the Skills Lab[;] [p]roviding networking opportunities which may lead to job opportunities[; and] [c]reating reputation enhancement opportunities for the student and school.

Id.

corresponding substantive law and the legal skills necessary for legal representation. The clinic classroom components vary in terms of required hours and frequency of meeting, and typically provide an opportunity for students to discuss their cases and reflect on their legal and professional experiences.

Clinics have long been the gold standard in terms of experiential learning; law students learn to “do” while learning the substantive law under the supervision of an experienced attorney-educator who helps the student link theory to practice.

5. Credit-Bearing Externships

David Gregory identified and addressed the problem of unpaid student interns over a decade ago.³⁶ Gregory focused on teaching assistants at Yale University and identified the public policy reasons why student interns should be paid a living wage.³⁷ He also noted the problem of credit-bearing internships: students who need the work experience are willing to work for free, but are actually paying to work through their tuition payments when they take a credit-bearing internship.³⁸ In fact, the universities in Gregory’s analysis *benefited* from arrangements with teaching assistants because they received tuition from students taking classes without having to pay the instructor or secure a classroom.³⁹

In a typical law school setting, however, the credit-bearing internship is not necessarily a windfall for the law school; the law school provides at least one full-time faculty member to fulfill internship duties. These faculty members work the hours necessary to establish and approve each

36. Gregory, *supra* note 7, at 229.

37. *Id.* at 245–49. Professor Gregory noted that:

The exploitation of labor is both global and highly localized in its virtually infinite dimensions. Rather than analyze the most flagrant, egregious abuses of workers, such as prison, slave, or child sweatshop labor, this article will critique the contemporary exploitation of labor through the applied prism of a considerably more subtle and nuanced dimension of potentially exploited labor—the student intern—concentrated primarily in white-collar, professional sectors of the United States economy. Unlike the more blatant forms of labor exploitation, student intern labor is a more subtle, but perhaps equally persuasive, manifestation of the contemporary exploitation of labor in capitalist political economy today.

Id. at 229.

38. *Id.* at 260.

39. *Id.*

internship, monitor the internship via meetings and/or journal review, and run interference if problems arise.

6. Externships in Nonprofit, Judicial, and Governmental Agency Settings

Externships are sometimes referred to as “field placements” and are distinguishable from live-client clinics as follows: “*Field placements* refer to those cases in which someone other than full-time faculty has primary responsibility to the client; these placements are frequently called externships or internships.”⁴⁰ In contrast, clinics, or “[f]aculty supervised clinical courses[,] are those courses or placements with other agencies in which full-time faculty have primary professional responsibility for all cases on which students are working.”⁴¹ Traditionally, externships are located within judicial, governmental, and nonprofit organizations. A recent Basu & Ogilvy survey of law school externships reported that the growth of externships appears to be “a consolidation of established trends.”⁴²

Although externships shift the supervision from faculty to the supervising attorney in the field placement, most externship courses also require a classroom component, although the structure, format, materials, and hours vary.⁴³ Faculty members, often tenured or tenure-track, teach these supplemental classes and the majority also require externs to keep academic journals.⁴⁴

40. Letter from Robert R. Kuehn, Assoc. Dean for Clinical Educ., Wash. U. Law School, to Jeffrey Lewis, Dean, St. Louis U. Law School (Jan. 14, 2013), available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/20130114_comment_outcome_measures_robert_kuehn.authcheckdam.pdf.

41. Basu & Ogilvy, *supra* note 4, at 3 n.2 (quoting LAW SCH. ADMISSIONS COUNCIL & AM. BAR ASS'N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, ABA/LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 70 (2013)).

42. *Id.* at 5 (alterations in original). The survey detailed law school externships, reviewing, *inter alia*, limits on the number of credits students can earn through externships, limits on the number of extern courses, and restrictions on the locale and organization types of placements, finding that overall (with 190/200 ABA approved law schools responding), approximately 18% of full-time law students are enrolled in externships. *Id.* at 6–10.

43. *Id.* at 21–26.

44. *Id.* at 27, 30 (“49% of the courses reported teaching by tenured faculty, 8% by tenure-track faculty, 16% by faculty on long-term contract, 9% by faculty on short-term contract, 10% by adjunct faculty, and 9% by other faculty.”).

7. For-Profit Externships

Some law schools have either implemented or are considering allowing externships at for-profit law firms.⁴⁵ The expansion of for-profit externships begs the question: what is driving this expansion? The most likely explanation is that the demand for experiential learning opportunities has, quite simply, created a need for new placement options. Such externships also have the obvious benefit of exposing law students to real-world law practice in the private setting while under the supervision of both a law school faculty member and law firm mentor. Further, because the core educational component of a for-profit externship does not differ from nonprofit or public agency externships, the law student presumably obtains the same benefits as an externship in either setting.

Nevertheless, the “profit” component of a for-profit externship causes concern because the law firm can potentially bill its clients for the law student’s work, or the law student’s work might free up a licensed attorney to work on other (billable) matters. But why is this any different to the nonprofit’s benefit of being able to hire an extra paid worker, or spend grant money on other projects, or maybe even absorb a grant reduction? And how is this different to the public agency benefiting from less staff, less tax dollars being spent on staff and services or diverted elsewhere (and maybe even a salary raise for the paid government workers!)? The main difference must therefore be in the altruistic vision of the nonprofit setting—the law student is driven in part by educational value and in part by serving the community. We want people to serve their community, we expect lawyers to do a certain amount of pro bono work, and nonprofit externships expose law students to this goal—unlike the for-profit model, which obviously lacks a community-service component.

Indeed, FLSA’s statutory exemptions carve out certain volunteers and workers in public agencies from coverage. DOL regulations reflect this view of the world by interpreting FLSA to exclude volunteers—defined as “an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.”⁴⁶ While not strictly volunteers under this DOL regulation—because externships also serve the law student’s interests—the altruistic component is obviously an important differentiating factor. Regardless of the social policy underlying this

45. *Id.* at 19 (finding that the number of law schools offering less restrictive limitations on type of organization placement doubled from in a five year period from surveys in 2002–2003 and 2007–2009). *See generally* Feeley, *supra* note 4 (noting that externship programs are growing).

46. 29 C.F.R. § 553.101(a) (2013).

distinction, the fact remains that as a matter of law, the DOL has interpreted FLSA to draw a distinction between unpaid work at nonprofits and government agencies, and unpaid work at for-profit organizations, which is discussed more fully in Part III, *infra*.

B. Students in Non-Law-School-Sponsored Unpaid Internships in Nonprofit Organizations and For-Profit Firms

In addition to credit-bearing and other law-school-sponsored internships, law students often participate in unpaid internships that are not organized or supervised by their law school. These law-student interns may work during the law school semester on a part-time basis or perhaps over the summer on a full-time basis, or simply work as needed. These internships are not for course credit or required for graduation, but provide the students with legal experience and exposure to legal issues and professionalism. The main question when dealing with the unpaid law-student worker outside the law school setting is one of nomenclature—what should this individual be called?⁴⁷ A rose is a rose by any other name,⁴⁸ and this category of student is an “unpaid law-student intern.”

1. Interns and Volunteers at Nonprofit Organizations and the Public Sector

Law students may obtain internships with public agencies directly through those agencies without any law school involvement. They may directly apply through an internship program, or they may learn of an informal opportunity. Law students independently find such work in federal, state, and local government settings.⁴⁹

47. As stated earlier, the term “externship” typically applies to law-school-sponsored experiential arrangements. *See supra* note 4.

48. “What’s in a name? That which we call a rose By any other word would smell as sweet.” WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

49. A quick search of internships on USA Jobs shows listings for *unpaid* internships at the following agencies: (1) Dept. of State – working on US foreign policy; (2) Judicial Branch – U.S. Courts; (3) Legislative Branch–Congressional Budget Office; (4) Executive Office of President – Office of Administration; (5) Dept. of Agriculture – Natural Resources Conservation Service; (6) Dept of Justice–Offices, Boards and Divisions. A List of Unpaid Internships, USAJOBS: THE FEDERAL GOVERNMENT’S OFFICIAL JOBS SITE, <https://www.usajobs.gov/JobSearch/Search/GetResults?Keyword=unpaid+internships&Location=&search.x=0&search.y=0> (last visited Sept. 30, 2012, 12:59 PM) (search keyword “unpaid internships”).

2. Interns and Volunteers at For-Profit Law Firms

As with any internship, the type of work, hours of work, and the length of the period of employment as an unpaid intern varies from student to student, and the army of unpaid law-student interns at for-profit law firms has a variety of arrangements with their law firms. Some student interns work for an indeterminate period of time; some work on a part-time basis during the semester, with or without a fixed schedule or even on a project basis; while others work forty hours or more per week for several weeks over the summer.

Another area of variance is the type of work and type of law firm. The possibilities are not, however, endless. It is typical for the unpaid law-student intern at a for-profit firm to work on junior-associate level legal tasks, such as researching and writing memoranda, pleadings, and motions, or perform more skills-based practical tasks, such as interviewing potential clients, drafting pleadings, or reviewing documents. The for-profit lawyer may also assign the intern to a limited universe of projects—either pro bono matters, paying-client matters, or matters that relate to the business of the law firm (such as newsletters, preparation for the lawyer's upcoming continuing legal education (CLE) presentation, and the like). The lawyer may or may not bill the student intern's work to the client, and, in contingency fee cases, the lawyer may monetarily benefit from the intern's labor if she settles or wins the case and claims her contingency share.⁵⁰

Thus, the law-student intern is not as easily recognized as the Harper's Bazaar plaintiff: working for months or even a year or more, logging over forty hours per week, filling in for regular employees, and being asked to do chores ranging from collecting dry-cleaning and making coffee.

II. FEDERAL FLSA

A. *Employer Coverage and Employee Protection Under FLSA*

1. Types of Employee Coverage: "Individual" and "Enterprise"

Congress enacted FLSA to protect workers from "labor conditions detrimental to the maintenance of the minimum standard of living necessary

50. An argument could be made that clients are never billed for work done by an intern working on contingency fee matters that are unsuccessful, but the same argument could be made for pro bono work or any other type of work that is not directly billed to the client—the lawyer benefits from the intern's work because she does not have to do that work and is free to do other work.

for health, efficiency, and general well-being of workers”⁵¹ The provisions of FLSA achieve worker protection through mandating minimum wage,⁵² maximum hours,⁵³ and child labor restrictions.⁵⁴ In addition, FLSA requires the employer to make, keep, preserve, and report time and pay.⁵⁵ The DOL’s Wage and Hour Division enforces FLSA, which provides for a private cause of action for damages—including liquidated damages and attorney’s fees and costs—from minimum wage and overtime violations.⁵⁶ While FLSA does apply to certain categories of law-student interns, they are often, and understandably, reluctant to report or complain about wage and hour issues to anyone, including their law school administration or faculty. Law students are even less likely to file a lawsuit, for fear of being blacklisted for future employment, despite FLSA’s anti-retaliation provision.⁵⁷

FLSA limits protections to persons classified as “employees,” but does not define employees in any meaningful or useful way—“any individual employed by an employer”⁵⁸—and defines the term “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁵⁹ The definition of the term “employ,” which includes “to suffer or permit to work,”⁶⁰ does not provide clarity. Obviously, these definitions are circular and not particularly helpful in determining who exactly is engaged in an employment relationship.⁶¹ The only clarity comes

51. 29 U.S.C. § 202(a) (2006).

52. *Id.* § 206(a). The minimum wage has periodically increased and is currently \$7.25 per hour. *Id.* § 206(a)(1)(C). The states can set a higher minimum wage and the workers in those states are entitled to the higher state rate. *Wage and Hour Division: Minimum Wage Laws in the States*, DEP’T OF LABOR, <http://www.dol.gov/whd/minwage/america.htm> (last visited Apr. 12, 2014).

53. 29 U.S.C. § 207 (2006). The maximum hours for covered, non-exempt employees are 40 hours in a “work week” unless overtime compensation is paid at the rate of not less than one-and-a-half times the regular rate of pay. *Id.* § 207(a)(1).

54. *Id.* § 212.

55. *See id.* § 211(c).

56. *Id.* § 216(b).

57. *Id.* § 215(a)(3).

[I]t shall be unlawful for any person . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Id.

58. *Id.* § 203(e)(1).

59. *Id.* § 203(d).

60. *Id.* § 203(g).

61. *See Yamada, supra* note 7, at 226–27 (noting that the *Portland Terminal* decision could be applied to student interns if a court so desired); Rubinstein, *Forgotten Workers, supra* note 7, at 160

from FLSA's coverage of employees as "individuals" and employers as an "enterprise," determined by their respective involvement in "commerce," defined as "trade, commerce, transportation, transmission, or communication among the several States."⁶²

An individual is covered if she is personally engaged in interstate or foreign commerce or in the production of goods for commerce.⁶³ Enterprise coverage applies when an individual's employer is engaged in either commerce or in the production of goods for commerce, or has more than two employees who handle goods or materials that someone else has moved or produced for commerce.⁶⁴ For enterprise coverage to apply, the entity must also have a gross volume of business of at least \$500,000 per year.⁶⁵ FLSA covers public agencies, regardless of the commerce or volume-of-business tests.⁶⁶

Whether an employer is covered as an "enterprise" depends on the definitions within the statute itself. A law school may be an employer under the definition of "enterprise":

Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that . . . is engaged in the operation of . . . an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).⁶⁷

A law firm is an employer engaged in commerce because "commerce" is defined broadly by Section 3(b) of FLSA as "trade, commerce, transportation, *transmission, or communication* among the several States."⁶⁸ Even if a law firm does not meet the enterprise definition because it does not meet the \$500,000 volume-of-business requirement, most law students working in law firms probably meet the "individual" coverage requirements because they are personally engaged in interstate or foreign commerce through section 3(b)'s very broad definition of commerce. Independent contractors, however, are not employees and therefore are not protected by FLSA. Consequently, the distinction between employees and independent

(describing the statutory definitions as "circular and useless"); Rubinstein, *Employees*, *supra* note 7, at 609 (highlighting courts' inability to clearly state the law).

62. 29 U.S.C. § 203(b).

63. *Id.* §§ 206(a), 207(a)(1).

64. *Id.* § 203(s)(1)(A)(i).

65. *Id.* § 203(s)(1)(A)(ii).

66. *Id.* § 203(s)(1)(C).

67. *Id.* § 203(s)(1)(B).

68. *Id.* § 203(b) (emphasis added); Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 3(b), 52 Stat. 1060, 1060.

contractors has been the subject of many court decisions and scholarly articles.⁶⁹

2. Express and Implied Exemptions

FLSA expressly exempts from coverage several categories of workers who would otherwise fall within the statutory definition of “employee,” the broadest statutory exemption being for executive, administrative, and professional employees, discussed in Part II.B, *infra*.⁷⁰ Despite such express exemptions contained in the original Act, Congress expressly intended coverage under FLSA to be broad.⁷¹ Nevertheless, the Supreme Court has had occasion to consider some restrictions on the broad definition of “employee” and has concluded that the language does not make all persons employees if they work for their own advantage on the premises of another without any express or implied compensation agreement;⁷² i.e., volunteers working purely for their own benefit. Congress incorporated this volunteer interpretation into FLSA via a 1985 amendment.⁷³

FLSA does not apply to two important categories of law-student interns: those working for the federal judiciary and those working for state or local public agencies.⁷⁴ First, although FLSA does cover certain individuals working for the federal government,⁷⁵ federal law clerks are likely considered exempt under 29 U.S.C. § 203(e)(2)(A)(iii), which

69. The distinction between employee and independent contractor is discussed more fully in Part II.B, *infra*. See also Yamada, *supra* note 7, at 240 (noting the inconsistent application of the common law and its importance in distinguishing between employees and independent contractors).

70. FLSA section 13 carves out numerous exemptions from the minimum wage and/or maximum hour requirements, the only one of which is relevant to the unpaid law-student intern at a for-profit law firm is the exemption for employees employed in a bona fide executive, administrative, or professional capacity, discussed *infra*. 29 U.S.C. § 213(a)(1); Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 13, 52 Stat. 1060, 1067.

71. See 81 CONG. REC. 7,656–57 (1937) (statement of Sen. Hugo Black) (“The committee . . . reached the conclusion that the definition of employee as given . . . is the broadest definition that has ever been included in any one act . . .”); see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947) (noting the broad definitions of “employ” in FLSA); *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 516 (1950) (“Breadth of coverage was vital to [FLSA’s] mission.”); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (noting the terms “employee,” “employer,” and “employ” are defined expansively).

72. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947); see also *Wirtz v. S.F. & Oakland Helicopter Airlines, Inc.*, 370 F.2d 328, 328 (9th Cir. 1966) (stating the lower court correctly applied the same *Portland Terminal* principle).

73. Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 790 (1985), (codified at 29 U.S.C. § 203(e)(1)).

74. In addition, congressional interns are exempt from FLSA. Congressional Accountability Act of 1995, 2 U.S.C. §§ 1301, 1313(a)(2) (2012).

75. 29 U.S.C. § 203(e)(2)(A).

provides that persons employed in units of the judicial branch that are *not* subject to federal government competitive service requirements are not employees within the meaning of FLSA.⁷⁶ Law clerks are not employed in such units.⁷⁷ Second, interns in state and local public agencies, including law students interning in the state prosecutor's office or public defender's office, are also likely exempt. This category is subsumed in the exemption for individuals who "volunteer[] to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency" if certain conditions are met,⁷⁸ discussed in Part II.B, *infra*.

Also relevant to unpaid law-student interns are exemptions from coverage, statutory reductions in coverage, and interpretative limitations issued by the DOL and federal courts, including: (1) the white-collar, learned professional exemption;⁷⁹ (2) certified student-learners who may be paid less than minimum wage;⁸⁰ (3) certain types of volunteers in the federal judiciary and state public agencies;⁸¹ (4) certain volunteers in nonprofit organizations;⁸² and (5) intern/trainees in for-profit organizations.⁸³

Thus, FLSA appears to have an inherent conflict—the Act envisions the broadest coverage for "employees" but, at the same time, contains limiting principles exempting many individuals. The DOL's lack of clear regulatory guidance and confusion among federal courts only compounds this conflict as to the proper interpretative parameters for employees, volunteers, and interns, as discussed in Part III, *infra*.

3. Other Statutory Violations

There are several other noteworthy laws, in addition to FLSA, relevant to a discussion of employee protection. Professor David Yamada, and others, have addressed the problem of whether other employment laws, notably harassment and discrimination, apply to interns,⁸⁴ and this Article

76. *Id.* § 203(e)(2)(A)(iii).

77. 5 U.S.C. § 2102 (2012) (indicating that civil service positions which are not in the executive branch must be "specifically included in the competitive service by statute").

78. 29 U.S.C. § 203(e)(4)(A).

79. *Id.* § 213(a)(1).

80. *Id.* § 214(b).

81. *Id.* § 203(e)(2)(A)(iii) (covering the federal judiciary); *Id.* § 203(e)(4)(A) (covering state agencies).

82. *Id.* § 203(e)(5) (exempting only volunteers at food banks).

83. *Fact Sheet #71, supra* note 9.

84. *See, e.g., Yamada, supra* note 7, at 238 (discussing the discrimination issues that may arise).

does not intend to replicate that work. Rather, this Part will highlight some of the key concerns that others have already dissected.

Some commentators have indicated that colleges may be responsible for sexual harassment of interns who are placed via a college program and earning credit.⁸⁵ Thus, Professors Cynthia Bowman and MaryBeth Lipp focus on colleges' responsibilities for sexual harassment of interns under Title IX, where the internship is a prerequisite for graduation and/or offered through the school.⁸⁶ The utility of these theories to potential FLSA violations by a non-law-school-sponsored arrangement is doubtful because there is no student-university contract in these situations. But, if the law school allowed an employer to advertise for unpaid interns through its career service office, an enterprising attorney might be able to make a promissory estoppel argument.

As noted by Professor David Gregory, employers are required to "withhold federal and state income tax from the employee's wages, pay federal and state payroll taxes, withhold FICA tax from wages, and report the employee's wages to the IRS and to the employee."⁸⁷ Employers who violate FLSA or fail to withhold taxes may be liable under tax law. In situations where a law firm pays a stipend or de minimus payment, it may also incur liability.⁸⁸ Professor Sachin Pandya has shown how employers who underpay workers may be liable for unreported income or disallowed business expense deductions.⁸⁹ Professor Pandya identifies how an underpaid worker can provide the requisite information to the taxing authority as a tax informant or by bringing a qui tam action under the False Claims Act, and in doing so has identified a new approach to combatting the problem of what he terms "wage theft."⁹⁰

Misclassification of workers as interns would also subject employers to liability for failure to pay employment compensation and workers' compensation premiums, as well as open them to claims for retirement plans and lost participation in other employee benefits. Finally, lawyers

85. See Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN'S L.J. 95, 96 (2000) (exploring legal remedies available to student interns who are sexually harassed).

86. *Id.*

87. Gregory, *supra* note 7, at 232 n.11 (citations omitted) (citing I.R.C. §§ 3401, 3306, 3102(a) (1994)).

88. See *id.* at 232 n.12 (noting that employers "must submit an IRS Form 1099 for each worker to whom it pays more than \$600 per year" (citing I.R.C. § 6041A(a) (1994)). The worker also has obligations under the tax code, for example, "the worker is responsible for declaring federal and state taxes on amounts received from the employer, and for federal self-employment tax." *Id.*

89. Sachin Pandya, *Tax Liability for Wage Theft*, 3 COLUM. J. TAX. LAW 113, 117 (2012).

90. *Id.* at 131, 132.

who misclassify employees as interns should consider whether they have violated their state rules of professional responsibility. For example, the Model Rules of Professional Conduct have a general prohibition on violating the law and a state bar could consider a failure to pay wages as reflecting adversely on an attorney's fitness to practice law.⁹¹ These are all considerations that an employing organization must take into account when deciding whether to pay or not to pay a law student who performs work for that organization.

B. FLSA Exemptions

1. Exemptions for White Collar Workers

Law clerks and interns may be exempt from FLSA's wage and overtime requirements if they satisfy the so-called "white-collar" exemption test for bona fide executive, administrative, or professional employees.⁹² FLSA's professional and administrative exemptions require that the employee meet three tests: (1) the primary duties test; (2) the salary basis test; and (3) the salary test.⁹³ First, to be exempt, the student's principle, main, major, or most important duty must be the performance of office or non-manual work, directly related to the management or general business operations of the employer.⁹⁴ Second, exempt workers must be paid on a "salary basis," explained by the DOL as "regularly receiv[ing] each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed."⁹⁵ Third, the student must be paid a salary of at least \$455 per week.⁹⁶ Clearly, the salary test is not met in situations where the

91. MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2013). "It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Id.*

92. 29 U.S.C. § 213(a)(1); *see also* 29 C.F.R. § 541.200–302 (2013) (discussing the administrative and professional exemptions). For the administrative exemption, *see* 29 C.F.R. § 541.300–302.

93. 29 C.F.R. §§ 541.200, 541204.

94. *Id.*

95. 29 C.F.R. § 541.602(a).

96. 29 C.F.R. § 541.600(a). This amount must be "exclusive of board, lodging or other facilities." *Id.* Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605:

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a 'fee basis' within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments

law-student intern is wholly unpaid.⁹⁷ Even in arrangements where expenses or a small stipend is paid, the law-student intern will not meet the \$455 weekly salary test. Note that lawyers who have graduated and obtained a license may be exempt from the salary test as “employee[s] employed in a bona fide professional capacity.”⁹⁸ This Article does not address this category of employees with a Juris Doctor, but there are signs of a nascent interest from some law firms in exploiting this group of law school graduates, which will be discussed in Part III.A.1, *infra*.⁹⁹

2. Student Learners

FLSA provides for employment under a student-learner certificate, but it is limited to retail and service establishments.¹⁰⁰ The student-learner certificate allows wages at 95% of minimum wage and exempts student

resemble piecework payments with the important distinction that generally a ‘fee’ is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$ 455 per week if the employee worked 40 hours.

29 C.F.R. § 541.605(a).

97. There is some debate as to whether employees who are paid on an hourly basis are considered to be paid on a salaried basis within the meaning of 29 C.F.R. § 541.118. *See* Andrew M. Campbell, Annotation, *When is Employee Paid on “Salaried Basis” in Order to Qualify as Bona Fide Executive, Administrative, or Professional Employee Under Labor Regulations (29 CFR § 541.1-541.3) Exempting Such Persons from Minimum Wage and Overtime Provisions Under § 13(a)(1) of Fair Labor Standards Act (29 U.S.C.S. § 213(a)(1))*, 123 A.L.R. Fed. 485, § 3[b] at 505 (2012) (compiling cases).

98. 29 C.F.R. § 541.300(a); *see also* 29 C.F.R. § 541.600(e) (“In the case of professional employees, the compensation requirements in this section [29 C.F.R. § 541.600] shall not apply to employees . . . who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (see § 541.304).”). Similarly, interns who have obtained their law degree but have not obtained their license are exempt from the salary test if they started their internship after obtaining their law degree. *Id.* This salary exemption may apply to the Boston law firm situation if the new associate has obtained their Juris Doctor but not yet obtained their license. *See id.* (discussing exemption as applies to law practitioners with license or certificate); Neil, *supra* note 15 (discussing Boston law firm that offered \$10,000 a year for an associate position and received over fifty applications).

99. *See* Neil, *supra* note 15 (discussing Boston law firm that offered only \$10,000 a year, not enough to live on, for an associate position and received over fifty applications).

100. 29 U.S.C. § 214(b)(1)(a) (2006).

learners from overtime rules,¹⁰¹ but is not available to clerical and office workers in any industry under current DOL regulations.¹⁰² It is mentioned here because it has potential for expansion to law-student interns.¹⁰³

3. Volunteers in Public Agencies

FLSA exempts two types of volunteers: public agency volunteers and volunteers at food banks. First, volunteers in state and local government agencies are exempt if:

- (i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
- (ii) such services are not the same type of services which the individual is employed to perform for such public agency.¹⁰⁴

The DOL regulations¹⁰⁵ further defines the public agency volunteer as an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered.¹⁰⁶ Although volunteers do not expect or receive compensation, they may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service

101. *Id.*; see also 29 C.F.R. § 520.408 (2012) (noting a subminimum wage rate of no less than 95%).

102. *Id.* § 520.401(c).

103. See Jessica 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, 1551 (2010) (proposing a new student-intern certificate for interns).

104. 29 U.S.C. § 203(e)(4)(B). Furthermore,

An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency may volunteer to perform services for any other State, political subdivision, or interstate governmental agency, including a State, political subdivision or agency with which the employing State, political subdivision, or agency has a mutual aid agreement.

Id. § 203(e)(4)(B).

105. The amount of deference that a federal court will apply to DOL regulations, guidelines and opinion letters is discussed in Part II.C, *infra*.

106. 29 C.F.R. § 553.101(a) (2013). The New York State Department of Labor has issued a useful fact sheet explaining and clarifying who is an exempt volunteer in a nonprofit situation. *Wage Requirements for Interns in Not-for-Profit Businesses*, N.Y. DEP'T OF LABOR, <http://www.labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf> (last visited Apr. 8, 2014).

without losing their status as volunteers.¹⁰⁷ In addition, although the federal government is generally prohibited from accepting voluntary service,¹⁰⁸ there are some exceptions that apply to law students. For example, 5 U.S.C. § 3111 authorizes agency heads to accept voluntary services from students.¹⁰⁹

4. Volunteers at Nonprofit Organizations

The status of non-governmental volunteers at nonprofit organizations is somewhat confusing. The Supreme Court addressed the unpaid volunteer in the nonprofit sector in *Tony & Susan Alamo Foundation v. Secretary of Labor*.¹¹⁰ The Supreme Court held that, “an individual who, ‘without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure *or profit*,’ is outside the sweep of the [FLSA].”¹¹¹

Although Congress amended FLSA to add a “volunteer” exemption after the *Alamo Foundation* decision,¹¹² it only applies to volunteers at food banks—“[t]he term ‘employee’ does not include individuals who volunteer their services solely for humanitarian purposes to private nonprofit food banks and who receive from the food banks groceries.”¹¹³ The courts have not apparently questioned whether the food bank exemption is properly applied to other nonprofits, perhaps because the *Alamo* case did not so limit the volunteer exclusion from the definition of employee and perhaps

107. 29 C.F.R. § 553.106(a). The volunteer must offer her services “freely and without pressure or coercion, direct or implied, from the employer.” *Id.* § 553.101(c). An individual may not be deemed a “volunteer” “if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.” *Id.* § 553.101(d). One can see how an employer might coerce an individual in such circumstances to “volunteer” to do extra work or unpaid overtime, so this regulation indicates the concern of the DOL to prohibit employers from abusing the volunteer exemption. *Id.*

108. 31 U.S.C. § 1342 (2006).

109. 5 U.S.C. § 3111(b) (2006).

110. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302–03 (1985) (describing volunteerism at a nonprofit, non-government agency).

111. *Id.* at 295 (emphasis added) (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947)).

112. 29 U.S.C. § 203(e)(4) (2006).

113. *Id.* § 203(e)(5). The limited legislative history to this 1998 amendment indicates that it was intended as a “very narrow” exclusion from the definition of employee in recognition that some volunteers at food banks received food when such volunteers might themselves be in need. 144 CONG. REC. H5386 (daily ed. June 25, 1998) (statement of Rep. Ballenger). The amendment was deemed necessary to clarify that such volunteers are not employees because the DOL had issued inconsistent opinions on the issue. *Id.*

because the DOL has similarly applied the exemption beyond food banks.¹¹⁴

The status of student interns at nonprofits therefore remains unclear because of subtle conflicts between Court's decision in *Alamo* and the post-*Alamo* FLSA amendment, the DOL's prior opinion letters, and the DOL's position in *Solis v. Laurelbrook Sanitarium & School, Inc.*

First, the *Alamo* case exempts volunteers at nonprofits.¹¹⁵ But, in amending FLSA to exempt volunteers after *Alamo*, Congress chose to only exempt volunteers at food banks and not any other type of nonprofit volunteer.¹¹⁶ The well-known canon of statutory construction *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others) may provide some guidance here.¹¹⁷ Nevertheless, the legislative history disavows any such construction—a supporter of the bill stated that the express exclusion “should not be in any way construed to mean that by [expressly excluding food bank volunteers] Congress is showing an intent that any other individual who performs community services and receives benefits is an employee.”¹¹⁸ Accordingly, the DOL has traditionally applied a broad construction in exempting volunteers generally.¹¹⁹

114. *Tony & Susan Alamo Found.*, 471 U.S. at 303; DOL, Wage & Hour Div., Op. Ltr. FLSA2008-14, (Dec. 18, 2008), available at http://www.dol.gov/whd/opinion/FLSA/2008/2008_12_18_14_FLSA.pdf (applying long-recognized DOL view that persons who freely provide volunteer services for public service, religious, or humanitarian objectives, and without contemplation or receipt of compensations, are not employees for purposes of FLSA); see also DOL, Wage & Hour Div., Op. Ltr. FLSA2006-4, (Jan. 27, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_01_27_04_FLSA.pdf (citing DOL, Wage & Hour Div., Op. Ltr. FLSA2002-9, 2002 WL 32406599 (Oct. 7, 2002), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_01_27_04_FLSA.pdf) (“Typically, such volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees.”).

115. *Tony & Susan Alamo Found.*, 471 U.S. at 302–03.

116. 29 U.S.C. § 203(e)(5).

117. See, e.g., *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616–17 (1980) (“Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”); see also *Cont'l Cas. Co. v. United States*, 314 U.S. 527, 533 (1942) (stating that where Congress enumerates exceptions, other exceptions should not be implied). Similarly, courts should not add language that Congress has not included because it could lead to a conclusion that only food bank volunteers, and not volunteers generally, are excluded. See, e.g., *Moskal v. United States*, 498 U.S. 103, 107–08 (1990) (refusing to extend coverage to a category not specified where Congress has specified categories of coverage—doing so would amount to enlarging the statute rather than construing it).

118. 144 Cong. Rec. H5386 (daily ed. June 25, 1998) (statement of Rep. Ballenger).

119. See DOL, Wage & Hour Div., Op. Ltr. FLSA2008-14 (Dec. 18, 2008), available at http://www.dol.gov/whd/opinion/FLSA/2008/2008_12_18_14_FLSA.pdf (describing various types of volunteer work as exempt from FLSA coverage); DOL, Wage & Hour Div., Op. Ltr. FLSA2006-4, (Jan. 27, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_01_27_04_FLSA.pdf (stating again that FLSA recognizes the value in volunteering); DOL, Wage & Hour Div., Op. Ltr. FLSA2002-9, (Oct. 7, 2002), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_01_27_04_FLSA.pdf (noting the “benefits of volunteering”).

More recently, in the *Laurelbrook* case, the DOL has taken the stance that student workers at a nonprofit educational institution were employees because they did not meet all of the criteria in the DOL's six-factor trainee test, discussed in Part II.B.5, *infra*.¹²⁰ This litigation posture is intriguing because the students could have been considered volunteers as the defendant organization was a nonprofit organization. The DOL's decision to litigate this case as "an employee" or "trainee" situation could be viewed as a signal that the DOL considered its six-factor test to apply to a sub-set of volunteers—students at educational nonprofit schools—or could signal a more general narrowing of the volunteer exemption.¹²¹ In any event, neither the DOL nor the Sixth Circuit Court of Appeals appeared to address the potential applicability of the volunteer-at-a-nonprofit exemption, and the case proceeded as an analysis of whether the students were employees or trainees, and whether the DOL's six-factor test should control. Ultimately, the Sixth Circuit did not agree with the DOL's position and held that the students were exempt trainees under FLSA.¹²²

It would be helpful to develop a bright-line test for when an individual crosses the line from being a "volunteer" to "trainee" or "employee." Although a 2013 Solicitor of Labor ("SOL" or "Solicitor") Letter may signify that law students performing legal work at nonprofits are considered non-employees under any circumstance (because such work is always pro bono work), the lack of statutory and regulatory guidance on student interns at nonprofits means that the precise legal status of these students remains unclear.¹²³ The lack of clear statutory and regulatory guidance is concerning because law schools attempting to place law students as interns at nonprofits are on shaky ground as to the legality of such arrangements—does the FLSA volunteer exemption apply, or does the for-profit intern/trainee six-factor test apply? Although the 2013 SOL Letter strongly

120. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 519 (6th Cir. 2011) (affirming district court's decision); see also *Fact Sheet # 71*, *supra* note 9 (listing the six-factor trainee test). The six-factor test as applied to for-profits is discussed more fully in Part III.B, *supra*.

121. For cases applying the various tests to vocational school settings, see Hilary Weddell, *Vocational Schools Are No Vacation: Determining Who Really Benefits From Student Labor*, 32 B.C. J.L. & SOC. JUST. 71, 76 (2012). The vocational school setting has some similarities to the law-school-sponsored externship, but has other, distinguishing, features. Certainly, the vocational setting and educational mission at issue in *Laurelbrook* are very different from the setting of a for-profit law firm utilizing law students to perform legal work. Thus, cases addressing the vocational setting may be helpful signals of what test the court in that circuit might apply to law student workers but is not dispositive (and regardless of whether the court applies the primary benefit/economic reality test or the DOL test, courts always review the totality of the circumstances).

122. *Id.* at 519, 529, 532.

123. Letter from M. Patricia Smith, Solicitor of Labor, to Larry G. Bellows, ABA Immediate Past President (Sept. 12, 2013), available at http://www.abajournal.com/news/article/law_students_may_work_as_unpaid_interns_on_pro_bono_matters_for_law_firms_1/ [hereinafter 2013 SOL Letter].

suggests that the DOL may not enforce FLSA in such situations, courts are not bound to follow the DOL's position. Without statutory or regulatory clarity, employers may be exposed to risk of lawsuits.

5. Student Internships in For-Profit Organizations

FLSA is silent on the question of whether a student in an unpaid internship or credit-bearing externship—essentially volunteers—are “employees.” Whereas the DOL has promulgated a regulation to address the definition of volunteers in public agencies and food banks, it has not done so in the case of internships at for-profit organizations. Instead, the DOL issued a *Fact Sheet* with a six-factor test to distinguish between individuals who are in employment relationships from those who are not with respect to intern or trainee situations.¹²⁴ The DOL derived the six criteria from the Supreme Court's 1947 decision in *Walling v. Portland Terminal Company*.

In *Portland Terminal*, the Supreme Court held that the circular FLSA definitions of “employee,” “employer,” and “employ” did not apply to certain vocational railroad trainees that were required to complete the railroad's week long training program before they were eligible for hire as brakemen.¹²⁵ The Wage and Hour Administrator had sued to enjoin the defendant railroad company from refusing to pay its trainees the minimum wage and argued that such trainees were covered under FLSA.¹²⁶ The Court disagreed, reasoning that because the trainees participated in the program without an express or implied compensation agreement, they worked for their *own advantage* on the premises of another.¹²⁷ Further, the Court found it persuasive that the trainees merely watched the regular employees perform tasks and then repeated those tasks while under the close supervision of the railroad company, a process that slowed down the railroad's operations but did not displace any of the railroad's regular employees.¹²⁸ In addition, no employees were displaced by the trainees, and neither the trainees nor the railroad expected compensation.¹²⁹

The Supreme Court held that the exemption in 29 U.S.C. § 214 for student learners was not applicable because it only applies to “employers

124. *Fact Sheet #71*, *supra* note 9; see also DEP'T. OF LABOR, WAGE & HOUR DIV., FIELD OPERATION HANDBOOK § 10b11 (Oct. 20, 1993), available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf [hereinafter FIELD OPERATION HANDBOOK].

125. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149 (1947).

126. *Id.*

127. *Id.* at 152–53.

128. *Id.* at 149–50.

129. *Id.*

who hire beginners [or] learners,” which was not the case here and—perhaps most significantly—these trainees were *not* “employees” because they “greatly benefited” from the instruction and the railroad received no “immediate advantage.”¹³⁰

Based on the *Portland Terminal* vocational trainees who fell outside FLSA’s definition of “employee,” the DOL subsequently articulated six criteria to determine whether a “trainee” is exempt from FLSA’s minimum wage coverage:

- (1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) The training is for the benefit of the trainees or students;
- (3) The trainees or students do not displace regular employees, but work under their close observation;
- (4) The employer that provides the training derives no immediate advantages from the activities of the trainees or students, and on occasion operations may be actually impeded;
- (5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- (6) The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.¹³¹

One can see from the test and *Portland Terminal* that the Court and the DOL intended to exempt a specific type of short-term blue-collar trainee program from FLSA’s broad application to those who are permitted or suffer to work. Neither the DOL test nor the facts or holding of *Portland Terminal* indicates any intent to exempt an individual simply because he is both a student performing work for the employer and learning on-the-job. The Supreme Court may have wanted to encourage employers to offer vocational training but perhaps unwittingly opened a loophole in FLSA’s intent to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general

130. *Id.* at 151, 153.

131. See FIELD OPERATION HANDBOOK, *supra* note 124, § 10b11(b).

well-being of workers . . . without substantially curtailing employment or earning power.”¹³²

In a series of Opinion Letters, the DOL has consistently applied this test for trainees to determine the employment status of student interns who provide services to for-profit sector employers.¹³³ Further, although the DOL’s position is that the six criteria must be applied in view of “all the circumstances” surrounding the intern’s activities, it consistently requires that all of the six criteria be met.¹³⁴ In response, commentators have questioned whether the application of the six criteria allow employers and courts to provide a consistent assessment of whether a trainee or intern is an employee or exempt from coverage.¹³⁵

In a 2010 New York Times article, the DOL stated that it intended to crack down on unpaid internships: “If 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.”¹³⁶ University presidents responded to these statements by sending a letter to then-U.S. Labor Secretary Hilda Solis, urging the DOL *not* to regulate student internships.¹³⁷

132. 29 U.S.C. §§ 202(a), 202(b) (2006).

133. See *Fact Sheet #71*, *supra* note 9 (acknowledging that the six factor analysis is the test applied when determining the employment status of student interns); see also DOL, Wage & Hour Div., Op. Ltr. FLSA, 2004 WL 2146931, at *2 (May 17, 2004), available at http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm (citing DOL, Wage & Hour Div., Op. Ltr. FLSA, 1996 WL 1031777, at *1 (May 8, 1996); DOL, Wage & Hour Div., Op. Ltr. FLSA, 1995 WL 1032493, at *1 (July 11, 1995); DOL, Wage & Hour Div., Op. Ltr., Fair Labor Standards Act, 1995 WL 1032474 (Mar. 13, 1995)) (describing the “six criteria” test). Trainees and interns are one and the same because they are gaining professional experience as part of an educational-type modality. *Id.*

134. DOL, Wage & Hour Div., Op. Ltr. FLSA, 2004 WL 2146931, at *1 (May 17, 2004), available at http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm; DOL, Wage & Hour Div., Op. Ltr. FLSA, 1996 WL 1031777, at *1 (May 8, 1996) (discussing activities on premises of employer business).

135. See, e.g., Rubinstein, *Employees*, *supra* note 7, at 609 (noting the problems with inconsistent application of the law); Yamada, *supra* note 7, at 240 (noting the same inconsistent application of the law); see also Sarah Braun, Comment, *The Obama “Crackdown:” Another Failed Attempt to Regulate The Exploitation Of Unpaid Internships*, 41 SW. L. REV. 281, 307 (2012) (arguing that the DOL test should be updated in light of new economic realities for students in today’s job market). *But see* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993) (noting the six criteria allow for consistent assessment of the totality of circumstances and applying the criteria but not adopting the “all or nothing” approach).

136. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 2, 2010, available at http://www.nytimes.com/2010/04/03/business/03intern.html?_r=1&emc=eta1 (quoting Nancy J. Leppink of the Wage and Hour Division).

137. Letter from Joseph E. Aoun, President, Northeastern University et al., to Hilda Solis, Sec’y of Labor, U.S. Dep’t. of Labor (April 28, 2010), available at http://www.epi.org/page/-/pdf/20100428_univ_presidents_letter_to_USDOL.pdf (stating, *inter alia*, “While we share your concerns about the potential for exploitation, our institutions take great pains to ensure students are placed in

The American Bar Association similarly expressed concern to the DOL about its stance on law-student internships.¹³⁸ Other organizations responded in favor of maintaining and enforcing the existing DOL position.¹³⁹

The SOL's recent clarification of the Department's stance with respect to law students performing pro bono legal work at for-profit law firms is instructive.¹⁴⁰ In September 2013, the Solicitor, M. Patricia Smith, issued an informal letter in response to the ABA's request for assurances that the DOL would not enforce FLSA against law firms and corporate law departments hosting certain law-student interns.¹⁴¹ The letter specifically addressed whether unpaid law-student interns may be considered "employees" where they work exclusively on non-fee-generating pro bono matters at for-profit law firms.¹⁴²

The Solicitor reiterated that the DOL's six factors apply to internships and trainees at for-profit companies, which includes for-profit law firms and corporate law offices, and that the intern/trainee exclusion from the definition of employment is "quite narrow."¹⁴³ Nevertheless, the exclusion "may be met in some circumstances when law students perform unpaid internships [at] for-profit law firms."¹⁴⁴ Applying the six-factors to the specific circumstances of an internship where the law student works exclusively on non-fee-generating pro bono matters and is structured to provide the student with professional experience in furtherance of his or her education, regardless of whether the intern receives credit, the Solicitor

secure and productive environments that further their education. We constantly monitor and reassess placements based on student feedback").

138. Letter from Laurel G. Bellows, ABA President, to The Hon. M. Patricia Smith, Solicitor of U.S. Dep't of Labor (May 28, 2013), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013may28_probonointerns_1.authcheckdam.pdf [hereinafter ABA Letter]. The ABA Letter requested clarification on law students and recent law graduates not yet licensed who perform pro bono work at for-profit law firms and corporate offices. *Id.* See also CAL. DIVISION OF LABOR STANDARDS ENFORCEMENT, OPINION LETTER, at 3 n.2 (Apr. 7, 2010) [hereinafter CAL. DLSE OPINION LETTER], *available at* <http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf> (discussing how interns at YearUp, Inc., a nonprofit, are not considered employees under the law in California).

139. Letter from Ross Eisenbrey, Vice President of the Econ. Policy Inst., to Hilda Solis, Sec'y of U.S. Dep't. of Labor (May 5, 2010), *available at*: http://www.epi.org/publication/epi_responds_to_university_presidents_on_internship_regulations/ (noting that regulations covering internships already exist and explaining why regulation is important in protecting student interns from exploitation).

140. 2013 SOL Letter, *supra* note 123.

141. *Id.*

142. *Id.*

143. *Id.* at 1–2.

144. *Id.* at 2.

opined that the internship would not be considered employment under FLSA.¹⁴⁵

The 2013 SOL Letter, however, distinguished between interns working on pro bono matters and interns working on fee-generating matters.¹⁴⁶ Because the analysis hinges entirely on the application of the DOL's six criteria, it is important to analyze which criteria might have tipped the scales in drawing this distinction between performing fee-generating work and performing pro bono work.¹⁴⁷ A significant criterion appears to be the requirement that the employer receive no "immediate advantage" from the intern's activities: "the firm will not derive any immediate advantage from the student's activities, although it may derive intangible, long-term benefits such as general reputational benefits associated with pro bono activities."¹⁴⁸ Since a law firm would receive an immediate advantage from a student's input on fee-generating matters, regardless of how that arrangement is structured, the "no immediate advantages" criterion arguably supplies the main basis for the distinction.¹⁴⁹

Accordingly, the Solicitor's interpretation limits the intern exemption to only those situations where the law student works on pro bono matters that are *in addition to* pro bono matters that the law firm's lawyers would work on absent the intern's presence.¹⁵⁰ The intern is therefore only exempt if their pro bono work does not "free up staff resources for billable work that would otherwise be utilized for pro bono work."¹⁵¹ In other words, this interpretation allows or even encourages law firms to accept *additional pro*

145. *Id.*

146. *Id.*

147. Although the Solicitor applied all six factors in her analysis (in accordance with the DOL's position that all six factors must be met in order to qualify as an intern), *id.* at 2, the reality is that if any single factor is not met, the intern/trainee exception does not apply. Hence, it is a truism that a single factor can indeed be a controlling factor (i.e., if one factor is not met, the person is an employee and covered under the FLSA). Courts and litigants seeking to reject or temper the DOL's all-or-nothing approach are likely to isolate that factor and attempt to reframe the inquiry through the lens of that single factor. Indeed, litigants have already seized on the "no immediate benefit criterion" as controlling, allowing creative lawyers to morph that criterion into a balancing-of-the-benefits test, significantly departing from the *Portland Terminal* analysis.

148. *Id.* at 2.

149. *Id.* The Solicitor's conclusion that interns working exclusively on pro bono matters are exempted from the definition of "employee" (provided all of the six criteria are met) might also implicitly incorporate FLSA nonprofit volunteer-exemption, since work performed pro bono will frequently be performed for a nonprofit legal organization or for *pro se* plaintiffs by court appointment. But the 2013 SOL Letter also squares with the Department's litigation position in *Laurelbrook* by framing the inquiry as whether student workers are "employees" under FLSA definition, as opposed to framing the issue through the lens of the volunteer exemption.

150. *Id.*

151. *Id.*

bono projects that they would not otherwise have taken, but does not permit them to hire interns to take over their *existing pro bono work*.

Applying both the DOL's six-criteria test and the Solicitor's informal letter to the situation of law students working as unpaid interns on fee-generating matters at for-profit law firms,¹⁵² it seems clear that a law student working on fee-generating matters will rarely, if ever, meet the definition of an intern or trainee, even if he or she is supervised and/or receiving credit. As the Solicitor explained:

In contrast [to an intern working exclusively on pro bono matters], a law student would be considered an employee subject to the FLSA where he or she works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimal supervision and guidance from the firm's licensed attorneys, or displaces regular employees (including support staff).¹⁵³

The interpretation is therefore a straightforward application of the Department's long-standing criteria, derived from the text of FLSA and Court's interpretation of "employment" in *Portland Terminal*.¹⁵⁴ The interpretation should not be viewed as a *carte blanche* for law firms or corporate law offices to "host" unpaid law-student interns unless they are prepared to structure the arrangement according to the stringent criteria *and* satisfy the pro bono exclusivity rule.

Employers must also comply with applicable state wage and hour laws, which can vary from the federal FLSA.¹⁵⁵ For example, the California Division of Labor Standards Enforcement (DLSE) applied an eleven-factor test for determining internship exemption, until the DLSE issued a 2010

152. *Id.*

153. *Id.* The same analysis and conclusion necessarily applies to law student interns working in corporate law departments, since the company is a for-profit business and although not "fee generating" in the same manner that a law firm generates fees, it derives a financial benefit from the intern's work in the same way.

154. A related question is how much deference a reviewing federal court will give to the 2013 SOL Letter, and therefore how much comfort an employer can take in relying on the letter to defend its position in any litigation. The letter is not a formal Administrator's Interpretation, is not an Opinion Letter, and is obviously not an agency rule. As such, it is almost certainly not entitled to *Chevron*-level deference; even Opinion Letters have not received such deference. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (asserting that Opinion Letters are "entitled to respect" under the *Skidmore* standard but only insofar as their "power to persuade." (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)) (internal quotation marks omitted)).

155. FLSA expressly allows states to provide higher protections. 29 U.S.C. § 218(a) (2006). *See also Pacific Merch. Shipping Ass'n v. Aubly*, 918 F.2d 1409, 1425 (9th Cir. 1990) ("[T]he purpose behind the FLSA is to establish a national *floor* under which wage protection cannot drop . . .").

opinion that, henceforth, it would apply the same six-factor criteria as the DOL.¹⁵⁶ In addition, New York has issued a Fact Sheet adding five additional criteria to the DOL's six.¹⁵⁷ New York has also clarified that *all* of the criteria must be met in order to exempt the intern from the wage and hour laws.¹⁵⁸ Whether New York would also exempt interns performing exclusively pro bono work at for-profit law firms remains to be seen.

C. Federal Courts' Application of FLSA

The federal courts apply a dizzying array of tests to determine whether an individual is an employee, independent contractor, intern, or volunteer. The courts are also confused as to whether they will apply and how much deference to give the DOL's six-factor test. Although some federal courts have applied the DOL's six-factor test, they have done so with varying degrees of deference.¹⁵⁹ Some courts give the DOL six-factor test

156. CAL. DLSE OPINION LETTER, *supra* note 138, at 5.

The additional factors to be met under the historical 11-factor test by DLSE are as follows: (7) Any clinical training is part of an educational curriculum, (8) the trainees or students do not receive employee benefits, (9) the training is general, so as to qualify the trainees or students for work in any similar business, rather than designed specifically for a job with the employer offering the program, i.e. upon completion of the program, the trainees or students must not be fully trained to work specifically for only the employer offering the program, (10) the screening process for the program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program, and (11) advertisements for the program are couched clearly in terms of education or training, rather than employment, although the employer may indicate that qualified graduates will be considered for employment.

Id. at 4 n.3.

157. *Fact Sheet, Wage Requirements for Interns in For-Profit Business*, N.Y. DEP'T OF LABOR (Apr. 2011), <http://www.labor.ny.gov/formsdocs/factsheets/pdfs/P725.pdf>.

158. *Id.*

159. *Skidmore* explains and governs the level of deference a federal court gives to a federal agency regulation, guideline, or other interpretative and guidance statements. Under *Skidmore*, if Congress charges an agency with enforcing a statute, "the agency's policy statements, embodied in its compliance manual and internal directives," *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (internal quotation marks omitted), which interpret the statute are entitled to a "measure of respect." *Id.* (quoting *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004)). Factors affecting the weight to be given an agency statement in the particular case include: "the thoroughness evident in [the agency] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

substantial deference,¹⁶⁰ while other courts have found the DOL test to be relevant but not dispositive.¹⁶¹ In contrast, some courts have rejected the DOL test entirely.¹⁶²

Commentators have discussed all three levels of deference¹⁶³ and the fact that the federal courts sometimes apply a “totality of the circumstances” test in contrast to the DOL’s “all-or-nothing” approach.¹⁶⁴ Courts may have relaxed the DOL standard using the totality approach in recognition of the difficulty of meeting all six criteria. Indeed, the Sixth Circuit in *Solis v. Laurelbrook* expressly admonished the DOL’s all-or-nothing approach as too rigid.¹⁶⁵ The difference between these two approaches is substantial; most modern internships will not meet the criterion that the employer cannot obtain an immediate advantage from the intern’s activities. If an employer does not receive an advantage from its interns, it seems unlikely that it would even offer internships. But, under the “all-or-nothing” approach, if any one of the criteria is not met, the intern is properly classified as an employee protected under FLSA. The “totality of the circumstances” approach, on the other hand, allows for more wiggle room and results in a balancing or weighing test, placing the benefit to the intern on one side of the scale and the benefit to the employer on the other side.

Although jurists may be attracted to the flexibility of a balancing test approach, Professor David Yamada, from Suffolk University Law School, has detailed the problems of this relaxed approach, including the inconsistency of judicial outcomes wrought by increased subjectivity that inevitably accompanies any type of balancing test.¹⁶⁶ Further, as Ross

160. *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir. 1983) (“[T]he Administrator’s interpretation is entitled to substantial deference by this court.”).

161. *See, e.g., Reich v. Parker Fire Prot. Dept.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (holding that six criteria are relevant but not determinative while affirming judgment using the criteria).

162. *See, e.g., Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525, 529 (6th Cir. 2011) (following a primary-benefits test rather than the DOL six-factor test); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 n.2 (4th Cir. 1989) (expressly not relying on the six-factor test).

163. *See Yamada, supra* note 7, at 230–31 (noting a Circuit split with one Circuit agreeing with the DOL and the other disagreeing).

164. *Id. See also* DOL, Wage & Hour Div., Op. Ltr. FLSA, 2004 WL 2146931, at *1 (May 17, 2004), available at http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm.

165. *Laurelbrook*, 642 F.3d at 525–26. In fact, the Sixth Circuit expressly denounced the DOL’s six-factor test as not following *Portland Terminal*. *Id.* at 526 n.2 (“[t]he Secretary inaccurately characterizes *Portland Terminal* as creating a six-factor test for trainee status. While the Court’s recitation of the facts included those that resemble the Secretary’s six factors . . . the Court gave no indication that such facts must be present in future cases to foreclose an employment relationship.” (internal citations omitted)).

166. Yamada, *supra* note 7, at 233.

Perlin points out for interns generally, how do we “balance out thirty hours of data entry with thirty minutes of database training or a brief powwow with executives?”¹⁶⁷ In the law firm context, it may be easier to engage in the quantitative aspect of a balancing test because lawyers, and law students, detail their time spent on each task, so it is possible to track how much time a law student is engaged in research and writing for the law firm, versus observing or training activities. It is also possible to track the supervising attorney’s time, if they record time, spent editing the law student’s work product or providing other types of feedback to a law student. The more intangible benefits of a law-student internship, however, such as networking and résumé building, are more difficult to track using the lawyer’s traditional time-recording systems.

But, even if student interns and supervising attorneys could accurately track their time and quantify the time spent on tasks that benefit each side, courts would need a qualitative assessment to weigh each task for an accurate balancing test. Otherwise, the courts would be left balancing the amount of *time spent* by each side and not the *benefit* to each side. Without a qualitative assessment, the court can only assess whether the student put in more time than the firm; the court must also consider what standard to apply to the balancing test—must the benefit to the student simply outweigh the benefit to the employer, substantially outweigh, or be measured by something else?

A test that allows employers to benefit from the work of interns on a fifty-fifty basis is simply too sweeping and ignores the genesis of the DOL’s “all-or-nothing” approach. The DOL’s test is strict *because* FLSA’s employee coverage is broad and to provide otherwise would undercut Congress’s purpose and the Supreme Court’s interpretation of “employee.” That is not to say that the DOL’s “all-or-nothing” approach is perfect, but that proposals to amend or revise that approach must proceed with extreme caution and remain mindful of congressional and Supreme Court dictates regarding statutory purpose. It is not clear that the federal courts are being faithful to the latter when they exclude student workers as the Sixth Circuit did in *Laurelbrook*.¹⁶⁸ Moreover, any approach that focuses on balancing

167. PERLIN, *supra* note 6, at 67.

168. In *Laurelbrook*, the Sixth Circuit barely even paid lip service to the purpose behind FLSA, although the court relied in part on a prior Sixth Circuit decision that interpreted FLSA’s application to a vocational school in light of the

the ‘evils’ the FLSA targets: displacement of regular employees and exploitation of labor. In examining any training or educational situation for possible signs of these evils, the court thought it relevant to consider both the validity of the

the employer's need for free labor with the worker's right to be paid should answer this question: *why* should FLSA be interpreted to allow employers to avoid paying workers for their labor?

D. Overview of Various Tests Used to Determine Employee Status under FLSA

The federal courts have noted that FLSA “provides little guidance in distinguishing between trainees [or interns] and employees.”¹⁶⁹ As discussed in Part II.B.5, the Supreme Court long-ago interpreted the definitional provisions of “employee” and “employ” under FLSA as *not* including categories of individuals who perform some work for others, but who are not otherwise “employees” under the Act.¹⁷⁰ Thus, although the trainees in *Portland Terminal* performed some work for the company, they were not “employees” and thus not covered under the Act.¹⁷¹

As previously noted, federal courts have also developed a number of tests to distinguish between employees who are covered under FLSA and independent contractors who are not covered under FLSA.¹⁷² Most courts have utilized one of the following tests:

(1) *The common law agency test.* This test is derived from Supreme Court decisions in non-FLSA cases, *Community For Creative Non-Violence v. Reid* and *Nationwide Mutual Insurance Co. v. Darden*, and looks at whether or not the traditional master/servant relationship exists, which in turn indicates an employer/employee relationship;¹⁷³

(2) *The primary purpose test.* This test looks at whether the relationship between the prospective employee and employer is primarily an economic one, or primarily something else, such as educational or

program as an educational experience and whether the primary benefit from the relationship flowed to the learner or to the alleged employer.

Laurelbrook, 642 F.3d at 527 (citing *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 468 (M.D. Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981)).

169. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1025 (10th Cir. 1993).

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

171. *Id.* at 153.

172. *See, e.g., Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 U.S. Dist. LEXIS 56277, at *22–23 (Apr. 23, 2012) (explaining that courts use a variety of tests).

173. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–28 (1992) (using master/servant test from agency law to distinguish employees and independent contractors under ERISA); *Cnty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989) (using a traditional master/servant test to determine whether an individual was an employee or independent contractor in a copyright case). In each case, the Court instructs that the coverage of the applicable Act must be determined in light of the statute's policy and purpose.

charitable,¹⁷⁴ and possibly encompasses the “primary benefit” test, which looks at who primarily benefits from the work,¹⁷⁵ or

(3) *The economic reality test.* This test uses a variety of factors to determine whether the prospective employee is economically dependent on the employer.¹⁷⁶

A minority of courts have not adopted these tests but have instead attempted to give the term “employment” its “‘ordinary’ meaning, that is, ‘physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.’”¹⁷⁷ This test might be useful in its simplicity, but it would sweep all volunteers into the definition and does not take into account the humanitarian or civic purposes of the volunteer.

Other commentators have discussed at length FLSA’s “employee” definition cases;¹⁷⁸ however, they will not be discussed here, because definitional tests are not dispositive when examining whether an individual is an employee who is covered under FLSA or a trainee, volunteer, or intern under FLSA. For example, under the economic reality test, an unpaid intern cannot be considered economically dependent on her employer unless the meaning of “economically dependent” morphs into something entirely different from its commonly understood meaning.¹⁷⁹ Likewise, the

174. *See* NLRB v. Hearst Publ’ns, Inc., 322 U.S. 111, 124, 128–29 (1944) (holding that the meaning of the term “employee” depends on the particular facts of the relationship), *overruled by* *Darden*, 503 U.S. at 324–25; *Brown Univ.*, 342 N.L.R.B. 483, 495–97 (2004) (Liebman and Walsh, Members, dissenting), *available at* <http://mynlrb.nlr.gov/document.aspx/09031d4500076ac> (discussing primary purpose test as an alternative to common law agency as it relates to employee relationships).

175. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011).

176. *Freeman v. Key Largo Volunteer Fire & Rescue Dep’t, Inc.*, 494 F. App’x 940, 942 (11th Cir. 2012) (citing *Villarreal v. Woodham*, 113 F.3d 202, 205 (11th Cir. 1997)) (explaining the economic reality test and factors); *Deal v. State Farm Cnty. Mut. Ins. Co. of Tex.*, 5 F.3d 117, 119 (5th Cir. 1993) (applying economic realities to determine alleged employer did not control appellant, resulting in independent contractor status). Some courts use a hybrid test, combining some of the main tests. *See, e.g., EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983) (“Consequently, the hybrid standard that combines the common law ‘right to control’ with the ‘economic realities’ as applied in Title VII cases is the correct standard for determining employee status under ADEA.”).

177. *Todaro v. Township of Union*, 27 F. Supp. 2d 517, 533 (D.N.J. 1998) (quoting *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944)).

178. *See, e.g., Gregory, supra* note 7, at 229 n.9, 233–35 (identifying articles discussing case law and statutory criteria for the employer-employee and independent contractor relationships).

179. Alternatively, one could argue for a broad interpretation of “‘compensation’” to encompass the types of benefits that the unpaid intern expects, such as networking, training, exposure to ethical and professional standards. *See Hallissey v. Am. Online, Inc.*, No. 99-CIV-3785, 2006 U.S. Dist. LEXIS 12964, at *17–18 (S.D.N.Y. Mar. 10, 2006) (stating that benefits other than cash payments may constitute “compensation” when contemplating the “expectation of compensation” for services rendered under the DOL six-factor intern test). The problem with this approach is that it is a very imperfect fit to take a test developed for one purpose and attempt to apply it for another purpose. Better to start afresh and create an appropriate fit.

independent contractor cases are informative, but some of the factors are simply not applicable or helpful in the internship relationship.¹⁸⁰

The question remains, what *is* the appropriate test to determine whether an individual is an employee and should be compensated or an intern and exempt from FLSA? Some courts and commentators have drawn a line between the easy case of a “pure” volunteer, who works for no compensation, and the gray area of the “enhanced” volunteer, who receives some form of stipend or minimal benefit.¹⁸¹ “Enhanced” volunteers are often found to straddle the line between “employee” and “volunteer,” which identifies compensation as a determinative factor in distinguishing amongst volunteers. Similarly, the DOL six-factor test takes expectation of compensation into account, but it is not determinative, nor should it be. If receipt of compensation is the litmus test of whether an individual is an “employee” under FLSA, FLSA would be redundant—employers would have an incentive not to pay any type of compensation to avoid FLSA coverage. That is not how the law works, however. FLSA determines who is entitled to a wage based on the existence of an employment relationship. The primary purpose test examines this relationship, distinguishing between economically driven employee/employer relationships and those driven by other factors, such as education or charity. The economic reality test also considers the employee/employer relationship, among other factors that are determinative of whether the employee is economically dependent on the employer.

Jovanovich v. Angelone illustrates the difficulty of applying the economic reality test to the situation of law clerks, as opposed to its intended use for distinguishing independent contractors.¹⁸² In *Jovanovich*, the Ninth Circuit Court of Appeals held that the economic reality test could be applied to determine whether prisoner law clerks were employees under FLSA.¹⁸³ The court found that the employment relationship was similar to

180. The Supreme Court recognized this truism in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 451 (2003), wherein the Court stated that traditional tests to determine employee versus independent contractor status are helpful but not controlling when distinguishing between employees and shareholder-owners, at least for purposes of the ADA. Other courts have made the same point with respect to determining whether an individual is an employee or a volunteer. See Rubinstein, *Forgotten Workers*, *supra* note 7, at 173 (noting that independent contractor tests are not dispositive in determining whether a person is a volunteer).

181. *Mendel v. City of Gibraltar*, 842 F. Supp. 2d 1035 (E.D. Mich. 2012); Rubinstein, *Forgotten Workers*, *supra* note 7, at 154.

182. *Jovanovich v. Angelone*, 59 F.3d 175, at *2 (9th Cir. June 26, 1995) (affirming district court’s grant of summary judgment and upholding district court’s holding that the economic reality test did not apply to the prisoners).

183. *Id.*

that which existed in the everyday economic marketplace:¹⁸⁴ the employers had the power to hire and fire, supervise schedules and conditions of employment, determine pay rates and methods, and to maintain employment records.¹⁸⁵ Not all of the “economic reality” factors apply in every employment situation, and the factors are designed to be flexible and viewed in light of all the circumstances. But the Ninth Circuit’s application of the economic reality test in the *Jovanovich* case illustrates that the test morphed into something more akin to a right to control test than a review of whether the prisoner law clerks were economically dependent on the prison employer. Indeed, the court tacitly acknowledged that the prisoners were not economically dependent on the prison because the prison provided their clothing, shelter, and food regardless of their positions as clerks.¹⁸⁶

Nevertheless, despite the inapplicability of the judicially created tests for independent contractor status, there are some common threads that may be helpful when applied to the internship relationship, one being *the right to control*,¹⁸⁷ and another being the *primary purpose* behind the arrangement.¹⁸⁸

In sum, FLSA, regulatory guidance, and federal court decisions offer a confusing patchwork of rules potentially applicable to law students who are gaining work experience through the various types of experiential learning opportunities. Because law students are working through law-school-sponsored programs in a variety of settings and are working in some of these settings without going through a law-school-sponsored program, the patchwork of rules becomes even more confusing.

Part III of this Article attempts to separate out each law student work setting and identify the legal rules that may apply. Part IV will then offer modest proposals to allow law students, law schools and employers to understand with more certainty whether each of these arrangements requires wage compensation, and hopefully give guidance on how to structure each arrangement to meet the needs of each of the key players.

184. *Hale v. Arizona*, 993 F.2d 1387 (9th Cir. 1993) (en banc).

185. *Jovanovich*, 59 F.3d at *3 (referring to the Ninth Circuit’s discussion in *Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir. 1993)).

186. *Id.* at *2 (referring to the Ninth Circuit’s discussion in *Hale v. Arizona*, 993 F.2d at 1394 that the prison’s “control” over the prisoner law clerks “does not stem from any remunerative relationship or bargained-for exchange of labor for consideration, but from incarceration itself.” (citing *Vanskike v. Peters*, 974 F.2d 806, 809 (7th Cir. 1992))).

187. *See, e.g.*, *Dep’t of Labor v. Lauritzen*, 835 F.2d 1529, 1534–36 (7th Cir. 1987) (applying both multi-factor and “right to control” test to determine whether pickle-pickers were economically dependent on farmer).

188. *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 402–03 (6th Cir. 2004).

III. APPLICATION OF FLSA “EMPLOYEE” TESTS TO INTERNS, TRAINEES, AND VOLUNTEERS

A. Exemptions for Unpaid Law-Student Interns and Volunteers in Nonprofit Organizations and Public Agencies

1. Law-Student Interns Are Not Exempt as “White Collar” Professionals or “Learned Professionals”

Some employers may believe that law-student interns (paid or unpaid) may be exempt from the wage and overtime requirements of FLSA if they meet the so-called “white collar” exemption for bona fide executive, administrative, or professional employees.¹⁸⁹ As discussed in Part II.B.1, *supra*, FLSA professional and administrative exemptions require that the employee meet three tests: (1) the salary test; (2) the salary basis test; and (3) the primary duties test. Law-student interns will rarely meet these requirements.¹⁹⁰

First, the unpaid intern does not meet the salary test because she is not paid a salary of at least \$455 per week¹⁹¹—or any salary at all.¹⁹² Second,

189. 29 U.S.C. § 213; 29 C.F.R. §§ 541.200–302 (2013) (discussing the administrative and professional exemptions). For the administrative exemption, see 29 C.F.R. §§ 541.200–204 (2013). For the professional exemption, see 29 C.F.R. §§ 541.300–302 (2013).

190. *Id.* § 541.600(e).

191. 29 C.F.R. § 541.600(a). This amount must be “exclusive of board, lodging or other facilities.” *Id.* Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605:

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a “fee basis” within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a “fee” is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least \$455 per week if the employee worked 40 hours.

Id. § 541.605.

192. There is some debate as to whether employees who are paid on an hourly basis are paid on a salaried basis within the meaning of 29 CFR § 541.118. See Campbell, *supra* note 97.

the unpaid intern is not paid on a “salary basis” because that requires regular receipt of each pay period on a weekly, or less frequent basis, of a predetermined amount; again, an unpaid intern is not receiving any pay on a regular basis.¹⁹³

Even if the intern received a minimum wage that would meet the “white collar” exemption’s salary tests, the question remains as to whether a law-student intern would meet the “primary duties” test. Lawyers are typically considered exempt employees as “learned professionals” whose work requires “advanced knowledge . . . customarily acquired by a prolonged course of specialized intellectual instruction.”¹⁹⁴

On the other hand, a law-student intern who is performing tasks similar to a paralegal will *not* be considered exempt as a learned professional:

Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution.¹⁹⁵

Not surprisingly, the DOL has accordingly held that paralegals and legal assistants do not fall within the administrative or professional exemption.¹⁹⁶ Law-student interns typically perform at a level akin to a legal assistant, not a licensed attorney, and in situations where this is the case, the DOL regulations and related opinions should lead to the conclusion that the law student is non-exempt, even if they meet the salary

193. 29 C.F.R. § 541.602(a). The learned professional exemption from the salary tests does not apply to the law school intern, since she has neither graduated with her J.D. nor obtained her license. *Id.* § 541.600(e); *see also Id.* § 541.304 (discussing law licenses and degrees).

194. *Id.* § 541.301; *see also Id.* § 541.3 (scope of exemptions).

195. *Id.* § 541.301(e)(7) (Paralegals).

However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

Id.

196. DOL, Wage & Hour Div., Op. Ltr. FLSA2006-27, 2006 WL 2792441, at *3 (July 24, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_07_24_27_FLSA.pdf; DOL, Wage & Hour Div., Op. Ltr. FLSA2005-54, 2005 WL 3638473, at *6 (Dec. 16, 2005), available at http://www.dol.gov/whd/opinion/FLSA/2005/2005_12_16_54_FLSA.pdf.

test. In part, this is because a supervising attorney supervises and reviews a paralegal's work, like that of a law clerk.¹⁹⁷

Even when the law-student intern is performing attorney tasks, such as researching and drafting memoranda and briefs, she may still fall short of the "learned professional" exemption because a law degree is not actually required to perform those tasks as evidenced by the fact that the intern has not yet obtained a law degree. Thus, the DOL has opined that a senior legal analyst position in a corporation does not qualify for the professional exemption under FLSA.¹⁹⁸ The DOL based this opinion less on the nature of the work performed and more on the fact that such employees are not required to have a law degree and thus do not satisfy the academic requirements necessary to invoke this exemption.¹⁹⁹

2. Law-School-Sponsored and Non-Law-School-Sponsored Interns at Public Agencies Are Exempt as Volunteers

As discussed in Part II.B.3, *supra*, FLSA expressly exempts volunteers at state public agencies, subject to certain conditions that do not typically apply to law-student interns.²⁰⁰ Similarly, law students may provide

197. A law firm might try to creatively circumvent FLSA wage and hour rules by contracting to pay a fee or commission or by entering into a contingency arrangement with a law clerk. Independent contractors are not covered by FLSA, but courts obviously look beyond the label given to a worker and apply the right to control or economic reality test to determine whether the individual is indeed an independent contractor. Given the nature of a law clerk arrangement, where the law clerk is assigned discrete tasks under the supervision, control and approval of an attorney, it is difficult to imagine a situation where the independent contractor label would succeed.

198. DOL, Wage & Hour Div., Op. Ltr. FLSA2006-27, 2006 WL 2792441, at *3 (July 24, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_07_24_27_FLSA.pdf.

199. *Id.* at *5 ("[P]aralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field."). *Cf.* *Zelasko-Barrett v. Brayton-Purcell, LLP*, 198 Cal. App. 4th 582, 585, 588 (2011). The court considered a law school graduate working in a law firm before becoming licensed to practice law an exempt professional under the California analogue of FLSA's professional exemption for overtime, where

he performed tasks customarily performed by junior attorneys. Although he was supervised by a licensed attorney and did not sign his name to pleadings, he drafted pleadings and discovery demands and responses, did legal research and drafted memoranda of points and authorities and supporting declarations, interviewed witnesses, assisted in deposition preparation and interacted with opposing counsel concerning discovery issues.

Id. The court further distinguished the DOL regulation because this individual had in fact graduated. *Id.*

200. Under FLSA, the public agency may not receive compensation (although it may receive expenses, etc.) and must not perform the same type of services which the individual is employed to perform for such public agency. 29 U.S.C. § 203(e)(4)(A) (2006).

voluntary services to federal agencies.²⁰¹ It should not make any difference whether the law-student worker attains her public agency or federal agency internship independently or through a law school, credit-bearing externship.

The only fly in the ointment for the law student “volunteer” at these agencies is that the DOL has further defined the “public agency volunteer” as an individual who performs such services “for civic, charitable, or humanitarian reasons.”²⁰² Can it truly be the case that thousands of law students across the United States are interning at the public defender’s office for civic, charitable, or humanitarian reasons, and not because they need the practical experience for their own purposes? Their motives likely do not matter; the DOL is not likely to start questioning law students’ subjective motives, which is what it would need to do if it ever chose to enforce its own regulation. Regardless, this is a gray area and the DOL has stated that it is reviewing the need for guidance in this area.²⁰³

3. Law-School-Sponsored and Non-Law-School-Sponsored Interns at Nonprofit Organizations May Be Exempt as Volunteers

Most of the law school experiential programs described in Part I neatly place the law student outside of FLSA’s “employee” coverage because the law students are placed in nonprofit organizations or in government agencies. The case for government agency internships may be easier to make because the law students in those settings are more easily labeled volunteers under § 203(e)(5) and the DOL regulations. FLSA’s volunteer exemption, § 203(e)(5), probably applies to law-student interns at nonprofit organizations, which provides a very limited exemption for those “who volunteer their services solely for humanitarian purposes to private nonprofit food banks.”²⁰⁴ Thus, neither the statute nor DOL regulations expressly exempt volunteers at nonprofits that are not food banks. The DOL

201. 5 U.S.C. § 3111 (2006).

202. 29 C.F.R. § 553.101(a). The New York State Department of Labor has issued a useful Fact Sheet explaining and clarifying who is an exempt volunteer in a nonprofit situation. NYS DEP’T OF LABOR, WAGE REQUIREMENTS FOR INTERNS IN NOT-FOR-PROFIT BUSINESSES, available at <http://www.labor.ny.gov/formsdocs/factsheets/pdfs/p726.pdf> (last visited Apr. 13, 2014).

203. *Fact Sheet #71*, *supra* note 9, at n.* (stating that the DOL is “reviewing the need for additional guidance on internships in the public and nonprofit sectors”). As currently articulated, the six-factor test only applies to the for-profit sector. See generally Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363 (2012) (proposing that DOL add a “limited-service-exemption” prong to the DOL six-factor test applicable to unpaid interns at nonprofits and public agencies).

204. 29 U.S.C. § 203(e)(5).

has, however, applied this food-bank exemption to other types of nonprofit enterprises in a series of Opinion Letters.²⁰⁵

Since the DOL has consistently taken the position that volunteers include individuals who provide services to nonprofits, and courts have accepted this view,²⁰⁶ the nonprofits should remain safe from the threat of lawsuits. Nevertheless, the fact that the nonprofit law-student intern falls outside express statutory and regulatory protection is cause for concern and should be addressed by the DOL. Law-student interns at nonprofit organizations are thus probably considered “volunteers,” but they fall into an illusory exemption.

It should not make any difference whether the law-student intern at a nonprofit is working independently or through a law-school-sponsored, credit-bearing arrangement, since the applicable “exemption” is the volunteer exemption, which focuses on the nature of the nonprofit activity. Nevertheless, it is worth noting that in *Solis v. Laurelbrook Sanitarium & School*, the federal court, and even the DOL, may overlook the nonprofit status of the defendant-employer and may choose not to revert to the volunteer option entirely in certain cases.²⁰⁷ As discussed below, *Laurelbrook* involved student workers at a nonprofit school; the boarding students at the school performed work as trainees on school grounds.²⁰⁸ Since the case involved students in a training and educational setting, the Sixth Circuit Court of Appeals focused on the DOL’s six-factor test to distinguish between employees and trainees—a test that applies to *for-profits*—and ignored the applicability of FLSA’s *volunteer* exemption for *nonprofits*.²⁰⁹ Thus, the DOL and the Sixth Circuit apparently did not view the nonprofit nature of the organization as dispositive but, instead, focused on the nature of the work performed and the nature of the workplace setting.²¹⁰ The court therefore looked beyond the nonprofit status of the defendant and focused on the nature of the work performed.²¹¹

This case raises the question whether the DOL and federal courts would also disregard the volunteer “exemption” for law students working at a nonprofit organization and instead focus on the nature of the work

205. See, e.g., DOL, Wage & Hour Div., Op. Ltr. FLSA1998, 1998 WL 1147734, at *1 (Nov. 9, 1998) (defining bona fide unpaid-volunteer relationships).

206. *Id.*; see also *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302–03 (1985) (stating that FLSA only reaches the “commercial activities” of nonprofit organizations and those “engage[d] in those activities in expectation of compensation”).

207. See generally *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011).

208. *Id.* at 520.

209. *Id.* at 529–32.

210. *Id.* at 531.

211. *Id.*

performed, which, in most externships, is focused on training and education. Thus, the question after *Laurelbrook* is whether law student externs at nonprofits fall within the volunteer or trainee category.²¹² If considered as “volunteers,” it should make no difference whether or not the law student works at a government agency or nonprofit. If considered as “trainees,” and the courts import the DOL six-factor intern test into the nonprofit setting, the test’s educational component should make it easier to apply. Either way, both are gray areas. If the applicable test is the DOL six-factor test for trainees at for-profits, the Solicitor’s recent letter probably applies with equal force to those students, and the analysis discussed in Part III.B will likely apply.

In summary, recent cases cast doubt on the assumption that the volunteer exemption applies to law student externs at nonprofit organizations. If the volunteer exemption does not apply, the question is whether the DOL six-factor test (as modified by the courts) will apply. If so, law school oversight is very likely determinative, as discussed more fully below.

4. Law Students in Non-Law-School-Sponsored Internships May Be Non-Exempt “Trainees”

The FLSA volunteer exemption for nonprofits and public agencies discussed above also applies to law students working at those organizations through independent arrangements (i.e., non-law-school-sponsored). But, if other federal courts follow the *Laurelbrook* route, the DOL six-factor test will apply (as modified by the applicable court), and the law-student interns are less likely to be labeled “trainees” simply because they lack the imprimatur of law school credits, the law school classroom component, and law school faculty supervision and oversight. The application of the DOL test is discussed more fully below.

B. Law-Student Interns in For-Profit Settings: Laurelbrook, the DOL Six-Factor Test, and Recent Litigation

The for-profit setting is the grayest area for law-student workers, their putative employers, and law schools. The for-profit setting lacks the

212. 2013 SOL Letter, *supra* note 123, discussed in Part II.B.4, *supra*, analyzed law student interns performing pro bono work at *for-profit* law firms under the six-factor test, but that still does not address the question of whether interns at *nonprofits* are analyzed under the volunteer exemption or the DOL six-factor test. The 2013 SOL Letter, however, provides nonprofit organizations with some comfort that law student interns at nonprofits are unlikely to run afoul of the six-factor test as long as they are performing pro bono work, which will typically be the case.

blessing of the Supreme Court's *Alamo Foundation* decision or any FLSA or DOL regulatory analogy because the law student cannot be said to be engaging in any humanitarian undertaking.²¹³ The law-school-sponsored internship, as compared with an independent internship, has the significant benefit of being credit-bearing and having an educational oversight component, which makes a better case under the DOL six-factor test. However, some federal courts have nonetheless applied the primary benefit test to both law-school-sponsored and independent internships,²¹⁴ which has led to even more confusion about the appropriate test.

1. Law-School-Sponsored Internships Under the *Laurelbrook* Paradigm

The leading case on point is *Solis v. Laurelbrook Sanitarium & School*, which involved unpaid student trainees at a nonprofit boarding school.²¹⁵ The school setting makes the case somewhat analogous to the law-school-sponsored externship in that both arrangements are an integral part of the educational curriculum. The Sixth Circuit stated that there is no settled test for determining whether a student in a trainee or learning situation was an employee for purposes of FLSA but affirmed the district court's application of the "primary benefit" test for student volunteers; i.e., "which party (school or student) receives the primary benefit of the work the student performs."²¹⁶ Furthermore, the Sixth Circuit expressly rejected the DOL's six-factor test as too rigid because it is an "all-or-nothing approach," whereas the court opined that a more case-specific "totality-of-the-circumstances approach" should be used to review education-based trainee situations.²¹⁷

The Sixth Circuit subsequently denied the DOL's request for rehearing en banc on the issue of deference to the DOL's interpretation of FLSA, essentially rejecting the six-factor test in favor of the "primary benefit" test.²¹⁸ Further, the district court later rebuked the DOL by granting the defendant's motion for attorneys' fees under the Equal Access to Justice Act, stating that the DOL's position that the student workers were

213. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302–03 (1985) (stating that the Court's holding does not disturb the concept that volunteers at religious or nonprofit organizations should be exempt from coverage under FLSA).

214. See, e.g., *Weddell*, *supra* note 121, at 78, nn.63, 64 (reviewing use of the primary benefit test by the Sixth Circuit in *Laurelbrook* and decisions in the Fourth, Fifth, and Eighth Circuits).

215. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 520 (6th Cir. 2011).

216. *Id.* at 521.

217. *Id.* at 525.

218. *Id.* at 518, *reh'g en banc denied*, *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, No. 09-6128, 2011 U.S. App. LEXIS 14678, at *1 (6th Cir. July 6, 2011).

employees, not trainees, was not substantially justifiable.²¹⁹ The DOL argued that the legal standard was unclear and hence it was justified in concluding that the students were employees under the DOL's long-standing six-factor test;²²⁰ the district court held that the DOL's conclusion that the students were employees was not sustainable even under the six-factor test, awarding the defendant \$231,675.79 in attorneys' fees, expenses, and costs.²²¹ This ruling may chill the DOL's plans to bring future lawsuits, or at least ensure that the Solicitor chooses its plaintiffs more cautiously.

The *Laurelbrook* case engaged in a four-step analysis to determine the "employee" status of student trainees:²²²

- (1) The FLSA definition of "employee" is unhelpful (useless, in fact);
- (2) the "economic reality" test is a method that courts use to determine whether an individual is an employee;
- (3) the "primary benefit" test is one method of determining the economic reality, and the DOL six-factor test is another method; and
- (4) the primary benefit test applies to these situations, not the DOL six-factor test, because the six-factor test is not faithful to the Supreme Court's interpretation of "employee" in *Portland Terminal*.

In addition to the similarity between *Laurelbrook* and a law-school-externship program's educational component,²²³ the case may also have application to law students working *outside* the law-school-sponsored setting because: (1) the Sixth Circuit rejected the DOL six-factor test and its all-or-nothing approach;²²⁴ (2) it embraced the primary benefit test;²²⁵ and (3) in applying the primary benefit test, the court stressed the same types of benefits experienced by law students in an internship (being meaningfully engaged, learning useful skills) and found the benefit to the defendant to be secondary.²²⁶ Moreover, the court in *Laurelbrook* found that the DOL was not substantially justified in its position and should not have relied on the

219. Chao v. Laurelbrook Sanitarium & Sch., Inc., No. 1:07-CV-30, 2012 WL 1836287, at *4, *8 (E.D. Tenn. May 21, 2012).

220. *Id.* at *4.

221. *Id.* at *5, *8.

222. *Solis*, 642 F.3d at 521, 522, 525, 529.

223. *Id.* at 521.

224. *Id.* at 525.

225. *Id.* at 521.

226. *Id.* at 532.

six-factor test.²²⁷ This decision could chill attempts by the DOL or private litigants to pursue claims that interns are employees; in fact, the DOL even made this argument when opposing an award of attorneys' fees, but the court rejected the DOL's claim that it should get any leeway due to its role as a safety net to ensure worker safety.²²⁸

Indeed, *Laurelbrook* is not an outlier. Other courts have similarly rejected the DOL's six-factor test and its all-or-nothing approach in favor of a balancing test focusing on which party reaps the "primary benefit" of the work performed or, in other words, which party is the "primary beneficiary."²²⁹ The "primary benefit" test, however, is fraught with difficulties, which are discussed in Part II.C, *supra*.

2. Non-Law-School-Sponsored Internships Under the DOL's Six-Factor Test

The law student who ostensibly "volunteers" at a for-profit law firm is not considered an exempt individual under the DOL regulations because, as explained in Part II.B, *supra*, a person may only do volunteer work in a nonprofit organization if that organization is set up and operates strictly for charitable, educational, or religious purposes.²³⁰ Other organizations may not use unpaid volunteers, and neither FLSA nor the DOL recognizes volunteer legal interns at for-profit law firms.²³¹

Nomenclature makes the difference, so it seems. Courts are confused as to whether to analyze putative "volunteers" and "interns" under the

227. *Id.* at 525.

228. *Chao v. Laurelbrook Sanitarium & Sch., Inc.*, No. 1:07-CV-30, 2012 WL 1836287, at *5-6 (E.D. Tenn. May 21, 2012).

229. *See Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) ("[T]he district court's balancing [of relative benefits] analysis appears to us to be more appropriate."); *see also Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971) (noting that "the Act does not apply to every instance in which one suffers or is permitted to work notwithstanding that facially it would appear applicable"); *Wirtz v. Wardlaw*, 339 F.2d 785, 788 (4th Cir. 1964) (assessing employees by the benefits of their labor). For this reason, the 2013 SOL Letter, *supra* note 123, discussed in Part II.B.4, *supra*, is not necessarily dispositive. That letter makes it clear that student interns working on fee-generating matters are considered "employees" under the DOL six-factor test. But the courts are not unanimously deferential to the DOL's position, as evidenced by the above discussion and the conflicting opinions by two federal district court judges in unpaid intern cases in the Southern District of New York, discussed more fully in this Part.

230. *See supra* Part II.B.

231. *See elaws – Fair Labor Standards Act Advisor: Volunteers*, DEP'T OF LABOR, available at <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp> (last visited Apr. 13, 2014) ("Under the FLSA, employees may not volunteer services to for-profit private sector employers."); *see also* 2013 SOL Letter, *supra* note 123, at 1 (listing the criteria for an employment relationship to not exist under FLSA).

variety of independent contractor tests²³² or some other test,²³³ such as the DOL six-factor test. Regardless of whether the court applies the DOL test or the primary benefit test, unpaid interns at for-profit firms are typically considered employees under both the DOL's six-factor test or the federal courts' "primary benefit" test.

The paradigm case where a person falls outside the definition of "to suffer or permit to work" is *Portland Terminal*. In the case, trainees worked in a school-like setting for their own advantage and on the premises of another.²³⁴ For the court in *Laurelbrook*, the students fell within this paradigm because the student trainee's work was an integral component of their education and the educational mission of the school, as well as their religion.²³⁵

The *Portland Terminal* paradigm may extend to the law-school externship setting, in the limited circumstances already discussed, but not to for-profit internships that are not sponsored by the law school. In the typical for-profit law firm setting, the intern is completely detached from the law school's educational component and may lack any indicia of training beyond the attorney-supervisor's feedback on an assignment. The for-profit independent arrangement may seem like a mutually beneficial arrangement—the law student is working for his or her own advantage in part—but the work product directly benefits the law firm. Most of these law firm internships will therefore fail at least four of the DOL's six factors, as explained below.

- i. "The training, even though it includes actual operation of the employer's facilities, is similar to that which would be given in a vocational school"²³⁶

Some law school training is experiential, as described in Part I, *supra*, but even the most hands-on experiential learning in a live-client clinic includes intense supervision by a faculty member and classroom components where the student learns the substantive laws corresponding to the clinic's clients. It would be the rare for-profit setting that would

232. See, e.g., *Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 U.S. Dist. LEXIS 56277, at *15 (April 23, 2012) (applying the six-factor test to determine whether a worker is an employee or an independent contractor).

233. E.g., *Roman v. Maietta Constr.*, 147 F.3d 71, 75–76 (1st Cir. 1998) (finding that a stock car enthusiast was a volunteer since he did it for his own enjoyment and not primarily for the defendant's benefit, and raising the question whether the court was applying a primary benefit test or a new pleasure/enjoyment test).

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

235. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 520 (6th Cir. 2011).

236. See *supra* note 131 and accompanying text.

approximate the law school experiential setting. Even the law-school-sponsored externship, the most analogous setting to the for-profit internship, has faculty supervision and opportunities for student reflection. Thus, although there are some valid comparisons to the “training” that is given in the law school setting, most for-profit internships are not similar to the training the law student would get through the law school.

ii. “The training is for the benefit of the trainees or students”²³⁷

This factor is probably the most problematic hurdle for the for-profit setting. The training at each law firm undoubtedly varies tremendously and may include close supervision by the assigning attorney, feedback on research and written products, and perhaps even training on substantive law. Nevertheless, the end product is for the benefit of the law firm and its clients, regardless of how beneficial the experience is to the law student. Even if the supervising attorney ultimately cannot use the student’s work product (for any number of reasons, work is often written off and not charged to a client), the law firm still obtains the primary benefit of the student’s work.

iii. “The trainees or students do not displace regular employees, but work under their close observation”²³⁸

As with the other factors, this factor will vary from firm to firm, but it seems to be highly subjective and difficult to verify. It is not easy to prove a negative—how can an intern or the DOL prove that no regular employees were displaced unless some junior associate was fired the day the intern arrived and the intern was given the associate’s desk, computer, and phone? It is more likely that the law firm’s ability to utilize unpaid law students will result in the law firm not hiring a new associate or paralegal, or will more likely result in the attorney being able to take on more cases than she otherwise might, or work more efficiently.

237. *See supra* note 131 and accompanying text.

238. *Id.*

- iv. “The employer derives no immediate advantage from the activities of trainees or students, and on occasion the employer’s operations may be actually impeded”²³⁹

Any attorney who has supervised a junior attorney is frustrated when the level of supervision and direction seems disproportionate to the work product. But, the attorney may also benefit from postponing a teleconference to find a sample set of interrogatories for the intern to review if the intern in turn drafts the interrogatories on his or her own. Having an intern do some initial research on a legal question is almost always to the immediate advantage of the law firm. Having a law student work on fee-generating matters clearly benefits the law firm, and the SOL’s 2013 Letter confirms that a law student performing fee-generating work is an employee under FLSA.²⁴⁰

- v. “The trainees or students are not necessarily entitled to a job at the conclusion of the training period”²⁴¹

It is rare that an employer will offer a law student an internship with an express promise that she is entitled to a job with that law firm; nevertheless, the intern undoubtedly *hopes* that a potential job offer will materialize. Indeed, law firms may dangle that potential in front of the student to entice her to take the position. However, if this criterion was determinative, it would be very easy for an employer to avoid FLSA liability by simply disclaiming any hope of a paid position at the time of hire.

- vi. “The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training”²⁴²

Obviously, a law student in an unpaid internship understands that they will not be paid for their time. However, if this criterion were dispositive, it would be simple for the law firm to avoid FLSA liability by issuing a bold disclaimer of compensation.

Viewing each of the criteria in light of all the circumstances, the typical unpaid law-student intern at a for-profit law firm is not a trainee, but rather an employee under the DOL six-factor test. Even under the more forgiving “primary benefit” balancing test, this arrangement is unlikely to

239. *Id.*

240. *See supra* Part II.B.

241. *See supra* note 131 and accompanying text.

242. *Id.*

withstand scrutiny. Some law firms may closely supervise their interns and provide feedback to them, but the end product of the intern's labor is for the primary benefit of the law firm and its clients (or, in the case of a corporation, the benefit of the corporate law department and its only client, the corporation) regardless of how beneficial the experience is for the law student. Even if the supervising attorney ultimately cannot use the student's work product (for any number of reasons, work is often written off and not charged to a client), the law firm still obtains the primary benefit of the student's work. As previously stated, law firms are not typically in the altruistic business of training unpaid workers with a view to only receiving a marginal benefit.

Indeed, class action lawyers in New York have recently filed several lawsuits alleging violations of FLSA and New York labor laws in analogous circumstances.²⁴³ The lawsuits focus on interns in the media and entertainment business, naming defendants such as Hearst Corporation, Fox Searchlight, and The Charlie Rose Show. These suits have tested federal district court judges' stances on the issue whether to apply the DOL's "all-or-nothing" six-factor test or "the totality of the circumstances" balancing test.²⁴⁴

In a case brought by plaintiffs Eric Glatt and Alexander Footman against Fox Searchlight Pictures, U.S. District Court Judge William H. Pauley III granted summary judgment in favor of the plaintiffs, holding that they were employees under FLSA and New York labor law, applying the DOL six-factor criteria.²⁴⁵ Judge Pauley also held that plaintiffs could proceed to prosecute their claims as a class action against the defendants on behalf of interns employed by FEG subsidiaries Fox Filmed Entertainment, Fox Group, Fox Networks Group, and Fox Interactive Media.²⁴⁶ In contrast, another judge in an almost identical case in the same district denied both class certification and partial summary judgment to the plaintiffs on the issue of whether they were employees under FLSA and New York law.²⁴⁷ In that case, *Wang v. Hearst Corp.*, U.S. District Judge Harold Baer applied

243. For details of the lawsuits, see UNPAID INTERNS LAWSUIT, <http://unpaidinternslawsuit.com> (last visited Apr. 8, 2014). For the plaintiff's complaint in *Wang v. Hearst Corp.*, see Brief of Plaintiff at 1, *Wang v. Hearst Corp.*, No 12-Civ.-793, 2013 WL 1903787 (S.D.N.Y. May 8, 2013), available at http://unpaidinternslawsuit.com/documents/Hearst_Corporation_Complaint_%28AMENDED%29_032312.pdf.

244. The Charlie Rose Show settled the lawsuit against it, agreeing to pay \$250,000 to a class of approximately 190 former interns. Steven Greenhouse, 'Charlie Rose' Show Agrees to Pay up to \$250,000 to Settle Interns' Lawsuit, UNPAID INTERNS LAWSUIT, (Dec. 20, 2012), <http://unpaidinternslawsuit.com/charlie-rose-show-agrees-to-pay-up-to-250k-to-settle-interns-lawsuit>.

245. Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 534 (S.D.N.Y. 2013).

246. *Id.* at 538-39.

247. *Wang v. Hearst Corp.*, 293 F.R.D. 489, 490 (S.D.N.Y. 2013).

the totality of the circumstances test, but later granted the plaintiffs' motion to appeal his ruling to the Second Circuit, stating that the Second Circuit could provide clarity for other pending intern suits on the issue of whether the DOL six-factor or totality test controls.²⁴⁸

The issue remains pending in the Second Circuit Court of Appeals—which has not yet decided whether to hear the appeal—but these unpaid intern class actions are clearly bellwethers for what an unpaid law-student intern might expect. In the meantime, the message is clear—former interns have found a champion and are ready to litigate their claims.²⁴⁹

IV. THE LAW SCHOOL'S ROLE UNDER FLSA

Law schools obviously have a vested interest in ensuring that their law-school-sponsored programs fall within the boundaries of applicable laws and ethical obligations. As explained in Part III, *supra*, there should be no problem with law-school sponsored shadow programs, pro bono programs, and supervised credit-bearing externships at nonprofits and government agencies. Credit-bearing externships at for-profit companies are very problematic, however, because it is unlikely that the law firm can satisfy the DOL's criterion that they derive no immediate advantage from the arrangement.²⁵⁰ In light of this uncertainty, the question arises: what is the

248. Wang v. Hearst Corp., No. 12-CV-793, 2013 WL 3326650, at *2 (S.D.N.Y. June 27, 2013) (quoting 28 U.S.C. § 1292(b) (1992)) (certifying the issue for interlocutory appeal under 28 U.S.C. § 1292(b) where “there is a [1] a controlling question of law [2] there is substantial ground for difference of opinion [3] and that an immediate appeal from the order may materially advance the ultimate termination of the litigation”). Judge Baer stated: “A decision on these questions will significantly affect the conduct of other lawsuits now pending in the district courts which have relied on other legal standards or the same legal standard, but have come out differently.” *Id.*

249. Whether these intern cases are suitable for class action is a related question. See FED. R. CIV. P. 23 (stating requirements for class actions). The *Fox Searchlight* and *Hearst* unpaid intern cases produced conflicting judicial opinions regarding the appropriateness of the class action device for such cases. Compare *Glatt*, 293 F.R.D. at 539 (granting class certification), with *Wang*, 293 F.R.D. at 490 (denying class certification). Cases involving AOL similarly reveal mixed results—some were denied class action certification because the “subjective” element of whether the interns thought they were volunteers precluded common questions of law or fact, but other courts have awarded class action certification. Cf. *In re Am. Online Cases*, No. H026959, 2005 WL 1249228, at *1 (Cal. Ct. App. May 26, 2005) (denying class certification) with *Hallssey v. Am. Online, Inc.*, No. 99-CIV-3785, 2008 WL 465112, at *1 (S.D.N.Y. Feb. 19, 2008) (granting class action certification conditionally). See also *Reab v. Elec. Arts, Inc.*, 214 F.R.D. 623, 629 (D. Colo. 2002) (conditionally certifying class for on-line fantasy “volunteers” claiming FLSA violations, stating “[p]laintiffs’ subjective belief as to their status under the FLSA is irrelevant to the question whether to conditionally certify a class”).

250. I am setting aside, for now, the problematic ethical issue of placing students in for-profit law firms with the knowledge that the law firm is benefiting economically from the work done by that law student.

law school's responsibility to its students when it comes to independent and non-credit-bearing for-profit internships?

Some unpaid for-profit internships will be arranged wholly outside of the law school's involvement or knowledge—a student may learn of an internship opportunity through a parent or family friend and the law school never learns about the arrangement. Other law schools may allow job postings through their career services website, and employers may advertise for unpaid interns through such sites. In these types of situations, the law school may not have a legal responsibility under FLSA, but arguably has an ethical and moral responsibility to protect its students from potential wage and overtime abuse. These considerations are addressed below.

A. The Propriety of Unpaid Internships in For-Profit Settings

Commentary on whether law schools should place students in for-profit law firms or corporate law departments is mixed. One commentator, Bernadette Feeley, professor at the Suffolk University School of Law, has made the case for for-profit externships, tracing the development of law school externships and noting the potential hurdles of ABA and Association of American Law School (AALS) standards,²⁵¹ as well as acknowledging that the externships must pass muster under FLSA *and* the DOL six-factor test.²⁵² Professor Feeley concluded that the for-profit externship is viable and can be a valuable legal educational tool, provided that law schools take certain steps to protect the externship's educational viability.²⁵³ Other commentators take the opposite position. Professor James Backman from Brigham Young University Law School has also examined the ABA rule that law school externs cannot be paid if they receive school credit.²⁵⁴ Professor Backman posited that both the ABA and law schools that allow for-profit externships without compensation run afoul of FLSA.²⁵⁵

251. Feeley, *supra* note 4, at 38–40.

252. *Id.* at 43–44.

253. *Id.* at 60.

254. See ABA SECTION OF LEGAL EDUC. AND ADMISSION TO THE BAR, ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOL 2013–2014 § 305 cmt. § 305-3 [hereinafter ABA STANDARD 305-3].

255. Backman, *supra* note 4, at 55–56. Note that the ABA Standards Committee was considering deletion deleting of Standard 305-3. See ABA STANDARD 305-3, *supra* note 254 (prohibiting paid externships). The Committee on Clinical Skills' comments recommended that Standard 305-3 *not* be deleted and take the position that FLSA is not violated if the externship is a true learning experience primarily for the benefit of the student. See ABA Section on Legal Educ. & Admission to the Bar & Comm. on Clinical Skills, *Comments Submitted by American Bar Association, Section on Legal Education and Admission to the Bar, Committee on Clinical Skills to the American Bar Association, Section on Legal Education and Admission to the Bar, Standards Review Committee on*

This split in academic viewpoints reflects several realities: (1) the law itself is unclear;²⁵⁶ (2) externship programs vary and generalizations are difficult; and (3) unpaid internships have pros and cons regardless of the legal landscape. Thus, on the one hand, a properly structured for-profit externship could provide law students with the benefits of learning substantive law and professional ethics, along with providing professional networking opportunities. This would also allow law firms to preview law students with an eye towards future hiring or recommendations and provide all parties with the benefits of the traditional externship relationship. On the other hand, even setting aside the difficulties of how to apply FLSA's legal standards, the problem with these arrangements remains the law firm's profit-motive—using unpaid labor to generate profit under the shield of “law school credit” to protect the firm from wage and hour claims. Further, not only do externs potentially displace entry-level attorneys, they pay tuition dollars for that privilege.

If, however, the law school attaches strict conditions and requires the type of supervision and training envisioned by the six-factor test, or the law student is the “primary beneficiary” of the arrangement, this type of externship might deter unscrupulous attorneys looking for free labor. Any attorney who has supervised a summer associate law student or junior associate knows that it can be very time-consuming to instruct the newcomer on the applicable law, supervise the appropriate use of research resources, review the work product for accuracy, and provide appropriate and meaningful feedback.

B. The Law School's Legal Responsibility

1. The Joint Employer Doctrine

From its inception, FLSA has contemplated joint employer liability, which both the DOL and courts have expansively defined and applied:

Student Learning Outcomes Draft for January 8–9, 2010 Meeting Prepared by the Student Learning Outcomes Subcommittee, 2, 9, 10, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/legal_education/committees/standards_review_documents/outcome_measurements/comments_outcome_measures_aba_clinical_skills_committee_march_2010.authcheckdam.pdf (last visited Apr. 13, 2014).

256. The DOL six-factor test itself is clear, but it is a guideline, not a statute or regulation, and it has been variously applied by the federal courts and adapted to suit individualized situations. Hence, the continued vitality of the DOL test has been questioned by the Sixth Circuit and is currently facing the prospect of scrutiny in the Second Circuit. Further, the test is applied on a case-by-case basis.

“Employer” includes any person *acting directly or indirectly in the interest of an employer in relation to an employee* and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.²⁵⁷

As early as July 1939, the DOL issued Interpretive Bulletin Number 13, which contained an interpretation of joint employer status with respect to FLSA’s overtime compensation requirements.²⁵⁸ The apparent purpose of the bulletin was to prevent would-be “wage chiselers” from avoiding the Act’s overtime provisions by having employees work overtime hours for a nominally “separate” employer acting as the primary employer’s agent.²⁵⁹

Although law schools sometimes permit for-profit law employers to advertise for (non-credit-bearing) unpaid internships through the law school, this *de minimus* involvement in the hiring process should not lead to joint employer liability. Even law schools that offer credit-bearing externships at for-profit firms are very unlikely to be held liable for their involvement, and a plaintiff would have an uphill battle making such a novel argument.

The DOL regulations, not surprisingly, apply a case-by-case assessment of whether employment is to be considered “joint” employment or “separate and distinct” employment under FLSA.²⁶⁰ If the facts establish that “employment by one employer is not completely disassociated from employment by the other employer(s),” both employers are responsible for compliance and may be held liable for FLSA violations.²⁶¹ The DOL

257. 29 U.S.C. § 203(d) (2006); 29 C.F.R. § 791.2(a) n.5 (2012) (emphasis added).

258. See Richard J. Burch, *A Practitioner’s Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L. J. 393, 404 (2002) (citing Interpretive Bulletin 13 (May 1940)).

Interpretive Bulletin Number 13 contained an interpretation of joint employer status with respect to the overtime compensation requirements of the FLSA. The apparent purpose of the bulletin was to prevent would-be ‘wage chiselers’ from avoiding the overtime provisions of the act by having employees work overtime hours for a nominally ‘separate’ employer. Thus, it appears that the overtime provisions of the FLSA first gave rise to the FLSA’s notion of “joint employment.”

Id. (citations omitted).

259. *Id.*

260. 29 C.F.R. § 791.2(a) (“A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case.”).

261. *Id.*

provides examples of joint liability that cover the most common types of joint employment, none of which on their face are applicable to a law school's sponsorship of internships and externships:

Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as: (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.²⁶²

2. Joint Employer Status: The Economic Reality Test

The question of whether a party is an employer or joint employer for purposes of FLSA is essentially one of fact. The Supreme Court instructs lower courts to consider the total employment situation and the economic realities of the work relationship.²⁶³ Thus, lower courts routinely apply the "economic reality" test to determine joint employer status rather than relying on an employer's formalistic labels, subjective intent, or a good-faith belief that an employer-employee relationship does not exist.²⁶⁴

Under the economic reality test, courts evaluate the totality of the circumstances and no single factor is determinative.²⁶⁵ Courts have developed a number of factors to consider when determining joint employer status, starting with a four-factor test as articulated by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*.²⁶⁶ The court in *Bonnette*

262. 29 C.F.R. § 791.2(b) (citations omitted).

263. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 29, 33 (1961) (holding that homemakers are employees under the economic reality test); see also *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149–50 (1947) (discussing the railroad's training process and trainee compensation).

264. See, e.g., *Burch*, *supra* note 258, at 405 (discussing court agreement to use "economic reality" test).

265. See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) ("[T]he determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.>").

266. *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983).

addressed the issue of whether a state welfare agency was a joint employer of domestic in-home caregivers.²⁶⁷ The court looked at “whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.”²⁶⁸ The Ninth Circuit found that the welfare agency “exercised considerable control” because the agency determined the hours a caregiver would work and the tasks a caregiver would perform, chose the rate and directly or indirectly chose the method of paying the caregivers, and maintained the caregivers’ employment records.²⁶⁹ Although the parties disputed the evidence as to whether the agency had the power to hire and fire the caregivers, the court found that the agency’s overall influence and control made it the caregivers’ employer under FLSA.²⁷⁰ Other circuits have built on or expanded the test to incorporate other factors to evaluate functional control,²⁷¹ using the

267. *Id.*

268. *Id.* The Ninth Circuit has subsequently incorporated other factors into the joint employer test in some other cases. *See, e.g.,* *Moreau v. Air Fr.*, 356 F.3d 942, 947–48, 953 (9th Cir. 2003) (affirming the trial court’s grant of summary judgment finding that Air France was not a joint employer of ground handling employees using the *Bonnette* and *Torres-Lopez* factors).

(1) whether the work was a specialty job on the production line; (2) whether responsibility under the contracts between a labor contractor and an employer pass from one labor contractor to another without material changes; (3) whether the premises and equipment of the employer are used for the work; (4) whether the employees had a business organization that could or did shift as a unit from one worksite to another; (5) whether the work was piecework and not work that required initiative, judgment or foresight; (6) whether the employee had an opportunity for profit or loss depending upon the alleged employee’s managerial skill; (7) whether there was permanence in the working relationship; and (8) whether the service rendered is an integral part of the alleged employer’s business.

Id. (quoting *Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997)).

269. *Bonnette*, 704 F.2d at 1470.

270. *Id.* *See* *Layton v. DHL Exp. (USA), Inc.*, 686 F.3d 1172, 1177–81 (11th Cir. 2012) (applying the economic reality test, and determining that “no one factor is determinative. . . . [T]he existence of a joint employment relationship depends on the economic reality of all the circumstances” (quoting *Antenor v. D&S Farms*, 88 F.3d 925, 932 (11th Cir. 1996))).

271. *See, e.g.,* *Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 69, 72 (2d Cir. 2003) (exemplifying this expansion). The *Zheng* court considered six factors beyond those identified in *Bonnette*: (1) whether a worker uses an alleged employer’s premises and equipment; (2) whether the subcontractor has a business that could or did operate as a unit in conjunction with more than one theoretical joint employer; (3) whether the worker performs a “discrete line-job” that is integral to the alleged joint employer’s “process of production;” (4) whether the subcontractor can transfer its contract to other subcontractors “without material changes” to the contract; (5) the degree the alleged joint employer supervises the workers’ work; and (6) whether the workers work exclusively for the alleged

economic reality test, thereby aligning the joint employer analysis with the analysis courts typically use to determine whether an individual is an employee or independent contractor.²⁷² The Eleventh Circuit Court of Appeals, for example, applied an eight-factor test to analyze whether a defendant is a joint employer under FLSA:

(1) the nature and degree of the [employer's] control of the [workers]; (2) the degree of [employer's] supervision, direct or indirect, of the [employees'] work; (3) the [employer's] right, directly or indirectly, to hire, fire, or modify the [employees'] employment conditions; (4) the [employer's] power to determine the workers' pay rates or methods of payment; (5) the [employer's] preparation of payroll and payment of the workers' wages; (6) the [employer's] ownership of the facilities where the work occurred; (7) the [employees'] performance of a [specialty job] integral to [the business]; and (8) the . . . investment in equipment and facilities.²⁷³

None of these tests, however, alter the fundamental inquiry relevant to a law school's control over the employment of law student externs and interns.

i. Law Schools Are Not "Joint Employers" of Law-Student Interns and Externs

It is unlikely that a law school will be subjected to joint employer liability, since typically the relationship between the law school and the potential employer is so attenuated that it is not possible for the law school to exercise control over the employer. Allowing for-profit law firms to advertise on the law school's website does not meet any of the standard

joint employer. *Id.* at 72. *See also* *Barfield v. N.Y.C. Health and Hosp. Corp.*, 537 F.3d 132, 145 (2d Cir. 2008) (declaring a hospital the joint employer of a nurse's assistant who worked on a temporary contract basis for the hospital, where hospital could hire and fire the nurse's assistant, controlled the assistant's schedule, maintained her employment records, and "functional[ly] controlled" the assistant because all six *Zheng* factors were present, including that she performed integral work exclusively for the hospital). *Accord* *Phillips v. M.I. Quality Lawn Maint., Inc.*, No. 10-20698-Civ., 2011 WL 666145, at *4 (S.D. Fla. Feb. 14, 2011) (adopting seven-part hybrid test based on the federal regulations for agricultural workers, which closely mirror the *Bonnette* factors, and common law factors similar to the *Zheng* factors).

272. *See, e.g., Layton*, 686 F.3d at 1177–81 (applying the economic reality test, and finding that "no one factor is determinative. . . [T]he existence of a joint employment relationship depends on the economic reality of all the circumstances" (quoting *Antenor*, at 932)).

273. *Antenor v. D&S Farms*, 88 F.3d 925, 932 (11th Cir. 1996) (citing *Aimable v. Long & Scott Farms*, 20 F.3d 434, 440–46 (11th Cir. 1994)).

tests for joint employer liability. Even credit-bearing externships, where the law school has a much closer relationship to the law firm than independent externships, are not likely to meet any of the factors of control under the economic reality test.

Most courts, applying the factors from *Zheng* and *Bonnette*, would likely find: (1) the law school does not have a sufficient degree of control over the law student, compared to that of the law firm supervisor; (2) the law school is generally not assigning work or supervising the employee but is instead monitoring the work assigned and the level of supervision; (3) the law school does not have the right to hire, fire, or modify the terms of employment; (4) the law school does not have the right to determine the rate and method of pay (for various reasons, including the fact that the ABA does not permit compensation in a credit-bearing externship); (5) the employer determines the payroll; and (6) the law school does not own the facilities or equipment used by the law student on-site at the law firm.

ii. The Law School's Other Obligations to Law Students

Although law schools are probably not responsible for FLSA compliance as a joint employer, they arguably have an obligation to take affirmative steps to educate and assist their students in navigating unpaid work situations. Some law schools deal with the issue by declaring a job posting policy to prospective employers in clear, unambiguous language, such as the job posting policy at the University of Maryland, Francis King Carey School of Law:

To facilitate hiring practices that comply with the Fair Labor Standards Act (FLSA), the Career Development Office will only list or advertise unpaid positions affiliated with School of Law academic programs, and public service and not-for-profit organizations. We encourage prospective employers that are recruiting for unpaid positions at for-profit institutions to consult U.S. Department of Labor (DOL) Guidelines. The Career Development Office reserves the right not to post or advertise position listings that are inconsistent with its employment policies or DOL guidelines.²⁷⁴

Other law schools post unpaid internships on behalf of law firms but issue a clear warning to the prospective employer that they should check

274. *Job Posting Policy*, UNIV. OF MD., FRANCIS KING CAREY SCH. OF LAW, <http://www.law.umaryland.edu/employers/hiring> (last visited Apr. 13, 2014).

FLSA on this point. Seton Hall University School of Law, for example, states on its website that it strongly prefers that interns be paid and that it is the employers' responsibility to comply with FLSA, and includes a link to the DOL criteria.²⁷⁵ The website also points out that employers can offer stipends, which obviate the need to satisfy the DOL's six-factor test.²⁷⁶ Other law schools may post the unpaid internship listings but with a more generic disclaimer that it is the employer's responsibility to comply with applicable federal, state, and local laws.²⁷⁷ Still, other law schools have no policy or statements on the matter.

The University of Maryland's approach is the most protective of students because it prevents for-profit employers from posting internships for unpaid interns. The Maryland approach also ensures that the law school is not on the hook for joint employer liability. Further, this approach may serve students by indirectly educating them on their wage and hour rights (to the extent a student looks on the webpage, reads the policy, and has the wherewithal to apply it to his or her own situation).

Seton Hall's disclaimer or warning approach may deter would-be wage thieves by at least alerting them to the existence of the applicable federal law that regulates the relationship—some lawyers may simply be unaware of the thorny issues surrounding unpaid interns. The generic approach is less effective in this regard, however, because prospective employers may skim the warning and are not specifically directed to consider and evaluate the wage payment issue. Further, these approaches do not serve to educate law students about their wage and hour rights—even the Maryland

275. *Paid versus Unpaid Internships: U.S. Department of Labor's Fair Labor Standards Act on Internship Programs*, SETON HALL SCH. OF LAW CAREER CTR., <http://www.shu.edu/offices/career-center/paid-unpaid-internships.cfm> (last visited Apr. 12, 2014) ("If your organization supports unpaid internships, Seton Hall University's Career Center recommends that all organizations review the U.S. Department of Labor's Fair Labor Standards Act on Internship Programs. It is strongly preferred that organizations pay interns for work performed.").

276. *Id.* ("If your organization is unable to offer a paid internship, please consider helping the student with a stipend or expenses related to their internship such as transportation costs, meals, etc.").

277. *See, e.g., Our Services*, FLA. COASTAL SCH. OF LAW, <http://www.fcsl.edu/career-services/our-services-0> (last visited Apr. 8, 2014) (inviting potential employers to inquire about hiring its students, but disclaiming that it is the employers responsibility to comply with the law).

Employers are solely responsible for ensuring that all postings, hiring procedures, subsequent employment, internships, volunteer work, or other engagements of any nature comply with all applicable local, state and federal laws. Florida Coastal School of Law bears no responsibility for determining whether any such postings or engagements by Employers comply with any local, state, or federal laws. All employers who utilize our services must adhere to the following Non-Discrimination Policy.

approach is an indirect method of educating students. Employers and students will seek each other out through other methods; therefore law schools should develop best practices to include student education on their basic employment rights.

V. PROPOSALS

The myriad ways that law students gain work experience reflects contemporary changes in law school education, the legal job market, and the legal profession itself. The analysis of whether these law-student workers should be paid must change. FLSA's definition of "employee" and exemption for volunteers neglect a broad swath of these workers, and the DOL has not filled all of the gaps with regulations. This regulatory vacuum has instead been filled with a guideline that does not apply to all situations, and inevitably the federal courts have attempted to utilize existing models of employee status to fill that gap on a case-by-case basis.

A. Encourage For-Profit Law Firms to Pay Law-Student Interns

This definitional problem would not exist if law firms paid their law-student workers at least minimum wage—that is the first and most obvious solution. Unfortunately, expecting law firms to pay up once the issue has been brought to their attention is not realistic. And a solo practitioner handling cases on a contingency basis is not likely to start paying minimum wage if he cannot afford to do so—he is just as likely to not use law-student interns at all.²⁷⁸

If law firms are operating in a legal and ethical gray area, they should react accordingly. But how can they be encouraged to do so? The top-down regulatory "stick" approach is the first line of "encouragement." The DOL could, quite simply, enforce FLSA against law firms. Private enforcement is also an option, but private attorneys might have difficulty finding a law student who is willing to sue a law firm and risk her chances of future employment in the legal field.²⁷⁹

278. The 2013 SOL Letter helps in this respect by clarifying that firms can utilize law students as long as they work exclusively on pro bono work. Hence, a solo practitioner can take on pro bono work specifically to assign it to the law student intern. The cynic would point out, however, that even the most scrupulous and punctilious attorney might be tempted to occasionally assign a fee-generating assignment in such a setting.

279. Plaintiffs' attorneys may also balk at suing other attorneys for similar reasons but might also be unwilling to handle these relatively small damages cases—the back pay and liquidated damage awards for a single intern will be minimal and a putative class hard to find when a single law firm

Alternatively, borrowing from new governance principles, the “carrot” approach may be moderately effective in motivating change. The “carrot” is a thinly veiled attempt to shame potential employers into doing the right thing—paying for interns’ work—but also has the advantage of educating employers on their legal obligations and potential legal exposure. Law schools can play an important role by taking a few simple steps, such as: (1) proactively take a position on unpaid internships after researching the law (reading this Article and others like it is a good starting point); (2) educate law school faculty, staff, and administrators on their view of the law and ask them to support the law school’s position; (3) educate law students on their legal rights—murky as they are, law schools can at least educate students to attempt to negotiate for a wage; and (4) make it crystal clear to prospective employers that they will not advertise unpaid positions (i.e., University of Maryland’s disclaimer).

B. Extend the Student-Learner Certification Exemption

Another option is to extend FLSA’s student-learner certification exemption to other types of student interns, including law students.²⁸⁰ The advantage of this approach is that certified learners would earn a wage, and employers would be free of the uncertainty of their present situation and the risk of future lawsuits. The disadvantage of this approach is that employers do not like red tape, and for many law firms, it will be business as usual. Law schools might be able to take on the task of obtaining certifications for law firms. The major downside of this approach is, however, that student learners must still be paid under FLSA, and even though it is sub-minimum

probably only has a single or small number of interns. The author thanks Professor Alan Morrison for pointing out these realities.

280. 29 U.S.C. § 214 (2006). *See also* Curiale, *supra* note 103 (setting forth a proposed rule that will create an explicit “intern-learner” exemption to FLSA, similar to the current “learner” exemption). *See* 29 C.F.R. § 520.300 (2012).

Student-learner means a student who is at least sixteen years of age, or at least eighteen years of age if employed in an occupation which the Secretary has declared to be particularly hazardous, who is receiving instruction in an accredited school, college or university and who is employed by an establishment on a part-time basis, pursuant to a bona fide vocational training program.

Id. Note that “student-learners” require a certification and are then allowed to be paid sub-minimum wages. *See generally* Employment of Fulltime Students at Subminimum Wages. *Id.* §§ 519.1–519.19 (2005) (stating rules for student worker certification).

wage, it is still 95% of the minimum wage.²⁸¹ It is unlikely that the “discounted” student-learner wage will incentivize employers to jump through the required certification hoops—they will likely choose to either pay the prevailing minimum rate or continue existing practices of hiring unpaid interns.

C. Expand the Law School Clinic Model

Law schools could also take on the task of expanding experiential learning to more closely approximate the real-world law firm experience. Law school clinics already play a significant role in that regard, but many prospective employers in the private sector probably want to hire law students with experience in an actual law firm or practice areas that are not necessarily found in clinics. One possibility for schools is the creation of law school nonprofit law firms, where law students can work with clients on a contingency basis but without the traditional clinic focus on indigent, under-represented groups. The focus instead would be on more typical for-profit law firm work. This proposal might reshape legal education to provide the apprenticeship and training that law firms traditionally provided to junior associates (and for which clients are no longer willing to pay). The law school for-profit externship also fulfills this role, but until Congress or the DOL regulate on this issue, these externships fall into the regulatory vacuum and are best avoided.

D. Refine FLSA’s Definition of “Employee” and “Employ”

The discussion thus far leads inexorably to the problem of definitions—the term “intern” is ambiguous and is not even a term used in FLSA, and the definitions of “employee,” “volunteer,” and “trainee” are ambiguous to the point of being unhelpful. Further complicating the issue are the various regulations, guidelines, DOL interpretations, and court cases.

The proposed Restatement of Employment Law goes so far as to exclude volunteers and interns from the definition of employee in employment laws: “[u]nless otherwise provided by law, an individual is a volunteer and not an employee *if the individual renders uncoerced services*

281. 29 U.S.C. § 214(b)(1)(A) (authorizing the Secretary of Labor to issue a regulation to provide a wage rate of not less than 85% of the otherwise applicable wage rate); 29 C.F.R. § 520.408 (setting rate at 95%).

*without being offered a material inducement.*²⁸² FLSA exempts public agency “volunteers,”²⁸³ and federal agencies have picked up the same terminology by exempting certain “volunteer” services.²⁸⁴ The problem with this terminology is that a volunteer is typically seen as someone working on an ad hoc basis for humanitarian or civic reasons, so it simply does not capture the reality of the modern intern. Similarly, the DOL’s definition of an intern under the six-factor test²⁸⁵ was developed to capture blue-collar railroad trainees, which was a short-term training program bearing scant resemblance to the modern intern. Somewhere in between falls the law-student intern at a nonprofit. They are a “volunteer” in one sense of the term, since they may often have humanitarian or civic motivations, but they are most likely also motivated by the same aspirations as any other modern-day intern—their internship will offer real-world experience, a boost to their résumé, and maybe even a job offer. Hence, a working definition of the modern intern is needed: one that can apply across industries and sectors, and one that fits law-student interns.

E. A New Working Definition of “Intern”

The final proposal is to create a new working definition of “intern” that the DOL and courts can apply to student interns in a variety of settings, including law-student interns working in the many settings described in this Article. A workable definition for all student interns should be easily applicable to law-student interns. The proposed Restatement of Employment Law’s exclusion of both volunteers and interns from its definition of “employee” has been critiqued by some employment law scholars for failing to define “intern” and an alternate definition has been offered:

An intern is someone whose uncompensated efforts primarily provide that person with tutelage and experience that are transferable in serving other persons or entities and do not to a material degree give value to the source of the tutelage or the

282. RESTATEMENT (THIRD) OF EMP’T LAW § 1.02 (Tentative Draft No. 2, 2009) (emphasis added), available at http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=31.

283. 29 U.S.C. § 203(e)(4)(A).

284. 5 U.S.C. § 3111(c) (2006).

285. See *Fact Sheet #71*, *supra* note 9.

source of the opportunity for experience that is greater than is the value of the intern's enhanced learning.²⁸⁶

It could be argued that the “primary benefit” test, employed by courts such as the Sixth Circuit, is a functional application of this definition. While that is fine for lawyers and interns in the Sixth Circuit—at least they know where they stand, sort of—other federal circuits apply different standards and different tests, so the lack of uniformity is a major problem. Even in jurisdictions applying the DOL's six-factor test, the stakeholders operate in a state of uncertainty because the DOL test is a Fact Sheet, not a regulation, and a federal court could decline to defer to the test at any time.

The proposed “intern” definition discussed above has the advantage of crossing statutory boundaries. The downside of a uniform definition is that it may not capture the purpose of each statute that employs the definition, so we must ask whether the proposed uniform definition captures the purpose of FLSA—we do not want a purely formulistic approach—and even as things stand, interns may lack protection in the courts because the courts are not necessarily focused on FLSA's underlying purpose to protect vulnerable workers from wage and hour abuse.²⁸⁷

CONCLUSION

Borrowing from the new governance theory, traditional top-down regulatory enforcement is not the only, or necessarily the most effective, solution and needs to be combined with other models of compliance and incentives,²⁸⁸ such as cooperation and collaboration among key stakeholders. Obviously, DOL enforcement and private litigation can be an effective deterrent to employers seeking to avoid paying for law student labor, but new governance theory teaches that a combination of self-

286. Dennis R. Nolan et al., *Working Group on Chapter 1 of the Proposed Restatement of Employment Law: Existence of Employment Relationship*, 13 EMP. RTS. & EMP. POL'Y J. 43, 56 (2009) (suggesting definition of “intern” under Comment (d) to Section 1.02).

287. Another way of saying this is: ‘why exactly do we think that Congress meant that employers are free to not pay workers?’ Alan Hyde, *Classification of U.S. Working People and Its Impact on Workers' Protection: A Report Submitted to the International Labour Office* at 127–28 (January 2000) available at http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/genericdocument/wcms_205389.pdf (“Why exactly do we think that Congress meant that employers are free to harass student interns sexually, and in what way is it a satisfying answer to be told that such interns are not common law employees?”).

288. See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (Oxford Univ. Press 1992) (arguing that regulation needs to find a new way to combine command-and-control regulation with deregulation).

governance, incentives, and deterrents are more likely to be a successful agent of change.

In the case of unpaid interns, a holistic approach should incorporate all key players—law firms, the ABA, state bars, law schools, law students, and the DOL should all have a voice. The ABA and state bar associations similarly have an important role to play in educating their members as to their legal and ethical obligations, which perhaps could be harnessed to gather data on the frequency and type of law firms using law students' free labor. Law schools also have an important role to play, mainly by educating students and prospective employers about FLSA and in advocating for their students to be paid "a fair day's pay for a fair day's work."²⁸⁹ Finally, law students can play an important role, possibly through their student bar associations. And, although the DOL's Wage and Hour Division has an important enforcement function, it also has the capacity and functions of educating and advising. The DOL Fact Sheet serves that purpose, but the DOL could also take the next step and use its rule-making power to promulgate updated regulations dealing with the various types of interns, upon notice and comment. But it is equally true that traditional regulatory and enforcement mechanisms need to be supplemented (not supplanted) by voluntary compliance efforts, which need to begin with education and awareness.²⁹⁰

289. 81 CONG. REC. 4,983 (1937) (statement of Pres. Franklin Roosevelt); S. REP. NO. 884-2475 at 2 (1937).

290. The author has previously advocated a new governance approach to using OSHA to address the problem of workplace bullying. Harthill, *supra* note 17, at 1303. The disadvantage to this approach under OSHA is the lack of a private cause of action to enforce OSHA and the paucity of the penalties under OSHA, none of which are obstacles under FLSA, which comes complete with a private cause of action, and appropriate civil penalties including liquidated damages and attorneys' fees.