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COLLEGE INTERNSHIP PROGRAMS AND THE FAIR LABOR STANDARDS ACT

by

Magdalena Lorenz*

INTRODUCTION

"A delirious fever-dream,"¹ "vivid and engrossing, teetering between trash and art,"² "a marvelous construction that's in line for multiple Oscar nominations,"³ were the words used by critics to describe the Fox Searchlight Pictures' production "The Black Swan." After the dance stopped and awards were handed out, the public got a glimpse behind the scenes of the acclaimed masterpiece. A complaint filed on behalf of two interns who worked on the movie set paints a far less alluring picture: "In misclassifying many of its workers as unpaid interns, Fox Searchlight has denied them the benefits that the law affords to employees, including unemployment and workers' compensation insurance, sexual harassment and discrimination protections, and, most crucially, the right to earn a fair day's wage for a fair day's work."⁴

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A case pending in the Southern District of New York, Glatt v. Fox Searchlight Pictures Inc.,\(^5\) has intensified a national debate over the question of whether for-profit employers can lawfully benefit from the work of unpaid interns. The litigation is proliferating.\(^7\) The question has gone without clear guidance from courts for decades. In 2010, the U.S. Department of Labor ("DoL") stirred up controversy by issuing guidelines for internship programs.\(^7\) The guidelines include a requirement that the employer cannot derive any "immediate advantage" from the activities of the intern, if the intern is not being paid minimum wage and overtime.\(^8\) While college administrators and employers are grappling with the question of how to structure their internship programs without running afoul of the Fair Labor Standards Act ("FLSA") and state employment regulations, the current cases may soon provide some answers.

This article (i) reviews the statutory framework and the Supreme Court jurisprudence with respect to the FLSA as it pertains to unpaid interns at for-profit businesses; (ii) discusses how the DoL approached the question of the unpaid interns in the past; (iii) compares the position of the DoL with the stance the courts have taken on the issue; (iv) considers current litigation brought by college interns; and (iv) discusses how schools and employers are responding to the changing legal environment while arguing that from the public policy perspective, the best approach may be a blanket requirement that interns who perform productive work for the employer should be classified as "employees" under the FLSA. The focus of the controversy and this article is internship programs in for-profit settings. Unpaid internships in public sector and non-profit organizations do not create the same issues, as both the FLSA and the DoL apply different standards to such employers.\(^9\)

The article focuses on the FLSA\(^10\) requirements because they potentially affect every single student who does productive work for an employer. Minimum wage and overtime provisions are also the basis for the recent litigation, which can potentially alter how internship programs are structured. It is worth mentioning, however, that the issue of whether college interns should be classified as "employees" has legal consequences beyond the impact of the FLSA. It affects the interns' ability to seek protection under other employment laws, including antidiscrimination provisions of Title VII, Americans with Disabilities Act and unemployment and workers' compensation statutes.\(^11\)

**THE STATUTORY FRAMEWORK AND SUPREME COURT JURISPRUDENCE**

The FLSA requires all covered employers to compensate employees at least the statutory minimum wage\(^12\) and overtime for hours worked in excess of forty in any given week.\(^13\) The statutory scheme explicitly contemplates that certain employees-in-training may be paid less than minimum wage.\(^14\) Congress gave the Secretary of Labor a broad mandate to write regulations allowing the employers to pay less than minimum wages to learners and apprentices.\(^15\) Under the relevant regulations, upon filing a certificate with the Secretary of Labor, an employer will be allowed to pay up to 25% less than the prescribed minimum wage if the employee is a "student-learner."\(^16\) A "student learner" is defined as a student "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."\(^17\) A vocational training program is one that teaches "technical knowledge and related industrial information."\(^18\) A typical college intern would not fall into that category. The significance of this provision, however, is that it shows that the
legislators have contemplated giving a break to employers who employ students requiring training. There is a mechanism under which the Secretary of Labor could relieve employers from paying minimum wage to college interns. If such breaks are not provided, it is by choice of the Secretary of Labor and not by the DoL being oblivious to reality.

The FLSA also contains a number of complete exemptions from minimum wage and overtime provisions, but no exemption applicable to interns. One exemption relieves employers from paying minimum wages and overtime to professional and administrative employees. The related regulations and DoL interpretations of this particular exemption, however, require that the employees must meet certain tests regarding their job duties and be paid a salary of no less than $455 per week. Consequently, even when the employer assures that the intern performs absolutely no menial work, this exemption would be completely irrelevant with respect to unpaid college interns.

Whether an intern is entitled to minimum wage has therefore been interpreted to depend on whether the intern is an “employee” within the meaning of the FLSA. Under the FLSA, an “employee” is “any individual employed by an employer” - a perfect definition to leave for the courts to interpret. The term “employ” means to “suffer or permit work.” It has taken the courts over seven decades to unpack the definition, and we still do not have a clear answer how to apply it to college interns.

Over 60 years ago the Supreme Court created a precedent which many employers have taken as opening a door to a wholesale exclusion of interns from the definition of “employees.” Walling v. Portland Terminal Co. involved a training program for individuals who wanted to be certified as qualified brakemen in a shipping yard. The training program lasted about a week. During that week, the individuals would follow and observe yard workers of Portland Terminal and eventually be permitted to do actual work under the workers’ close observation and supervision. Upon successful completion of the course, the names of the trainees were placed on a list of certified brakemen. When the company had to hire new brakemen, the new employees came from that list.

The Court held that the individuals who participated in the training should altogether be excluded from the definition of “employees.” The court reasoned that an individual whose work serves “only his own interest” cannot be treated as an employee of the person who provides him with instruction. Had the individuals taken a similar course at a vocational school, it would be absurd to treat them as employees of that school and require the school to compensate them. The railroad was not deriving any “immediate” advantage from providing the training.

Never again did the Supreme Court look at the definition of “employee” in the context of a training program or a situation which would resemble a college internship program. When called upon to clarify the concept of employment under the FLSA in distinguishing between employees and independent contractors, the court has considered a variety of factors, basically looking at the totality of circumstances. The totality of circumstances approach has crystalized into a multi-factor test. When asked to distinguish between employees and volunteers at a non-profit organization, the Court used an “economic reality” test. The facts of the cases which distinguish employees from independent contractors or employees from volunteers are so different from the circumstances surrounding a typical college internship that those cases are of little help.
The bottom line is that the FLSA does not have an exemption for interns. There is no guidance from the Supreme Court whether and when employers could exclude interns from the definition of “employees,” just a single case involving a week-long program for certification as a brakeman at a railroad yard. Is that enough for legions of employers to justify not paying their interns?

THE POSITION OF THE U.S. DEPARTMENT OF LABOR

The DoL took the facts of Portland Terminal, cut the opinion into bits and pieces and crafted a six-factor test to determine when an intern or trainee could be excluded from the definition of “employee.” In effect, if the internship program does not look exactly like the Portland Terminal case, the DoL has consistently taken the position that the intern should be paid, especially when the employer in question is a for-profit entity.

The test, hereafter referred to as the “DoL test,” has appeared in opinion letters issued by Wage and Hour Administrator responsible for the oversight of the minimum wage and overtime provisions of the FLSA since at least 1967 and in Wage & Hour Division’s manual since 1975. The most recent reincarnation of the DoL test has been quoted from the “Fact Sheet # 71: Internship Programs Under the Fair Labor Standards Act” (the “Fact Sheet”) published in 2010.

The Fact Sheet made its way to colleges and employers and stirred a significant amount of controversy, as discussed below, although the DoL test has been around for quite a while. It is notable that the DoL makes it clear that this test is to be applied to interns working for “for profit” employers. The FLSA contains an exception for volunteers at governmental agencies and private non-profit food banks. The Wage and Hour Administrator also recognizes an exception for volunteers at non-profit organizations. The aforementioned Fact Sheet explicitly states that “unpaid internships in the public sector and for non-profit charitable organizations are generally permissible.”

The DoL has applied the test quite consistently in evaluating various training programs fashioned by employers. The DoL has also been generally consistent in insisting that all six factors of the test must be met, or the trainee falls within the scope of FLSA protections. What particularly stirred up the controversy when the Fact Sheet was published was the factor requiring that the employer could not derive any immediate advantage from the services provided by the intern. A plain reading translation of that factor leads to the conclusion that it does not matter whether the intern is doing substantive work and learning skills which she can transfer to another setting; or whether the intern performs completely menial duties, filing and answering telephones. If the employer has any actual use for the product of the intern’s work, the factor cannot be met and the intern has to be paid. As reiterated by Nancy J. Leppinck, a one-time acting director of the Wage and Hour Division: “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.”

Until 2009, an employer who had questions regarding compliance with the FLSA could formally ask the Wage and Hour Administrator for an opinion. The Wage and Hour Division, after reviewing the facts, would issue and publish an opinion letter. Research of opinion letters currently available at the DoL’s website revealed only one situation where a quasi-
intership program passed the muster of the DoL Test. The program involved students “shadowing” employees of the sponsor organization for one week. The purpose of the program was to expose students to various careers. The students did not receive college credit for participating in the program. They did not work for the employer, although they would sometimes be asked to perform small office tasks. In sum, short of student interns whose principle task is “shadowing” employees, it is really hard to conceive any internship program in a for-profit setting which would relieve the employer from paying the interns minimum wage and overtime, unless the employer is ready to pick a fight with the DoL.

The Wage and Hour Administrator no longer issues opinion letters since a slight difference in facts may result in a different interpretation of the law, and the Wage and Hour Division believes that responding to fact-specific inquiries is not the best use of the DoL’s resources. The Administrator also reserves the right to update and withdraw a ruling or an interpretation. A couple of older opinion letters from the mid-1990s, not currently available on the DoL’s website, suggested that the situation was not so clear-cut when the school sponsored the internship program and the intern was receiving college credit for the experience. In such a situation, the older opinion letters suggested that the Administrator may weigh whether the productive value of work performed by interns outweighs the burden of training suffered by the employer. As recent litigation shows, despite the guidance provided in the Fact Sheet, more recent opinion letters, and public statements made by the Secretary of Labor, some employers see college credit as a shield against the FLSA.

It is worth mentioning that state departments of labor have followed the example set by the DoL. It has been reported that officials in California, Oregon and New York stepped up enforcement efforts. The New York State Department of Labor (the “NYDoL”), for example, has come up with its own “fact sheet” and a twelve-factor test. The test incorporates the six DoL factors plus adds another six, thus assuring that virtually no internship program in New York in a for-profit setting could feasibly escape the reach of New York’s employment laws. On the issue of college credit, the New York fact sheet explains that if an academic institution awards credit for the internship, it is considered to be SOME evidence that the internship is for the benefit of the student rather than the employer, one of the twelve factors to be satisfied.

DoL’s opinion letters and fact sheets do not have the force of law. The position taken by the DoL may change overtime due to new court rulings inconsistent with DoL’s interpretation or even due to change in the administration and the priorities of the agency. In sum, however, given the more current pronouncements of DoL’s position, any for-profit employer who offers unpaid internships, whether they are for college credit or not, is exposing itself, at a minimum, to a DoL investigation.

THE POSITION OF THE COURTS

While the stance of the DoL has been generally clear and consistent, the judicial interpretation of the FLSA on the issue has been anything but. After Portland Terminal the High Court has not revisited the question of how trainees should be treated under the FLSA. The Court has interpreted the meaning of the term “employee” in the context of distinguishing “employees” from “independent contractors.” The Court has also considered whether volunteers at a non-profit foundation should be considered employees. A modern day college intern at a for-profit business has never appeared as a plaintiff before the Supreme Court.
Would the decision of the court have been different had Wardlaw paid the two women nothing instead of $12 per week? That would seem like a perverse result. And yet, that must be the belief of scores of employers today who offer unpaid internship programs.

Subsequent to Wardlaw, in the last half a century circuit and district courts were faced with a plethora of cases which considered the Portland Terminal precedent and the six factor DoL test, but none of these situations involved college interns working in an office setting. The cases discussed e.g. trainees in a flight attendant school, children working in a school cafeteria, homeless undergoing job skills training or individuals undergoing training at companies selling snacks and knives. What clearly emerges from these cases is that the courts are split on how Portland Terminal precedent or the DoL test should be applied. Three different approaches to the issue emerge from the review of court cases: (i) accept the DoL test, as described above, as the standard for determining whether a trainee is an employee; (ii) reject the DoL test and inquire whether the employer or employee is the primary beneficiary of the trainee labor and (iii) employ an "economic realities" test, which uses the DoL factors, but does not require that all six factors be satisfied. Some courts clearly take one of the above approaches; other courts analyze the cases under more than one of the tests.

Courts Accepting the DoL Test

If the case is brought in the Fifth Circuit, the court will likely examine all six criteria of the DoL test and require that the employer satisfy all of them in order to escape the definition of employee. For example, in Atkins v. General Motors Corp., the corporation designed a course of study for workers at a manufacturing plant. The classes were
conducted either by the State of Louisiana or by General Motors on its premises outside normal working hours. The court applied all six factors of the DoL test, including the requirement that the employer did not derive any immediate advantage from the trainees' work. In essence, the trainees were not to perform any productive work during the training.

Similar analysis was performed by the court in Donovan v. American Airlines, which involved future flight attendants attending classes at American's Learning Center. Affirming the dismissal of the trainees' case, the court observed that all six criteria of the DoL test were satisfied.

The Primary Beneficiary Test

If your case comes up in the Fourth or the Sixth Circuit, the court will use the primary beneficiary test. The test essentially looks at the totality of circumstances to determine who benefited more from the work of the trainee: the organization or the trainee. In a recent case Solis v. Laurelbrook Sanitarium and School, Inc., the court surveyed various approaches taken by courts to determine whether a trainee is an employee and ultimately rejected the DoL test, finding it to be "a poor method for determining employee status in a training or educational setting." Laurelbrook Sanitarium involved a school established by the Seventh-Day Adventist Church, which embraced the view that education should have a practical training component. As part of the learning experience, students were assigned to kitchen, housekeeping or CNA training programs at a sanitarium run by the school. On balance, the court found that the greater benefit from the work of the students was to the students themselves and not the school.

The primary beneficiary test was also used in cases where the employer was not the school itself, but a for-profit business. In McLaughlin v. Ensley, a snack food distributor required its employees, prior to paid employment, to work for a week assisting regular routemen as part of "training." The "training" was found to be of primary benefit to the employer rather than trainees, who were entitled to minimum wage.

The Economic Realities Test

If the case comes up in the Ninth or the Tenth Circuit, the court will use the economic realities test. Under this test, the court will apply the six factors of the DoL test, but will not require the employer to comply with all the factors. The Ninth Circuit discussed the test in a recent case, Harris v. Vector Marketing Corp., where plaintiffs were required to undergo a three-day marketing training to become sales representatives selling knives. Similarly, the Tenth Circuit examined all six factors of the DoL test to determine whether potential firemen undergoing training were "employees" within the meaning of the FLSA. The employer satisfied all but one of the factors (all trainees expected to be employed after completion of the training); the court concluded that the trainees cannot win just because of this one factor and dismissed the case.

Summary

On balance, there is: (i) no single opinion dealing with a situation of an intern working without pay in an office setting at a for-profit business; (ii) one case involving what today could be called "interns", who did expect to get paid and won; (iii) a plethora of cases involving various types of trainees and volunteers, where courts struggle what test to apply in evaluating whether these trainees and volunteers are "employees;" and (iv) one circuit following the DoLs approach...
to require application of the six-factor DoL test with all six prongs of the test satisfied.

Courts are increasingly focusing the debate on which test to apply and how much deference should be given to the DoL in evaluating these cases. In the pursuit of the right “test”, the perfect measurement, the courts and commentators seem to be losing the forest for the trees. There is no statutory exemption for college interns under the FLSA. That should be a starting point for any discussion on whether a trainee or intern should be compensated for work performed. In the words of Justice Sotomayor, evaluating the Pathways to Employment Program,

[The] question of whether such program should be exempted from the minimum wage laws is a policy decision either Congress or the Executive Branch should make...[The] Court... cannot grant an exemption where one does not exist in law.83

Where a typical college intern performs substantive work which has a direct economic benefit for the employer, there is no sound reason based on the plain reading of the statute to exclude the internship program from the coverage of the FLSA. In particular, it is troubling to see how the old Portland Terminal case got transformed by some lower courts into a “primary beneficiary test” where the company pays the trainee only if the company gets more out of the work of the trainee than the trainee out of the training. The statute clearly contemplates paying trainees for the work performed, albeit allowing the employer under certain circumstances, to pay less than the minimum wage.84 The “balancing of interests” as a sole measurement whether the trainee should be paid is a pure invention of a couple of circuit courts. The proper focus should be whether the trainee performs any productive work for the employer. If so, the trainee is an “employee” under the FLSA Plain and simple.

RECENT LITIGATION

When it rains, it pours. While there are no published opinions addressing college internship programs up-to-date, there are currently three such cases pending in New York. Two of the cases have been brought in federal court under the FLSA.85 The one in state court involves New York employment law statutes,86 and, therefore is beyond the scope of this article. The spur in litigation may be due to the DoL’s recent focus on college internship programs, the issuance of the Fact Sheet #71 in an effort to educate the employers and schools, and the resulting increase in national debate about the legality of unpaid internships.

The first case, Glatt v. Fox Searchlight Pictures Inc. involves two college interns who worked on the production set of The Black Swan.87 Eric Glatt was an accounting intern who worked for several months full-time under the supervision of the employees of the accounting department. When the film shooting ended, he continued interning there on a part-time basis.88 Glatt was not getting college credit for his work.89 The complaint alleges that he did not get paid for his work, other than for one single Sunday, when he worked for 12 hours. Glatt worked hand-in-hand with the accounting staff. His duties included filing, mailing and purchasing office supplies and snack foods.90 The second plaintiff in the case, Alex Footman, worked as an office production intern for about five months.91 His duties included preparing coffee, taking and distributing lunch orders, running errands and miscellaneous secretarial work.92 On many occasions, he worked overtime.93 He never got paid for the work performed.94 Instead, University of Maryland granted him college credit for the internship, for which he presumably paid tuition to the school.
The two were not the only unpaid interns on the set. The complaint alleges that Fox Searchlight is profitable due, in part, to lowering film production costs by employing a steady stream of unpaid interns on the sets.\(^9\) The plaintiffs seek a class-action certification, which would make the lawsuit a worthwhile endeavor for their attorneys. One reason why there have not been much litigation surrounding unpaid internship programs is that individual interns do not have much to gain by bringing a law suit.

Since the lawsuit hit the news in 2011, the plaintiffs have successfully added another defendant, Fox Entertainment Group, Inc., of which Fox Searchlight is a unit.\(^9\) Several other plaintiffs joined the litigation, including Eden Antalik, who worked in the publicity office of Fox Entertainment Group and Kanene Gratts, who was employed in the production of the movie *300 Days of Summer*.\(^9\) The lengthy discovery process was completed mid-January 2013.\(^9\) The court is scheduled to reach a decision whether to certify the case as a class action in May 2013.\(^9\) No trial date has been set.\(^9\)

The plaintiff in the second case is Xuedan Wang who worked as the "Head Accessories Intern" at *Harper's Bazaar*, a publication of Hearst Corporation.\(^10\) She was employed for about five months, according to a set schedule, on occasions working over 40 hours a week.\(^10\) Her responsibilities included coordinating pickups and deliveries of samples between the magazine and outside vendors, showrooms and public relations firms, maintaining records of the samples kept by the magazine and assisting at photo shoots.\(^10\) The interesting development in this case is that the magazine apparently believed that Wang was earning college credit doing this. Wang, who had presented some evidence to Hearst's human resources department that she would be enrolled at Ohio State University to receive credit for her internship, eventually did not do that.\(^10\)

Hearst's position is that if a student is getting college credit for an internship, that should create a presumption that the internship is for the benefit of the student rather than the employer.\(^10\) The defendant is arguing that the "primary beneficiary" test, as discussed above, applies in college internships.\(^10\) Consequently, Hearst makes it a prerequisite for all interns to be registered for college credit. Many employers follow that practice. The defendant seems to believe that that requirement shields Hearst from application of the FLSA. In an interesting twist, Wang's attorneys contended that tuition payments amounted to an unlawful deduction from wages, and interns should be reimbursed for such payments.\(^10\) The judge was not convinced by their arguments on that point and dismissed that portion of the complaint.\(^10\)

So far, a number of interns have joined the *Hearst* class action and another plaintiff, Erin Spencer, has been included as a lead plaintiff.\(^10\) The discovery process is still in progress, to be completed by the end of January 2013, with the trial to take place during the summer of 2013.\(^10\)

The question whether an intern is an employee within the meaning of the FLSA is a question of law to be determined by the courts. It is to be hoped that either the *Glatt* or the *Hearst* court will answer the question and provide guidance for employers and schools on how to lawfully structure their internship programs.

The Southern District of New York Court has already faced the question of whether a trainee should be viewed as an employee and answered it in the affirmative. In *Archie v. Grand Central Partnership*,\(^11\) plaintiffs, formerly homeless and unemployed individuals performed clerical, administrative,
maintenance, food service and outreach work as part of a "Pathways to Employment" program run by the defendant. The defendant argued that the plaintiffs were not employees but rather trainees receiving essential basic job skills and counseling. Justice Sotomayor examined how the training program complied with all six factors of the DoL test and found that the program failed to comply with several of those factors. Next, the court determined that although trainees did receive some benefit, the greater benefit went to the employer. Finally, the court focused on the "economic reality" of the situation, in particular whether the plaintiffs expected compensation and whether the defendant gained an immediate advantage from the trainees' labor. The court concluded that the defendant structured a program that required the plaintiffs to do work that had a direct economic benefit to the defendants. That made the trainees "employees."

The current cases differ from Archie v. Grand Central Partnership principally in two respects: (i) the interns for Fox and Hearst knew from the beginning that these were unpaid internships and (ii) some of the interns were receiving college credit for their work. The expectation of the trainee with respect to pay is a factor that courts and DoL will consider, but it is not determinative. One of the goals of the FLSA is to eliminate the competitive advantage an employer who uses unpaid labor has over a competing business who complies with wage and hour regulations. Furthermore, there is the obvious concern that employers can use superior bargaining power to coerce employees to waive protections of the FLSA.

With respect to the college credit issue, for Hearst the fact that an educational institution grants college credit should constitute objective evidence that the internship provides an educational experience. Whether an internship provides an educational experience is, in fact, a crucial question that the school should answer when evaluating the internship for credit, but it is not the proper inquiry for the employer to rely on when deciding whether to classify the intern as an employee or not. The educational assessment by the school is a separate question from the classification of an intern by the employer under the FLSA. When assessing the internship for credit, the internship coordinator should look at whether the intern is going to be doing substantive work rather than performing menial tasks. The coordinator should assess whether the intern will be gaining skills which can be carried over to another job, rather than learning about the employer's operations. That will be enough to earn college credit. The statute and case law suggest that when a trainee is doing substantive, productive work for the employer, that trainee should be paid. The result should not be different when the trainee is required by the employer to register for college credit and labeled an "intern." Merging the inquiry of whether the internship is worthy of college credit (performed by the school) with the inquiry whether the intern is an "employee" within the FLSA (performed by the employer) would be a policy mistake and set a dangerous precedent, effectively making the colleges guardians of FLSA compliance.

From the public policy perspective, it would be detrimental if the court bought into Hearst's argument that educational credit creates a presumption that the internship is for the benefit of the intern rather than the employer. As a result of practices of companies like Hearst, students who want to break into industries such as publishing or entertainment are effectively arm-wrestled by the employers into paying tuition for credit whether they need that credit for graduation or not, just so the employer can wield that college credit as a shield against the FLSA and other employment laws.
RESPONSE FROM COLLEGES AND EMPLOYERS, AND THE CHANGING REALITY

The recent enforcement efforts on the part of DoL, as well as current litigation have stirred controversy among both employers and colleges. The National Association of Colleges and Employers ("NACE"), an organization representing campus recruiting and career services professionals, has openly criticized the six-factor DoL test, in particular the requirement that the employer derive no immediate advantage from the activities of the intern. \(^{121}\) The organization approvingly cited the primary beneficiary test and proposed its own set of factors to determine whether "experience" can be considered a legitimate internship. Once the school determines that the experience qualifies as a creditworthy "internship," the employer would classify the student as an "intern" rather than "employee" and would be free not to pay the intern. If one followed the NACE approach, the decision whether to pay or not pay the intern would be left with the college internship coordinators. Once the college coordinator decided that credit could be granted for the experience, the employers would effectively be off the hook with respect to compliance with the FLSA and other employment laws.

Using college credit as a proxy for whether an intern is or is not an "employee" within the meaning of the FLSA is a flawed approach for the reason that educators generally do not have training in the application of employment laws and are poorly positioned to be the judges of compliance, even if they had appropriate training. Internship coordinators are generally not even aware that their classification of a position as an "internship" may have profound employment law consequences for the employer and for the student. Internship coordinators should be interested in what the student is going to learn during the internship experience; what kind of transferable skills the student will acquire; whether the student will be working on substantive assignments and gaining knowledge of the industry or doing menial work, such as filing and answering phones. If the work is substantive rather than menial, the school will coordinate with the employer in enabling the student to receive college credit for the experience. \(^{122}\) My assessment of the "creditworthiness" of the internship is completely separate from the employer's assessment whether the intern is an "employee" within meaning of the FLSA. To collapse these assessments into one would have detrimental effects for our students.

Why is that? As it is, not many students can afford the luxury of an unpaid internship. When employers, such as Hearst, take the position that college credit creates the presumption that the intern is not an "employee", such employers require students to enroll for credit for the duration of the internship. Now the student not only has to work for free, but the student also has to pay tuition expenses for the privilege of working. Seems like a win-win situation from the perspective of for-profit employers and colleges, considering that many colleges today operate like businesses. Thirteen universities, including New York University, issued a letter to the DoL asking the government to cool down recent regulatory enforcement efforts with respect to internships. \(^{123}\)

Why would some schools care whether interns are classified as "employees" under the FLSA or not? Since wages should neither enhance nor diminish the educational value of the experience, one would think that schools would be neutral or even supportive of the DoL's efforts. Once the employer pays the intern, the employer does not require the intern to register for college credit. Unless the student needs those college credits to graduate, as in the situation where the college made the internship a mandatory part of the program, the
student now has no incentive to register for credit and pay tuition to the school. Some commentators point out that the schools may have ulterior motives in expanding their internship programs. Internships can help the schools’ bottom line, allowing schools to charge tuition without needing faculty to conduct classes. Whatever motivates some universities like NYU to criticize the enforcement efforts of the DoL, one thing is for certain: when an employer requires a student to register for college credit while interning, it is the tail wagging the dog. And, that is the current result of the interpretation that college credit creates a presumption that the intern is not an “employee.”

All can agree that work experience before graduation benefits students and helps them get a job once they graduate. There is no evidence, however, that unpaid work experience is any more “educational” than paid work. Carving out an exception to FLSA requirements for “interns” does not find any justification from either public policy perspective or plain reading of the statute. Neither does application of “the primary beneficiary test” in the situation where an intern works for a for-profit employer. When an intern working full-time, performing productive work for an employer, is also registered for college credit, both sides arguably benefit. How does one measure whether the college credit is worth more to the intern than the productive work performed by the intern is worth to the employer? A simple approach mandating compliance with minimum wage requirements whenever an intern performs productive work for the employer, other than de minimis in value, seems to make the most sense. Adopting such an approach would likely eliminate some internship opportunities for students, but may also open some paid employment opportunities for others. Having no guidance from the courts and many inconsistent approaches certainly do not benefit anyone.

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1 Lou Lumenick, On pointe!, N. Y. Post (Dec. 2, 2010), at http://www.nypost.com/p/entertainment/movies/portman_is_swan_derful_in_dance_FnEpfl1zTfSi6q8MvNntI.
5 Id.
8 Id.
9 See id., explaining: “The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.” “WHD” refers here to the Wage and Hour Division of the DoL. The Wage and Hour Division is the part of the DoL in charge of administering and enforcing minimum wage and overtime provisions of the FLSA.

2. §206 (2012).

3. §207 (2012).


5. §214(a) (2012).


7. Id. at 5.


10. Yamada, supra note 11, at 228, citing various Opinion Letters issued by the Wage and Hour Division and evaluating training / internship programs; see also e.g. Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518 (6th Cir. 2011) at 524, where the Secretary of Labor urged the court to apply all six prongs of the DoL test to evaluate training programs run by a nonprofit school; the court ultimately rejected the all-or-nothing approach advocated by the Secretary of Labor.

11. See National Association of Colleges and Employers, A Position Statement on U.S. Internships (July 2011) available at http://www.naceweb.org/connections/advocacy/internship_position_paper/, stating that “In the 2010 NACE survey, both career services and employers agreed with five of the six FLSA criteria; both groups disagreed with the criterion that the employer derives no immediate advantage from the activities of the student.”


15. Id.


17. See e.g. Memorandum in Support of Defendant’s Motion to Strike the Class and Collective Action Allegations at 13, Wang v. Hearst Corp., No. 12 CV 00792 (S.D.N.Y. Feb. 1, 2012), stating that “internships for college credit are presumptively lawful.”

18. Greenhouse, supra note 42.

may actually be impeded; 5. The internship is not necessarily entitled to a job at the conclusion of the internship; and 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.
65. Id.
66. See e.g., supra note 32.
67. Supra note 34. In the aftermath of this decision Congress has amended FLSA to include an exception for volunteers. U.S.C. §203(e)(4)(A). DoL promulgated regulations to define who is a “volunteer” 29 C.F.R. § 533.10(a). Consequently, interns at public agencies and not-for-profit could in many instances fall within the “volunteer” exception. There is no “volunteer” exception for for-profit employers.
68. See e.g. supra note 36 at 1026-27; and supra note 61.
69. See e.g. supra note 59, applying all six factors of the DoL test and the economic realities test.
70. Supra note 62.
71. Id.
72. Supra note 57.
73. Id.
74. See e.g. supra note 60; Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518 (6th Cir. 2011).
76. Id. at 525.
77. Id. at 520.
78. Supra note 60.
79. Id.
80. Supra note 61.
81. Supra note 36.
82. Id.
83. Supra note 59 at 508.
86. See Greenberg, supra note 6.
87. Supra note 4.
88. Id.
89. Id.
90. Id.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
97. Id.
99. Id.
100. Id.
102. Id.
103. Id.
105. Id. at 13.
106. Id. at 2.
107. Id. at 24.
I. Introduction

Consider the following hypothetical.

A vegetarian living in a small coastal New England town decides to open a restaurant, named Veggies, that only serves salads and soups. The freshness of these menu options is going to be Veggies's biggest selling point and it advertises accordingly: nothing processed, canned or shipped from out of state will do. To ensure freshness, Veggies negotiates supply contracts with local farmers all within the state.

*KATZENBACH V. McCLUNG REVISITED: HOW THE RENQUIST AND ROBERTS COURTS WOULD HAVE DECIDED THE CASE*

by

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with

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***This article arose from an Independent Study conducted by Attorney Jannetty who is the primary author of this article. Dr. McEvoy suggested the topic which arose out of a discussion in the course The Supreme Court in the 1960's. McEvoy presented the paper at the 2012 NEALSBS meeting and edited the article for publication.*