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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 the purpose of the FLSA 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 student interns have long been a well-utilized labor source in the non-profit 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 resume, and may be able to engage in valuable networking during the internship. The internship may also lead to a full-time paid position either at the company where she interns or through the networking 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 gets work done for free. In fact, for some non-profits, unpaid internships enable their doors to stay open and they likely cannot function without them.

This mutually beneficial arrangement is also common in the legal field. Law students across the United States, for example, earn law school credit while undertaking supervised externships in non-profit legal service organizations and federal, state and local government agencies.³ But, this

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¹ 29 U.S.C. § 201, *et. seq.* (2006).

² May 24, 1937, 81 Cong. Rec. 4983, 75th Cong., 1st Sess., Sen. Rep. No. 884 on S. 2475, July 6, 1937, p. 2.

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 workplace arrangements and this Article will adopt that term, in part because it helpfully distinguishes school-sponsored arrangements from non-school-sponsored and non-credit bearing private arrangements between law students and for-profit law firms. This Article

source of free labor has become increasingly prevalent in for-profit law firms, both in credit-bearing school-sponsored externship arrangements⁴ and in private non-school sponsored arrangements.⁵ The two-fold 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 foot-hold in the labor market by offering their services for free in exchange for a networking and resume-building experience.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 paid summer associate positions 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. Obviously, the rate of pay and the opportunities have always been dependent upon the rank of the law school, the rank of the law student and other factors, but 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

will adopt the term “unpaid law student intern” to refer to the latter arrangement. The problem of definitional ambiguity is addressed in Part IV, *infra*.

⁴ Bernadette T. Feeley, *Examining The Use Of For-Profit Placements In Law School Externship Programs*, 14 *Clinical L. Rev.* 37 (2007) (papers presented at the "Externships 3: Learning from Practice" Conference) (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 (2010) (Papers From The Externships 4 & 5 Conferences). *See also* Ogilvy, J. P. and Basu, Sudeb, *Externship Demographics Across Two Decades with Lessons for Future Surveys* (2012). CUA Columbus School of Law Legal Studies Research Paper No. 2012-5. Available at SSRN: <http://ssrn.com/abstract=2038455>. The Ogilvy and Basu survey of law student externships found: “From the 2007-2009 data, on average, 119 full-time students per school enroll in externship courses each academic year. The average closely tracks the ABA-LSAC average of 118. Turning to part-time students in the 2007-2009 survey, on average, 35 part-time students enroll in externship courses each year. The ABA-LSAC average is close, at 28.” *Id.* at 4-5.

⁵ The term “law firm” is used to encompass both multi-attorney law firm and solo practitioners, as well as the in-house legal departments of non-law-firm 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.*, National Association of Colleges and Employees (NACE) Edwin Koc, *Intern Hiring Up 8.5 Percent* (February 28, 2012), http://www.nacweb.org/Press/Releases/Intern_Hiring_Up_8_5_Percent.aspx?referer=knowledgecenter&menuid=109 (employers taking part in NACE’s 2012 Internship & Co-op Survey report plans to increase internship hires by 8.5 percent over the last year). For an excellent overview of the various types of internships and the “explosion” of internships in the U.S., see ROSS PERLIN, *INTERN NATION* (VERSO 2011).

pleadings, and assisting licensed attorneys in witness and client interviews and other matters. Law students were sometimes paid to attend depositions and hearings as a note-taker or observer. But the legal market has changed, jobs are scarce and law students and law graduates are plentiful, and as a result, today's law students are increasingly doing this same type of work for free. Despite the increase in unpaid law student interns, very few judicial opinions or legal commentators have specifically focused on this issue,⁷ which is sometimes referred to as 'wage theft.'

This Article attempts to fill that gap by examining the legality of private arrangements between law student workers and for-profit law firms, in unpaid 'internships' where the law student is not sponsored through a law school and does not earn any law school credit. The Article ultimately concludes that these arrangements violate both the statutory terms and the Congressional purpose of the minimum wage and maximum hour requirements of the Fair Labor Standards Act. Although the focus of this Article is on the wage theft of law students by law firms, other legal and ethical implications are also briefly addressed. 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.

The Fair Labor Standards Act exempts certain volunteers from its minimum wage and overtime provisions,⁸ and the U.S. Department of Labor has issued guidelines on whether interns are exempt.⁹ The Department of Labor ("DOL" or "Department"), Wage and Hour Division guidelines provide, *inter alia*, that unpaid internships are only lawful in the

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 (2012); Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 147 (2006) (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 the FLSA: (1) whether the putative employee was hired and whether the employer controls the work); David Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215 (2002); David Gregory, *the Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227 (1998). See also Feeley, *supra* note 4; Backman, *supra* note 4.

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

⁹ U.S. Dept. of Labor, Wage and Hour Division,

context of an educational training program, when the interns do 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 Department of Labor rules regarding what constitutes exempt volunteer work are not uniformly applied by the courts.¹¹ On the other hand, some law firms may simply be unaware of the existence of the Department's guidelines and have likely never considered the applicability of the DOL test to their internship situations.

In recent years, however, Plaintiffs' attorneys have been paying more attention to FLSA wage and hour discrepancies, and federal courts have experienced an ever-increasing volume of FLSA lawsuits alleging unpaid overtime and minimum wage violations, principally based on claims that workers have been misclassified 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 Southern District Court of New York is illustrative of the attention that the intern issue is starting to receive in other sectors - intern Xuedan Wang seeks to represent a class of hundreds of unpaid interns at Heart Magazines, which publishes Harper's Bazaar, Cosmopolitan, Seventeen and Good Housekeeping.¹³ The same law firm also filed a class action in 2011

¹⁰ See DOL Wage and Hour Opinion Letter, 2006 WL 1094598 (April 6, 2006); U.S. Dep't of Labor, *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act* (Apr. 2010).

¹¹ See Discussion, Part __, *infra*. See also Yamada, *supra* note 7, at __; Gregory, *supra* note 7 at __; Rubinstein, *supra* note 7, at __. 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 Department of Labor has a renewed interest in unpaid internships, the courts' application of the six-factor DOL criteria is mixed). See, e.g., Seth Gilbertson and Stefan Eilts, *Internship and Externship Programs Under the Fair Labor Standards Act* (September 28, 2012, 11:35 AM), <http://counsel.cua.edu/fedlaw/nacuanoteinternshipexternshipFLSA.cfm>.

¹² Bloomberg BNA, Human Resources Report, "FLSA Lawsuits Hit Record High in 2012, Continuing Recent Trend of Sharp Growth," (Aug. 6, 2012) (reporting data) (internal citations omitted), 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 U.S. Department of Labor, Wage and Hour Division, BRIDGE TO JUSTICE: Wage And Hour Connects Workers To New ABA-Approved Attorney Referral System, <http://www.dol.gov/whd/resources/ABAReferralPolicy.htm> (last visited February 14, 2013).

¹³ See Outten & Golden LLP, Unpaid Interns Lawsuit, (September 8, 2012),

against Fox Searchlight Pictures, accusing it of violating wage laws by using unpaid interns to work on “Black Swan” and other films.¹⁴

Part I describes the main categories of law student workers, including law-school-sponsored educational ‘experiential’ learning programs, and distinguishes students in these programs from unpaid law students in independent (i.e., non-school-sponsored) ‘internships’ at for-profit law firms. Part I also reviews attendant problems created by the rise of the unpaid intern, such as the creation of a divide between who can afford to gain “unpaid” experience and who cannot, further perpetuating class-divisions. Part II provides a comprehensive overview of the 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. A related problem is that non-profits rely on unpaid volunteer interns to provide pro bono legal services to underserved communities. Enforcement of the FLSA should take into account the differences between this type of pro bono work and for-profit internships. Part III considers what, if any, obligations and responsibility law schools bear in addressing and resolving the legal ambiguities in the arrangements described in Part I,¹⁵ and also briefly explores other legal implications and ethical considerations. For example, wage violations also mean that unpaid interns are also denied Social Security contributions and the right to receive unemployment insurance and workers’ compensation, so these implications must be considered.

<http://unpaidinternslawsuit.com/>

¹⁴ Outten & Golden LLP, The Hearst Corporation Class Action Litigation, (September 8, 2012, 1:14:00 PM), <http://unpaidinternslawsuit.com/hearst-corporation>.

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 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 50 applications. *See* 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 the FLSA salary test if they have obtained their license, under the learned professional exemption, discussed in Part III.B.1, *infra*.

Part IV proposes solutions beyond the admonition that law firms should pay their law student workers in accordance with the FLSA,¹⁶ such as educating law students as to 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/experiential programs. Part IV will also explore the role of private class action litigation, as well as enforcement and regulation by Wage and Hour Division of the Department of Labor. Alternative approaches might include a formal DOL regulation defining the intern exemption or adopting 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, since the DOL Wage and Hour Division already has enforcement power and the FLSA already prohibits unpaid labor in these situations. Although the power of government regulation and class action litigation as a tool for reform should not be underestimated, a suggested approach will track new governance principles in that it will recognize the role of class action litigation “stick” (brought by the DOL or by private litigants) but combine the stick 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 because law students are educated, professional, and have the potential for high paid jobs. Additionally, the public may have little sympathy for lawyers generally and ‘entitled’ students who should have known what they were getting into - law students even better positioned to know their potential legal rights. 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 deserving of protection. The average law

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 are presumably paid at least the minimum wage (obviously, whether this is true in each case will depend on the number of hours worked in a given work week). *See* FL NELA, Summer Advocacy Fellowship 2013 Announcement, <http://www.floridanela.org/regforms/Advocacy-Fellowship-Announcement-2012.pdf>.

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* 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, 1300-1305 (2010).

student graduated in 2011 with \$100,584 in debt¹⁸ and recent statistics show starting salaries have declined as job prospects have dwindled, and like every other group of entry-level workers, law students are desperate to have work experience prominently displayed on their resumes. 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 - and that is why the situation is ripe for abuse.

I. TYPES OF LAW STUDENT WORKERS

Law students attend law school to learn about the substantive law and to learn to ‘think like a lawyer’ but increasingly, their legal education teaches them how to ‘do.’ They gain valuable work experience in a variety of law-school settings, as well as through externships offered through the law school, and by obtaining non-school-sponsored paid and unpaid positions 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, 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 MacCrate Report, the American Bar Association recognized the gap between legal education and the legal profession and called on legal educators and the bar two decades ago 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 to integrate knowledge,

¹⁸ Sam Favate, Law Students, *How Much Debt Do You Want?* (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, stating “Among 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.”).

¹⁹ See Robert Hornstein, *The Role and Value of A Shadow Program In The Law School Curriculum*, ___ MISS. L. REV. ___, nn.1&2 (forthcoming 2012) (citations omitted).

²⁰ American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development - An Educational Continuum* (Report of the Task Force on Law Schools and the Profession: Narrowing the Gap) (1992) at 29 [hereinafter MacCrate Report].

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, legal education and the legal profession. Such experiential learning settings range from 'shadowing programs' where law students simply observe non-faculty attorneys at specific events, to faculty-supervised representation of clients in law school clinics. Experiential programs are now utilizing an increasing amount of law school building space, law-school credit offerings and faculty. Many of these law-school based programs are typically credit-bearing and law school faculty are involved in part of the instructional elements in addition to approving each internship and matching 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 non-profit legal service organizations and government agencies. Under the Department of Labor'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 non-profits. Professor Robert Hornstein at Florida Coastal School of Law has written about the benefits of a law school shadow program, discussing the various ways in which such a program supports doctrinal and skills instruction, and exposes students to

²¹ WILLIAM M. SULLIVAN ET AL., CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007) [hereinafter CARNEGIE REPORT].

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 week internship with classroom reflection and mentoring. This program earns students five credits and in summer 2012 the tuition charge was \$3125, plus \$125 program fee). http://www.law.temple.edu/pages/current_students/T_SPEC.aspx.

some professionalism and ethical questions.²³ Professor Hornstein described the shadow program introduced at Florida Coastal School of Law, which is likely typical of such programs, and emphasizes 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 shadowing lawyers and judges in a wide array of civil and criminal judicial proceedings as well as 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 also serves to bridge doctrinal instruction and skills instruction – again solely through observation.²⁴

Law students enroll for the program and learn of specific events through email, which they sign up for and attend. In Florida Coastal’s 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 being able to see a dry procedural rule in action, such as a deposition, as described by Professor Hornstein.²⁶ The law student is the primary, if not the sole, beneficiary of a shadowing experience and it enhances and is part of the law school curriculum, and can indeed be part of the law student’s graduation requirement.²⁷

The participating judge or attorney/law firm may receive some tangential benefit from the shadow program, such as a public relations benefit or marketing tool, but is not getting any direct pecuniary benefit in the form of work that would implicate the FLSA. Indeed, Florida Coastal’s experience has been that prospective attorneys are concerned that

²³ Robert Hornstein, *The Role and Value of A Shadow Program In The Law School Curriculum*, -- MISS. C. L. REV.-- (forthcoming 2012).

²⁴ *Id.* at __ (internal citation omitted).

²⁵ *Id.* at __. Summary reports are only required at Coastal’s program if the student wants to earn “professionalism” credits.

²⁶ *Id.* Coastal’s shadowing program is open to all students, including first year students.

²⁷ Coastal’s shadow program is voluntary but participating students can earn “professionalism” credits for each observation/shadow – professionalism credits are a graduation requirement. *Id.* at __.

participation will detract from the attorney's or firms work,²⁸ which is one of the six criteria that the DOL considers if an issue were to be raised that a shadowing event constituted a type of internship relationship. Thus, provided the shadow program is solely observational, it can serve as the model example of a law student learning experience that involves no 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."

2. Pro Bono Hours

Some law schools offer voluntary pro bono opportunities for law students who do legal or non-legal work for organizations or individuals of limited means.²⁹ 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 non-profit 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."³⁰ Pro Bono work is typically defined as volunteer work that serves the community and is aimed at serving the underserved population. Some law schools offer pro bono honors through certification that can be listed on the resume, but do not offer credit.³¹

3. Skills Labs

Students can formalize and enhance their pro bono experience through a "skills lab." This is typically credit-bearing volunteer pro bono work with a

²⁸ *Id.*

²⁹ 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 Standard 302(b)(2) & Interpretation 302-10 (focusing "pro bono" service on service to persons of limited means or to organizations that serve such persons) (discussed in Part __, *infra*).

³⁰ Florida Coastal School of Law, "Student Life" "Pro Bono" available at: <http://www.fcsf.edu/pro-bono>.

³¹ The ABA has a resource describing pro bono programs throughout the country. ABA, Legal Services, http://apps.americanbar.org/legalservices/probono/lawschools/pb_programs_chart.html.

classroom component. Florida Coastal's Skills Labs are described on the law school website as follows:

A Skills Lab 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 a prior semester are eligible to register for the Trusts and Estates Skills Lab.

The Coastal Skills Labs have a weekly classroom component to allow the professor to review substantive law that the students need to learn or be refreshed in order to work on the types of cases they observe and assist on.³² The listed benefits of the Skills Lab emphasize the educational benefits and the desired educational-practical combination that forms 'experiential learning.'³³

4. Clinics

Law school clinics are credit-bearing law school 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. Clinics at Florida Coastal are typical of the types of practice areas offered at other law schools – family clinic, consumer law clinic, immigrant rights clinic, criminal defense clinic and disability and benefits clinic.

In addition to faculty-supervised representation of clients and all that such cases entail (from interviewing the prospective client through

³² *Id.* "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; . . ."

³³ *Id.* (listing benefits of live client experience as including: Observing practitioners and learning professionalism from practicing attorneys; fostering an awareness of the importance of pro bono work; learning practical skills they can use upon graduation; receiving mentoring from the practitioner who is teaching the Skills Lab; providing networking opportunities which may lead to job opportunities; creating reputation enhancement opportunities for the student and school).

resolution of the case), clinics have a classroom component wherein the student learns the corresponding substantive law and the legal skills needed for legal representation. The clinic classroom component also typically provides an opportunity for students to discuss their cases, experiences and reflect on their legal and professional experiences. The classroom components vary in terms of required hours and frequency of meeting.

Clinics are the long-standing gold standard in terms of experiential learning; law students learn to 'do' while learning the substantive law and are supervised by an experienced attorney-educator who helps the student link their theory to practice.

5. Credit-Bearing Externships

David Gregory identified and addressed the problem of student interns over a decade ago.³⁴ Gregory focused on teaching assistants at Yale University and identified the public policy reasons why student interns should be paid a living wage.³⁵ He also noted the problem of credit-bearing internships – students who need the work experience are willing to work for free but when they take a credit-bearing internship, they are actually paying to work through their tuition payments for the credits that they earn.³⁶ The universities in Gregory's analysis in fact benefited from this arrangement because they receive tuition without having to provide an instructor, classroom, etc.³⁷ In a typical law school setting, however, the credit-bearing internship is not necessarily a windfall for the law school; the law school typically provides at least one full-time faculty member to fulfill internship duties, who works the hours necessary to establish and approve each internship, monitor the internship via meetings and/or journal review,

³⁴ David Gregory, *The Problematic Employment Dynamics Of Student Internships*, 12 ND J. LEGAL ETHICS & PUB. POL'Y 227 (1998).

³⁵ *Id.* 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.

³⁶ *Id.*

³⁷ *Id.*

and runs interference if problems arise.

1. Externships in Non-Profit, 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.” 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.”³⁸ A recent Ogilvy & Basu survey of law school externships reported that the growth of externships appears to be “a consolidation of established trends.”³⁹

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 of the classroom component varies,⁴⁰ and the majority also require externs to keep academic journals.⁴¹ Extern courses are most often taught by a faculty member, usually a tenured or tenure-track faculty member, but are also taught by other faculty groups.⁴² Traditionally, externships are located within judicial, governmental, and non-profit organizations.

2. For-Profit Externships

Some law schools have either implemented or are considering allowing

³⁸ Ogilvy & Basu, *supra* note 4, at __ (citing Law School Admission Council & American Bar Association, ABA-LSAC Official Guide to ABA-Approved Law Schools (2012) 70, http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_official_guide_for_web.authcheckdam.pdf).

³⁹ Ogilvy & Basu, *supra* note 4, at 1-2. 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.

⁴⁰ Ogilvy & Basu, *supra* note 4, at 14 (citing to ABA Standard 305 on *Guided Reflections*).

⁴¹ Ogilvy & Basu, *supra* note 4, at 20-21.

⁴² *Id.* at 23 (“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.”).

externships at for-profit law firms.⁴³ The expansion of for-profit externships begs the question of what is driving this expansion, and the most likely explanation is that the drive toward more experiential learning opportunities for law students 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.

The core educational component of a for-profit externship does not differ from the non-profit/public agency externship, and the law student presumably obtains the same benefit as she would in the non-profit setting. Nevertheless, this arrangement causes concern because of the “profit” component – the law firm benefits because it can potentially bill the law student’s work to a client, or the law student’s work frees up a licensed attorney to work on other matters. But why is this any different to the non-profit’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 (maybe even a salary raise for the paid government workers!). The main difference must therefore be in the altruistic vision of the non-profit 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 non-profit externships expose law students to this goal, versus the for-profit model which obviously lacks that component.

Indeed, the DOL regulations reflects this view of the world by interpreting the 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.”⁴⁴ While not strictly volunteers under the DOL regulations (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 distinction, the fact

⁴³ See generally Bernadette T. Feeley, *Examining The Use Of For-Profit Placements In Law School Externship Programs*, 14 *Clinical L. Rev.* 37 (2007) (papers presented at the "Externships 3: Learning from Practice" Conference). See also Ogilvy & Basu, *supra* note 4, at 11-12 (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, and increased from 14% to 20% of all courses surveyed).

⁴⁴ 29 C.F.R. § 553.101(a).

remains that as a matter of law, the DOL has drawn a distinction between unpaid work for non-profits and government agencies and unpaid work at for-profit organizations, discussed more fully in Part III.

B. *Non-Law-School Sponsored Volunteers and Unpaid Interns*

1. Non-Profit and 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.⁴⁵

2. For-Profit Law Firms

The first issue one encounters when dealing with the unpaid law student worker outside the law school setting is one of nomenclature – what should this individual be called?⁴⁶ A rose is a rose by any other name,⁴⁷ and this category of student is an “unpaid law student intern.” This army of law student interns have a variety of arrangements with their law firms; some 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 40 hours or more for several weeks over the summer. 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, 40-plus hours per week and being asked to do chores ranging from collecting dry-cleaning and making coffee to filling in for regular employees.

As with any internship, the type of work, hours of work and the length of the period of employment will vary from case to case. Nevertheless, the

⁴⁵ 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. *See, e.g.,* USAJobs, <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).

⁴⁶ As stated earlier, n.3, the term “externship” typically applies to law-school-sponsored experiential arrangements.

⁴⁷ “What’s in a name? that which we call a rose By any other name would smell as sweet.” William Shakespeare, *Romeo and Juliet*.

typical law student unpaid intern works on junior-associate level legal tasks, such as researching and writing memoranda, pleadings and motions, or performing more skills-based practical tasks, such as interviewing potential clients or drafting pleadings or reviewing documents. The law student intern 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. Another area of variance will be the type of work and type of law firm that the law student will participate in. The possibilities are not, however, endless. The for-profit lawyer will assign the intern to a limited universe of projects – either pro bono matters, paying client matters, or matters that related to the business of the law firm (such as newsletters, preparation for the lawyer's upcoming CLE presentation, and the like). The lawyer may or may not bill the work done by the student intern to the client. Even in contingency fee cases, the lawyer will monetarily benefit from the intern's labor if he/she settles or wins the case and claims their contingency share.⁴⁸

III. FEDERAL FLSA

A. *Employer Coverage and Employee Protection Under The FLSA*

Congress enacted the FLSA to protect workers from “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers”⁴⁹ The provisions of the FLSA achieve worker protection through mandating minimum wage,⁵⁰ maximum hours,⁵¹ and child labor restrictions.⁵² In addition, the FLSA requires the employer to make, keep, preserve, and report time and pay.⁵³ The FLSA is enforced by the Department of Labor, Wage and Hour Division, but it also provides for a private cause of action, damages (including liquidated damages) and payment by defendant of

⁴⁸ 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 he/she does not have to do that work and is free to do other work.

⁴⁹ 29 U.S.C. § 202(a) (Congressional finding and declaration of policy).

⁵⁰ *Id.* at § 206. The minimum wage has periodically increased and is currently \$7.25 per hour. *See* 29 U.S.C. § 206(a) (enacted May 25, 2007). The states can set higher minimum wage and the workers in those states are entitled to the higher state rate.

⁵¹ 29 U.S.C. § 207. 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.* at § 207(a)(1).

⁵² *Id.* at § 212.

⁵³ *See* 29 U.S.C. § 211(c).

attorneys' fees and costs.⁵⁴

Employees are covered by the FLSA either under “individual” or “enterprise” coverage. An individual is covered if she is personally engaged in interstate or foreign commerce, or in the production of goods for commerce.⁵⁵ Enterprise coverage applies to individuals who work for an enterprise that is engaged in commerce or in the production of goods for commerce, or that has employees who handle goods or materials that someone else has moved or produced for commerce.⁵⁶ For enterprise coverage to apply, the entity must also have a gross volume of business of at least \$500,000 per year.⁵⁷ Public agencies are covered employers regardless of the commerce or volume of business tests.⁵⁸ A law firm is an employer engaged in commerce because “commerce” is defined by Section 3(b) of the FLSA as “trade, commerce, transportation, *transmission*, or *communication* among the several States.” 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. A law school may also be an employer under the “enterprise” definition:

“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).⁵⁹

Law students are understandably reluctant to report or complain about wage and hour issues to anyone, including their law school administration or faculty, and even less likely to file a lawsuit, for fear of being blacklisted for future employment. Nevertheless, the FLSA does have an anti-retaliation provision.⁶⁰

⁵⁴ *Id.* at § 216(b).

⁵⁵ 29 U.S.C. §§ 206(a), 207(a)(1).

⁵⁶ 29 U.S.C. § 203(s)(1)(A)(i) (2006).

⁵⁷ *Id.* at § 203(s)(1)(A)(ii).

⁵⁸ 29 U.S.C. § 203(s)(1)(C).

⁵⁹ 29 U.S.C. § 203(s)(1)(B).

⁶⁰ 29 U.S.C. § 215(a)(3) (“it shall be unlawful for any person - . . . to discharge or in any 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 any industry committee.”).

The FLSA provides protections only to persons who are classified as “employees” but does not define employees in any meaningful or useful way. The FLSA defines an “employee” as “any individual employed by an employer”⁶¹ and the term “employer” is not defined but “includes any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁶² The term “employ” is defined as including: “to suffer or permit to work.”⁶³ Obviously, these definitions are circular and not particularly helpful in determining who exactly is engaged in an employment relationship.⁶⁴

Independent contractors are not employees and therefore are not protected by the FLSA. Consequently, the distinction between employees and independent contractors has been the subject of many court decisions and scholarly articles.⁶⁵

Several categories of workers who would otherwise fall within the statutory definition of “employee” are expressly exempted from coverage, the broadest statutory exemption being for executive, administrative and professional employees, discussed in Part II.B., *infra*.⁶⁶ Despite such express exemptions contained in the original Act, Congress expressly intended coverage under the FLSA to be broad.⁶⁷ 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

⁶¹ 29 U.S.C. § 203(e)(1).

⁶² *Id.* at § 203(d).

⁶³ 29 USC §203(e)(I).

⁶⁴ See Yamada, *supra* note __, at ____; Rubinstein, *supra* note __, at ____.

⁶⁵ The distinction between employee and independent contractor is discussed more fully in Part __, *infra*. See also Yamada, *supra* note __, at ____.

⁶⁶ Section 213 of the FLSA 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).

⁶⁷ See 81 Cong. Rec. 7656-57 (1937) (“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”) (statement of Sen. Hugo Black); see also *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Powell v. United States Cartridge Co.*, 339 U.S. 497, 516 (1950) (“Breadth of coverage is vital to [the FLSA’s] mission.”); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-28 (1992) (terms “employee” “employer” and “employ” are to be interpreted expansively).

without any express or implied compensation agreement⁶⁸ – i.e., volunteers working purely for their own benefit. Congress incorporated this volunteer interpretation into the FLSA via a 1985 amendment.⁶⁹

The FLSA does not apply to two important categories of law student interns – those working for the federal judiciary and State or local public agencies.⁷⁰ First, although the FLSA does cover certain individuals working for the federal government,⁷¹ federal law clerks are likely considered exempt under 29 U.S.C. 203(e)(2)(A)(iii), which 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 the FLSA.⁷² Law clerks are not employed in such units.⁷³

A second group of law student interns that are probably exempt under the FLSA’s express provisions are interns in State public agencies, such as law students interning in the state prosecutor’s office or public defender’s office. 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,⁷⁴ discussed *infra*.

Thus, of relevance to unpaid law student interns, the FLSA’s broad coverage is limited by several statutory exemptions from coverage, statutory reductions in coverage, and interpretative limitations issued by the U.S. Department of Labor and federal courts: (1) the white-collar, learned professional exemption;⁷⁵ (2) certified student-learners who may be paid less than minimum wage;⁷⁶ (3) certain types of volunteers in the federal judiciary and State public agencies;⁷⁷ (4) certain volunteers in non-profit

⁶⁸ *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947; *see also* *Wirtz v. San Francisco and Oakland Helicopter Airlines, Inc.*, 370 F.2d 328 (9th Cir. 1966) (stating same Portland Terminal principle).

⁶⁹ P.L. 99-150, 99 Stat. 787 (1985).

⁷⁰ In addition, Congressional interns are exempt from the FLSA under the Congressional Accountability Act of 1995, 2 U.S.C. § 1301 *et seq.* Congressional Accountability Act of 1995, 2 U.S.C. § 1313(a)(2).

⁷¹ 29 U.S.C. 203(e)(2)(A).

⁷² 29 U.S.C. 203(e)(2)(A)(iii).

⁷³ *Id.*

⁷⁴ 29 U.S.C. 203(e)(4)(A).

⁷⁵ 29 U.S.C. § 213(a)(1).

⁷⁶ 29 U.S.C. § 214(b).

⁷⁷ 29 U.S.C. 203(e)(2)(A)(iii) (federal judiciary); 29 U.S.C. § 203(e)(4)(A) (State agencies).

organizations;⁷⁸ and (5) intern/trainees in for-profit organizations.⁷⁹

Thus, the FLSA appears to have an inherent conflict – the Act envisions the broadest coverage for ‘employees’ and at the same time contains limiting principles exempting many individuals. This conflict is compounded by the lack of clear regulatory guidance from the DOL and confusion among federal courts as to the proper interpretative parameters for employees, volunteers and interns, as discussed in Part III.C.

B. *The FLSA Exemptions*

1. Exemptions for White Collar Workers

Law clerks/interns may be exempt from the wage and overtime requirements of the FLSA if they meet the FLSA bona fide executive, administrative, or professional employees (or so-called “white-collar”) exemption tests.⁸⁰ The FLSA professional and administrative exemptions require that the employee meet three tests: (1) primary duties test; (2) salary basis test; and (3) salary test. First, the exempt employee must be paid a salary of at least \$455 per week in order for the exemption to apply⁸¹ - clearly the salary test is not met in situations where the law student intern is wholly unpaid.⁸² Even in arrangements where expenses or a small stipend

⁷⁸ 29 U.S.C. § 203(e)(5) exempts only volunteers at food banks.

⁷⁹ DOL Fact Sheet #71.

⁸⁰ 29 U.S.C. §213; *see also* 29 C.F.R. Part 541. For administrative exemption, *see* 29 C.F.R. § 541.200-204; for professional exemption, *see* 29 C.F.R. § 541.300-301.

⁸¹ 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.

⁸² Employees who are paid on an hourly basis are not paid on a salaried basis within the meaning of 29 CFR § 541.118. *See* Andrew M. Campbell, *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*

is paid, the law student intern will not meet the \$455 weekly salary test.

Second, exempt workers must be paid on a “salary basis” which is explained by the DOL as “the employee regularly receives 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.”⁸³ Note that lawyers who have graduated and obtained a license may be exempt from the salary test as an “employee employed in a bona fide professional capacity.”⁸⁴ This Article does not address this category of graduated law students with a J.D., but there are signs of a nascent interest from some law firms in exploiting this group of law school graduates.⁸⁵

2. Student Learners

The FLSA provides for employment under a student-learner certificate, but it is limited to retail and service establishments.⁸⁶ The student-learner certificate allows wages at 95% of minimum wage and the student learners are exempt from overtime rules.⁸⁷ The student-learner certificate is not available to clerical and office workers in any industry under current DOL regulations,⁸⁸ but is mentioned here because it has potential for expansion to

Persons From Minimum Wage And Overtime Provisions Under § 13(A)(1) Of Fair Labor Standards Act, 123 A.L.R. Fed. 485, Section 3[b] (2012) (compiling cases).

⁸³ 29 C.F.R. § § 541.602(a).

⁸⁴ 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. 29 C.F.R. § 541.300(c). This salary exemption may apply to the Boston law firm situation if the new associate has obtained their J.D. but not yet obtained their license.

⁸⁵ ABA Journal, *More Than 50 Have Now Applied For \$50,000-A-Year Boston Law Firm Job*, June 11, 2012:

http://www.abajournal.com/news/article/more_tha_50_have_now_applied_for_10000-a-year_boston_law_firm_associate_job. Martha Nell, *More Than 50 Would-Be Associates Have Now Applied for \$10,000-a-Year Boston Law Firm Job*, ABA J, June 11, 2012, http://www.abajournal.com/news/article/more_tha_50_have_now_applied_for_10000-a-year_boston_law_firm_associate_job.

⁸⁶ 29 U.S.C. § 214(b)(1)(a).

⁸⁷ *Id.*; see also 29 C.F.R. § 520.408.

⁸⁸ *Id.* § 520.401(c).

law student interns.⁸⁹

3. Volunteers in Public Agencies

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

The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, 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.⁹⁰

The public agency volunteer is further defined by DOL regulation⁹¹ 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.⁹² 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 without losing their status as volunteers.⁹³ Although the federal government is generally

⁸⁹ See generally 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 (2010) (proposing a new student-intern certificate for interns).

⁹⁰ 29 U.S.C. § 203(e)(4)(A). Further, "(B) 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.

⁹¹ The amount of deference that a federal court will apply to DOL regulations, guidelines and opinion letters is discussed in Part III.B.3, *infra*.

⁹² 29 C.F.R. § 553.101(a). The New York State Department of Labor has issued a useful Fact Sheet explaining/clarifying who is an exempt volunteer in a non-profit situation: <http://www.labor.ny.gov/formsdocs/wp/P726.pdf>

⁹³ *Id.* at 553.106(a). the volunteer must offer her services freely and without coercion, direct or implied, from the employer. *Id.* at 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.* at 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.

prohibited from accepting voluntary service,⁹⁴ there are some exceptions that apply to law students. For example, 5 U.S.C. section 3111 authorizes agency heads to accept voluntary services from students.⁹⁵

4. Volunteers at Non-Profit Organizations

The status of non-governmental volunteers at non-profit organizations is somewhat confusing. The Supreme Court addressed the unpaid volunteer in the non-profit sector in *Tony & Susan Alamo Foundation v. Secretary of Labor*.⁹⁶ The Supreme Court held that, an individual who, without promise or expectation of compensation, but solely for her personal purpose or pleasure works in other activities carried on by other persons either for their pleasure *or profit* falls outside the coverage of the FLSA.⁹⁷

Although Congress amended the FLSA to add a ‘volunteer’ exemption after the *Alamo Foundation* decision, the FLSA, however, only exempts volunteers at food banks: “[t]he term ‘employee’ does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.”⁹⁸ The courts have not apparently questioned whether the food bank exemption is properly applied to other non-profits, perhaps because the *Alamo* case did not so limit the volunteer exclusion from the definition of employee and perhaps because the DOL has similarly applied the exemption beyond food banks.⁹⁹

⁹⁴ 31 U.S.C. § 1342 (2006).

⁹⁵ 5 U.S.C. § 3111 (2006).

⁹⁶ 471 U.S. 290, 303 (1985) (describing volunteerism at a non-profit, non-government agency) (emphasis added).

⁹⁷ *Id.*

⁹⁸ 29 U.S.C. § 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, defined not as payment but in recognition that such volunteers might themselves be in need. Amy Somers Volunteers at Food Banks Act of 1998, H.R. 3152, 105th Cong., § __; 144 Cong. Rec. R5386 (daily ed. June 25, 1998) (statement of Rep. Ballenger). The amendment was deemed necessary to clarify such volunteers are not employees because the DOL had issued inconsistent opinions on the issue. *Id.*

⁹⁹ *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 303 (1985); DOL Wage and Hour Opinion Letter FLSA2008-14 (Dec. 18, 2008) (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 and Hour Opinion Letters FLSA2006-4 (Jan. 27, 2006), FLSA2002-9 (Oct. 7, 2002) (typically, such volunteers serve on a part-time basis and do not displace regular employees or perform

The status of student interns at non-profits is unclear because of subtle conflicts between the statute, the DOL's prior opinion letters and the DOL position in the *Laurelbrook* case. First, the *Alamo* case exempts *volunteers* at non-profits. But, in amending the FLSA to exempt volunteers after *Alamo*, Congress chose to only exempt volunteers at food banks – it does not exempt any other type of non-profit volunteer.¹⁰⁰ The well-known canon of statutory construction that *expressio unius est exclusio alterius* – the inclusion of one is the exclusion of others.¹⁰¹ 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.”¹⁰²

Accordingly, the DOL has traditionally applied a broad construction in exempting volunteers generally.¹⁰³ More recently, however, the DOL has taken a contrary litigation stance in the *Laurelbrook* case, arguing that student workers at a non-profit educational institution were employees because they did not meet all of the criteria in the DOL six-factor trainee test.¹⁰⁴ The case is confusing because the students could have been considered volunteers, since the defendant organization was a non-profit organization. In any event, neither the DOL nor the Sixth Circuit appeared to consider 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

work that would otherwise be performed by regular employees).

¹⁰⁰ 29 U.S.C. § 203(e)(5).

¹⁰¹ See, e.g., *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980); *Continental Casualty Co. v. United States*, 314 U.S. 527, 533 (1942) (where Congress enumerates exceptions, other exceptions should not be implied). Similarly, courts should not add language when Congress has not included 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 (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).

¹⁰² Amy Somers Volunteers at Food Banks Act of 1998, H.R. 3152, 105th Cong., § __; 144 Cong. Rec. R5386 (daily ed. June 25, 1998) (statement of Rep. Ballenger).

¹⁰³ See DOL Wage and Hour Opinion Letters FLSA2008-14 (Dec. 18, 2008), FLSA2006-4 (Jan. 27, 2006), FLSA2002-9 (Oct. 7, 2002).

¹⁰⁴ *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011) (affirming district court's decision).

and held that the students were trainees under the FLSA.¹⁰⁵ The DOL's decision to litigate this case as an employee/trainee situation could be viewed as a signal that the DOL considers its six-factor test to apply to volunteers, or could be taken as a signal that *some* students at *some* non-profits might be viewed by the DOL not as volunteers but as employees.¹⁰⁶ But, it is hard to guess what the DOL's position is due to the lack of statutory and regulatory guidance on non-profit volunteers/interns.

Professor Samuel Estreicher and Associate Dean Alan Morrison have brought this situation to the DOL's attention.¹⁰⁷ They have attempted to secure guidance from the DOL on its position regarding enforcement of the FLSA against law student interns working in various settings, and they have expressed concern about the DOL's strict position in *Laurelbrook* that the students there were properly classified as employees.¹⁰⁸ The lack of clear DOL guidance is of concern because law schools attempting to place law students as interns at non-profits 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? And will the DOL enforce the FLSA in such situations? The DOL's response to Professor Estreicher and Dean Morrison was not particularly illuminating, setting forth the volunteer exemption and long-standing DOL position that *volunteers* at non-profits are exempt from the FLSA, but not explaining why the DOL did not then take that position in *Laurelbrook*; in response to concern about the enforcement and litigation posture taken by the DOL in the *Laurelbrook* case, the Secretary of Labor ambiguously stated that the Sixth Circuit did not address whether *volunteers* are exempt from the FLSA, because the

¹⁰⁵ *Id.* at 527.

¹⁰⁶ 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). 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) (collecting cases and analyzing *Laurelbrook*).

¹⁰⁷ Letter from Professor Samuel Estreicher and Dean Alan Morrison to Hon. M. Patricia Smith, Secretary of Labor, dated Oct. 11, 2011; Letter from Professor Samuel Estreicher and Dean Alan Morrison to Hon. M. Patricia Smith, Secretary of Labor, dated Dec. 5, 2011; Memo from Alan Morrison to Rajesh Nayak, dated March 30, 2012 (on file with author).

¹⁰⁸ *Id.*

court found the student workers in *Laurelbrook* to be *trainees*. This is indeed ambiguous (or perhaps circular?) – it belies that fact that the DOL took the position in *Laurelbrook* that the students were employees and asserted that the six-factor test to distinguish employees/trainees applied (despite the fact that the defendant was a non-profit organization). This rather begs the question of why the DOL took that position, and it begs the question of what, exactly, is the DOL's position for interns at non-profits – are they exempt volunteers, trainees or something else?

5. Student Interns In For-Profit Organizations

The FLSA is silent on the question of whether a non-certified student-learner is a covered employee. 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 interns. Instead, the DOL has issued the six-factor test through a Fact Sheet to guide attempts to distinguish between individuals who are in an employment relationship and individuals who are not with respect to intern or trainee situations.¹⁰⁹

In the *Portland Terminal* case, the Supreme Court first interpreted some vocational trainees to escape the circular FLSA definitions of “employee” and “employer” and the definition of “to suffer or permit to work” where that person, without any express or implied compensation agreement, may work for their own advantage on the premises of another.¹¹⁰ In *Portland Terminal*, railroad trainees were required to complete the railroad's weeklong training program before they were eligible for hire as brakemen.¹¹¹ The trainees watched regular employees perform tasks and then the defendant railroad closely supervised the trainees performing the same task, which slowed down the railroad's operations. In addition, no employees were displaced by the trainees, and neither the trainees nor the railroad expected compensation.¹¹² The Wage and Hour Administrator sued to enjoin the defendant from refusing to pay its railroad trainees the minimum wage and argued that trainees were covered under the FLSA.¹¹³ The Supreme Court held that Section 214 exemption for student learners was not applicable because that section applied only to “employers who hire beginners [or] learners,” which was not the case here and – perhaps most significantly –

¹⁰⁹ Department of Labor, Wage and Hour Division Fact Sheet #71; *see also* Department of Labor Field Operation Handbook § 10b11.

¹¹⁰ *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

¹¹¹ *Id.* at 149.

¹¹² *Id.*

¹¹³ *Id.* at 149.

these trainees were not ‘employees’ because they “greatly benefited” from the instruction and the railroad received no “immediate advantage.”¹¹⁴

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

- (1) 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;
- (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 derives no immediate advantage from the activities of trainees or students, and on occasion the employer's 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.¹¹⁵

One can see from the test and its originator, *Portland Terminal*, that the Court and the DOL intended to exempt a specific type of short-term blue-collar trainee programs from the 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 an intent to exempt an individual simply because he is a student who is performing work for the employer and at the same time is learning on-the-job. The Supreme Court may have wanted to encourage employers to offer vocational training but perhaps unwittingly opened a loophole in the FLSA’s intent to eliminate “labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers . . . without substantially curtailing employment or earning power.”¹¹⁶

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.¹¹⁷ Further, although the DOL’s

¹¹⁴ *Id.* at 151-153.

¹¹⁵ The listed criteria is also contained in DOL's Wage & Hour Manual (BNA) 91 :416 (1975) and in DOL Wage and Hour Field Operations Handbook (10/20/93). *See also* DOL OL 5/I 7/04 [criteria derived from *Portland Terminal*]

¹¹⁶ 29 U.S.C. § 202(a)-(b).

¹¹⁷ *See* Fact Sheet #71; *see also* DOL OL 5/17/04, citing DOL OLs 5/8/1996, 7/11/95, 3/13/95, and WH Publication 1297 [Employment Relationship Under the Fair Labor

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.¹¹⁸ Commentators have questioned whether 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.¹¹⁹

In 2010, the Department of Labor stated in the New York Times 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.”¹²⁰ University Presidents responded to these statements by sending a letter to U.S. Labor Secretary Hilda Solis, urging the Department of Labor not to regulate student internships.¹²¹ Other organizations responded in favor of maintaining and enforcing the existing DOL position.¹²²

Employers must also comply with state law, which can vary from the

Standards Act]). Trainees and interns are one and the same because they are gaining professional experience as part of an educational-type modality.

¹¹⁸ DOL OL 5/17/04, 5/8/96 [activities on premises of employer business].)

¹¹⁹ See, e.g., Rubinstein, *supra* note __, at __; Yamada, *supra* note __, at __; see also Sarah Braun, Comment, *The Obama "Crackdown:" Another Failed Attempto Regulate The Exploitation Of Unpaid Internships*, 41 SW. L. REV. 28, __ (2012) (arguing that the DOL test needs updating in light of new economic realities for students in today’s job market). *But see* Reich v. Parker Fire Protection District, 992 F.2d 1023, 1027 (the six criteria allow for consistent assessment of the totality of circumstances; applying the criteria but not adopting the “all or nothing” approach).

¹²⁰ New York Times, Apr. 3, 2010, Statement of Nancy J. Leppink, Acting Director of U.S. Department of Labor Wage and Hour Division, *available at*:

http://www.nytimes.com/2010/04/03/business/03intern.html?_r=1&emc=eta1

¹²¹ Letter from 13 University Presidents to Hilda Solis, Secretary 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 secure and productive environments that further their education. We constantly monitor and reassess placements based on student feedback.”).

¹²² Letter from Economic Policy Institute, Vice President Ross Eisenbrey wrote to Secretary Hilda Solis, 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). Note that the DOL six-factor test is not, in fact, a regulation.

federal FLSA.¹²³ For example, until 2010, the California Division of Labor Standards Enforcement (DLSE) applied an eleven-part test for determining internship-exemption, until the DLSE issued a 2010 opinion that, henceforth, it would apply the same six-part criteria as the DOL.¹²⁴ New York has issued a Fact Sheet, similar to the DOL, which lists the six-criteria from the DOL Fact Sheet plus 5 more criteria.¹²⁵ New York has clarified that *all* of the criteria must be met in order to exempt the intern from the wage and hour laws.¹²⁶

C. Federal Courts Application of the FLSA

The federal courts apply a dizzying array of tests to determine whether an individual is an employee, and independent contractor, an intern or a volunteer. The courts are also in confusion as to whether they will apply the DOL six-factor test to each of these situations and if so, how much deference to give the DOL test. Although some federal courts have applied the DOL's six-factor test, they have done so with varying degrees of deference.¹²⁷ Some courts give

¹²³ The FLSA expressly allows states to provide higher protections. *See* 29 U.S.C. § 218(a). *See also* *Pacific Merchant Shipping v. Aubly*, 918 F.2d 1409, 1421 (9th Cir. 1990), *cert den.* 112 S.Ct. 2956 (19_) (“Among the purposes of the FLSA is to establish a national floor under which wage protection cannot drop.”).

¹²⁴ Division of Labor Standards Enforcement (DLSE), Opinion Letter, Apr. 7, 2010, available at <http://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf>. “The additional factors to be met under the historical 11-factor test by DLSE were as follows: (7) Any clinical training is part of an educational curriculum, (8) the trainees/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. 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 n.3.

¹²⁵ New York State Department of Labor, Labor Standards, Fact Sheet, P725 (4/11), available at <http://www.labor.ny.gov/formsdocs/wp/P725.pdf>.

¹²⁶ *Id.*

¹²⁷ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) explains and governs the level of deference a federal court allows 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,” which interpret the statute are entitled to a “measure of respect.” *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399, 128 S. Ct. 1147, 170 L. Ed. 2d 10 (2008). 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 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.

the DOL six-factor test substantial deference,¹²⁸ while other courts have found the DOL test to be relevant but not dispositive.¹²⁹ In contrast, some courts have rejected the DOL test entirely.¹³⁰

Commentators have discussed both the level of deference¹³¹ 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.¹³² Courts may have relaxed the DOL standard using the totality approach in recognition of the impossibility of meeting the criteria. Indeed, the Sixth Circuit in *Solis v. Laurelbrook* expressly admonished the DOL’s all or nothing approach as too rigid.¹³³ The difference between these two approaches is substantial; it is hard to imagine *any* internship that can meet the criteria that the employer cannot obtain any immediate advantage from the activities of the intern – if an employer receives no advantage from the intern it seems unlikely that it would offer any internships. But if any one of the criteria is not met, under the “all or nothing” approach, the intern is properly classified as an employee protected under the FLSA. The totality 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.

Professor Yamada 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.¹³⁴ Further, as Ross 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?”¹³⁵ In the law firm context, it may be

¹²⁸ *Atkins v. General Motors Co.*, 701 F.2d 1124, 1127-1128 (5th Cir. 1983) (substantial deference).

¹²⁹ *See, e.g., Reich v. Parker Fire Prot. Dept.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (six criteria are relevant but not determinative, affirmed judgment using criteria).

¹³⁰ *See e.g., Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518, 527-29 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209-10 n.2 (4th Cir. 1989).

¹³¹ *See Yamada, supra note __, at __.*

¹³² *See Yamada, supra note __, at __. See also Mendel v. City of Gibraltar*, 842 F. Supp. 2d 1035 (E.D. Mich. 2012) (totality test).

¹³³ *Laurelbrook*, 642 F.3d at 525-526. 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)).

¹³⁴ *Yamada, supra note __, at 230.*

¹³⁵ *PERLIN, supra note __, at 67.*

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/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, such as networking and resume building, are more difficult to track using the lawyer's traditional time-recording systems.

But, even if we can track all this time and quantify the time spent on tasks that benefit each side, a qualitative assessment is still required to determine how much weight to give each task performed and the standard to apply to the balancing test - must the benefit to the student simply outweigh the benefit to the employer, substantially outweigh, or something else? A test that allows employers to benefit from the work of interns on a 50-50 basis is simply too sweeping and ignores the genesis of the DOL all-or-nothing approach - the DOL test is strict *because* the FLSA's employee coverage is broad and to provide otherwise would undercut Congress's purpose and the Supreme Court's interpretation of 'employee' in providing for broad coverage under the FLSA. That is not to say that the DOL all-or-nothing approach should not be modified, but 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 such as those in *Laurelbrook*.¹³⁶

Moreover, any approach that focuses on balancing the employer's need for free labor with the worker's right to be paid should answer this question - *why* should the FLSA be interpreted to allow employers to avoid paying workers for their labor?

¹³⁶ In *Laurelbrook*, the Sixth Circuit barely even paid lip service to the purpose behind the FLSA, although the court relied in part on a prior Sixth Circuit decision that interpreted the 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 program as an educational experience and whether the primary benefit from the relationship flowed to the learner or to the alleged employer." *Id.* at 527 (citing *Marshall v. Baptist Hosp., Inc.* 473 F. Supp. 465, 488 (M.D. Tenn. 1979), *rev'd on other grounds*, 668 F.2d 234 (6th Cir. 1981)).

D. *Overview of Various Tests Used To Determine Employee Status Under the FLSA*

The federal courts have noted that the FLSA provides little guidance in distinguishing between trainees/interns and employees.¹³⁷ As discussed in Part ___, the Supreme Court has long-ago interpreted the definitional provisions of 'employee' and 'employ' under the FLSA as *not* including categories of individuals who perform some work for others, but who are not otherwise "employees" under the Act. Thus, although the trainees in *Portland Terminal* performed some work for the company, they were not "employees" and thus not covered under the Act.¹³⁸ As previously noted, the federal courts have also developed a number of tests to distinguish between employees who are covered under the FLSA and independent contractors who are not covered under the FLSA.¹³⁹ 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, *Reid* and *Darden*, and looks at whether or not the traditional master/servant relationship exists, which in turn indicates an employer/employee relationship.¹⁴⁰

(2) The primary purpose test. This test looks at whether the relationship between the prospective employee/employer is primarily an economic one, or primarily something else, such as education or charity,¹⁴¹ and possibly encompasses the "primary benefit" test which looks at who primarily benefits from the work.¹⁴²

(3) The economic reality test. This test uses a variety of factors to determine whether the prospective employee is economically dependent on the employer.¹⁴³

¹³⁷ See, e.g., *Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1025 (10th Cir. 1993).

¹³⁸ *Portland Terminal*, 330 U.S. at 148.

¹³⁹ See, e.g., *Okoro v. Pyramid 4 Aegis*, Case No. 11-C-267, 2012 U.S. Dist. LEXIS 56277 (Apr. 23, 2012) (explaining that courts use a variety of tests).

¹⁴⁰ *Nationwide Mutual 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); *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.

¹⁴¹ *N.L.R.B. v. Hearst Publications*, 322 U.S. 111, 123-32 (1944), *overruled by* *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); *Brown University*, 342 N.L.R.B. 483, 495-500 (2004) (discussing primary purpose test as an alternative to common law agency as it relates to employee relationships).

¹⁴² *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011).

¹⁴³ *Freeman v. Key Largo Volunteer Fire & Rescue Dep't., Inc.*, No. 12-10915 2012

Other courts have not adopted these tests but have instead attempted to give the term “employ” its “ordinary meaning: ‘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.’”¹⁴⁴ 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.

The FLSA “employee” definition cases have been discussed by other commentators at length,¹⁴⁵ and will not be repeated here because these tests are not dispositive when examining whether an individual is an employee who is covered under the FLSA or an intern/volunteer/trainee who is either not covered or receives limited protection; the independent contractor cases are informative but some of the factors are simply not applicable or helpful in the internship relationship.¹⁴⁶ An example is the economic reality test – if an intern is not being paid any form of compensation she cannot be said to be economically dependent upon the employer unless the meaning of ‘economically dependent’ morphs into something entirely different from its commonly understood meaning.¹⁴⁷

U.S. App. LEXIS 22392, at **4-5 (11th Cir. Fla. Oct. 31, 2012) (explaining economic realities test and factors); *Deal v. State Farm County Mutual Insurance Co. of Texas*, 5 F.3d 117 (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, 35-39 (3d Cir. 1983) (holding that hybrid standard, which combined the common law right to control with the economic realities test, was the correct standard for determining employee or independent contractor status under the ADEA).

¹⁴⁴ *Mendel v. City of Gibraltar*, 842 F. Supp. 2d 1035 (E.D. Mich. 2012), (citing *Todaro v. The Township of Union*, 27 F. Supp. 2d 517 (D.N.J. 1998) (citing *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944))).

¹⁴⁵ *See, e.g.*, Gregory, *supra* note __ at 233-235 & n.9.

¹⁴⁶ The Supreme Court recognized this truism in *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (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, supra* note __, at 173 (citing cases).

¹⁴⁷ 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 Hallessey v. America Online, Inc.*, No. 99 Civ. 3785, 2006 U.S. Dist. LEXIS 12964 at *17 (S.D.N.Y. Mar. 10, 2006) (benefits other than cash payments may constitute “compensation” when contemplating the “expectation of compensation” for services rendered under the DOL six-part intern test). The problem with this approach is that it is a very imperfect fit to take a test developed for

Illustrative of the difficulty of applying the economic reality test to the situation of law clerks, as opposed to its intended use for distinguishing independent contractors, is *Jovanovich v. Angelone*.¹⁴⁸ In *Jovanovich*, the Ninth Circuit held that the economic reality test could be applied to determine whether prisoner law clerks were employees under the FLSA. The court found that the employment relationship was similar to that which existed in the everyday economic marketplace,¹⁴⁹ and that the employers had the power to hire and fire, power to supervise schedules and conditions of employment, power to determine pay rates and methods, and maintained employment records.¹⁵⁰ Not all 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 the 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 since their clothing, shelter, and food were provided by the prison.¹⁵¹

But the question is then – what is the appropriate test for whether an individual is an employee who should be compensated versus an intern who need not be compensated? Some courts and commentators have also drawn a line between the easy case of the pure volunteers who works for no compensation and the grey area of the 'enhanced' volunteer who receive some form of stipend or minimal benefit and this may straddle the line between employee and volunteer.¹⁵² This view identifies compensation as a determinative factor in distinguishing volunteers, and considers unpaid volunteers who do not receive any kind of stipend or benefit the easy case (the grey area being "volunteers" who are paid a *de minimus* stipend or benefit). The DOL six-factor test does take expectation of compensation into account but it is not determinative, nor should it be. If receipt of

one purpose and attempt to apply it for another purpose. Better to start afresh and create an appropriate fit.

¹⁴⁸ *Jovanovich v. Angelone*, 1994 WL 16133692, Civ. No. 92-896 (9th Cir. Nov. 21, 1994) (reversing district court's grant of summary judgment and rejecting district court's holding that the economic reality test did not apply to the prisoners).

¹⁴⁹ *Id.* at *11

¹⁵⁰ *Id.* at *14.

¹⁵¹ *Id.* at *12 (stating that the prison could deduct some of these amounts from the wages).

¹⁵² *Mendel v. City of Gibraltar*, 842 F. Supp. 2d 1035 (E.D. Mich. 2012); Mitchell Rubinstein, *supra* note 7, *passim*.

compensation is the litmus test of whether an individual is an ‘employee’ under the FLSA, the FLSA would be redundant – employers would be incentivized to not pay any type of compensation in order to avoid FLSA coverage. That is not how the law works – the FLSA determines who is entitled to a wage based on the existence of an employment relationship.

Nevertheless, despite the inapplicability of the judicially created tests for independent contractor status, there are some common threads in those cases that can be helpfully applied to the internship relationship, one being *the right to control*,¹⁵³ and another being the *primary purpose* behind the arrangement.¹⁵⁴

In sum, the FLSA, DOL 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 school-sponsored programs in a variety of settings, and are working at 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 rule(s) 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.

¹⁵³ Mendel v. City of Gibraltar, 842 F. Supp. 2d 1035 (E.D. Mich. 2012). The court in *City of Gibraltar, id.*, identified “control” as the underlying theme in most of the independent contractor cases, which has been recognized by other courts in that context. See, e.g., Secretary of Labor, United States Dep’t of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. Wis. 1987) (applying multi-factor test to determine the economic reality of whether pickle-pickers were economically dependent on farmer but in fact focusing more on the right to control). The court in *City of Gibraltar*, however, isolated the control factor as the determinative factor for distinguishing volunteers from employees, which is indeed very odd. A volunteer surely never has any control over the work they do, how it is done, or when it is done.

¹⁵⁴ *But see* Mendel v. City of Gibraltar, 842 F. Supp. 2d 1035 (E.D. Mich. 2012) (finding that the “right to control” test was common trend in all the FLSA employee tests; applying the right to control test to volunteer firefighters and finding that the firefighters were not controlled by the city and therefore were volunteers).

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

A. *Unpaid Law Student Workers in All Settings Are Not Exempt White Collar Professionals*

Some employers may believe that law student interns (paid or unpaid) may be exempt from the wage and overtime requirements of the FLSA if they meet the FLSA bona fide executive, administrative, or professional employees (or so-called "white-collar") exemption tests.¹⁵⁵ As discussed, *supra*, the FLSA professional and administrative exemptions require that the employee meet three tests: (1) primary duties test; (2) salary basis test; and (3) salary test. Law student interns will rarely meet these requirements.

1. Unpaid Law Student Workers Are Not Paid the Minimum Salary of \$455 Per Week

First, the unpaid intern does not meet the salary test because she is not paid a salary of at least \$ 455 per week¹⁵⁶ - clearly the salary test is not met where if the law student intern is unpaid.¹⁵⁷ Second, the unpaid intern is not paid on a "salary basis" because that requires regularly receipt of each pay

¹⁵⁵ 29 U.S.C. §213; *see also* 29 C.F.R. Part 541. (For administrative exemption, *see* [29 C.F.R. §541.200](#)-§541.204; for professional exemption, *see* [29 C.F.R. §541.300](#)-§541.301).

¹⁵⁶ 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.

¹⁵⁷ Employees who are paid on an hourly basis are not paid on a salaried basis within the meaning of 29 CFR § 541.118. *See* Andrew M. Campbell, *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*, 123 A.L.R. Fed. 485, Section 3[b] (2012) (compiling cases).

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.¹⁵⁸

2. Law Student Workers Are Not Exempt Because They Are Not ‘Learned Professionals’

Even if the intern is paid a minimum wage that would meet the salary test, questions remain as to whether a law student intern would meet the exemption 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.”¹⁵⁹

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.¹⁶⁰

Not surprisingly, the DOL has accordingly held that paralegals and legal assistants do not fall within the administrative or professional exemption.¹⁶¹ Law student interns are typically performing at a level akin to a legal assistant, not a licensed J.D. graduate, 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 test. In part, this is because a supervising attorney supervises and reviews a paralegal’s work, like that of a law clerk.¹⁶²

¹⁵⁸ 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. 29 C.F.R. § 541.600(e); § 541.304.

¹⁵⁹ 29 C.F.R. § 541.3(a)(1); *see also* 29 C.F.R. § 541.301.

¹⁶⁰ 29 C.F.R. § 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.*

¹⁶¹ *See, e.g.*, DOL Wage and Hour Opinion Letter, 2005 WL 3638473 (Dec. 16, 2005); DOL Wage and Hour Opinion Letter, 2006 WL 2792441 (July 24, 2006).

¹⁶² A law firm might try to creatively circumvent the FLSA wage and hour rules by

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 the law degree. Thus, the DOL has opined that a senior legal analyst position in a corporation does not qualify for the professional exemption under the FLSA.¹⁶³ The DOL based this opinion less on the nature of the work performed and more upon the fact that such employees are not required to have obtained a law degree and thus do not satisfy the academic requirements necessary to invoke this exemption.¹⁶⁴

B. *Volunteers at Public Agencies*

The FLSA expressly exempts volunteers at State public agencies, subject to certain conditions that do not typically apply to a law student intern.¹⁶⁵ Similarly, law students may provide voluntary services to federal agencies.¹⁶⁶ It should not make any difference whether the law student worker attains their public agency or federal agency internship

contracting to pay a fee or commission or by entering into a contingency arrangement with a law clerk. Independent contractors are not covered by the 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.

¹⁶³ U.S. Dept. of Labor, Op. Letter No. FLSA2006-27 (July 24, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_07_24_27_FLSA.htm (citing 29 U.S.C. § 213(a)(1) and 29 C.F.R. § 541.301 (2006)).

¹⁶⁴ *Id.* (citing 29 C.F.R. 541.301(e)(7)) (“[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. Ap. 582, 585 (Cal. App. 2011) (law school graduate working in a law firm before becoming licensed to practice law is an exempt professional under the California analogue of the FLSA 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.” Court distinguished the DOL regulation because this individual had in fact graduated).

¹⁶⁵ Under 29 U.S.C. § 203(e)(4)(A), the public agency may not receive compensation (although they may receive expenses, etc.) and must not perform the same type of services which the individual is employed to perform for such public agency

¹⁶⁶ 5 U.S.C. § 3111 (2006).

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.”¹⁶⁷ Can it truly be the case that thousands of law students across the United States are interning and externing 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.

C. *Volunteers at Non-Profit Organizations*

1. Law-School-Sponsored Programs

Most of the law school experiential programs described in Part I neatly place the law student outside of the FLSA’s “employee” coverage because the law students are placed in non-profit settings or in government agencies. The FLSA’s volunteer exemption, section 203(e)(5), probably applies to law student interns at non-profit organizations. The statutory volunteer exemption provides a very limited exemption for those “who volunteer their services solely for humanitarian purposes to private non-profit food banks.”¹⁶⁸ Thus, neither the statute nor DOL regulations expressly exempt volunteers at non-profits that are not food banks. The DOL has, however, applied this food-bank exemption to other types of non-profit enterprises in a series of Opinion Letters.¹⁶⁹

Since the DOL has consistently taken the position that volunteers include individuals who provide services to non-profits, and courts have accepted this view, the non-profits should remain safe from the threat of lawsuits. Nevertheless, the fact that the non-profit 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 non-profit

¹⁶⁷ 29 C.F.R. § 553.101(a). The New York State Department of Labor has issued a useful Fact Sheet explaining/clarifying who is an exempt volunteer in a non-profit situation: <http://www.labor.ny.gov/formsdocs/wp/P726.pdf>.

¹⁶⁸ 29 U.S.C. 203(e)(5).

¹⁶⁹ See *Volunteers/Employee Status* [Nov. 9, 1998], 6A Lab. Rel. Rep. (BNA), at WHM 99:8048 (Nov. 9, 1998) [hereinafter Opinion Letter, Nov. 9, 1998] (defining bona fide unpaid-volunteer relationships).

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 non-profit is working independently or through a school-sponsored, credit-bearing arrangement, since the applicable 'exemption' is the volunteer exemption, which focuses on the nature of the non-profit activity. Nevertheless, it is worth noting that the *Laurelbrook* case illustrates that a federal court and even the DOL will overlook the non-profit status of the defendant/employer and may ignore the volunteer option entirely in certain cases. As discussed below, *Laurelbrook* involved student workers at a non-profit school; the boarding students at the school performed work at a sanitarium attached to the school. Since the case involved students in a training/educational setting, the court focused on the DOL's six-factor trainee/employee tests which apply to *for-profits*, and did not discuss the applicability of the FLSA *volunteer* exemption. Thus, the DOL and the Sixth Circuit apparently did not view the non-profit nature of the organization as dispositive but instead focused on the nature of the work performed and the nature of workplace setting - the court therefore looked beyond the non-profit status of the defendant and focused on the nature of the work performed. The question arising from this case is whether the DOL and federal courts would also disregard the volunteer 'exemption' when reviewing law students working in non-profit settings and instead focus on the nature of the work performed and the setting, which in most externships is focused on training and education. Thus, the question after *Laurelbrook* is whether law student externs at non-profits fall within the volunteer or trainee category? Either way, both are gray areas. If the applicable test is the DOL six-factor test for trainees at for-profits, the analysis discussed in Part __ will likely apply

The case for government agency internships may be easier to make because the law students in those settings are more easily labeled volunteers under Section 203(e)(5) of the FLSA and the DOL regulations. However, even these settings can be a gray area and the DOL has stated that it is reviewing the need for guidance in this area.¹⁷⁰ If the test for these settings

¹⁷⁰ DOL Fact Sheet No. 71(DOL is "reviewing the need for additional guidance on internships in the public and non-profit sectors"). As currently articulated, the six-part test only applies to the for-profit sector. See generally Anthony J. Tucci, *Worthy Exemption? 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-part test applicable to unpaid interns at nonprofits and public agencies).

is whether the law student is a ‘volunteer,’ then it should make no difference whether or not the law student works at the agency or non-profit under the auspices of a school-sponsored program. If the courts import the DOL six-factor intern test into this non-profit setting, the educational component should make the test easier to apply.

In sum, although it was relatively uncontroversial in the past that the volunteer exemption applies to law students who take on externships at non-profits or government agencies, recent cases may have cast doubt on that assumption. 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. If the

2. Non-School-Sponsored Programs

The FLSA volunteer exemption for non-profits 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 students interns are less likely to be labeled trainees, simply because they lack the imprimatur of law school credits, law school classroom component, and law faculty supervision and oversight. The application of the DOL test is discussed more fully below.

D. Unpaid Law Student ‘Interns’ Working at For-Profit Organizations

The for-profit setting is the grayest area for law student workers, their putative employers and law schools. The for-profit setting lacks the blessing of the Supreme Court *Alamo Foundation* decision and lacks any FLSA or DOL regulatory analogy because the law student cannot be said to be engaging in any humanitarian undertaking. The law-school-sponsored internship does have the significant benefit of being credit-bearing and having an educational oversight component that makes a better case under the DOL six-factor test, but the primary benefit test applied by some federal courts¹⁷¹ simply leads to even more confusion.

¹⁷¹ See, e.g., *Weddell*, supra note 106, 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).

1. Law School Sponsored Programs

Commentary on whether law schools should place students in for-profit law firms is mixed. One commentator, Professor Feeley, has made the case for for-profit externships, tracing the development of law school externships and noting the potential hurdles of the ABA and AALS standards,¹⁷² as well as acknowledging that the externships must pass muster under the FLSA and the DOL six-part test.¹⁷³ Professor Feeley concluded that the for-profit externship is viable and can be a valuable legal educational tool, provided certain steps are taken to protect the externship's educational viability.¹⁷⁴

Other commentators take the opposite position. Professor James Backman also examined the ABA rule that law school externs cannot be paid if they receive school credit,¹⁷⁵ and posited that the ABA and law schools that allow for-profit externships without compensation run afoul of the FLSA.¹⁷⁶

This split in academic viewpoints reflects several realities: (1) the law itself is unclear;¹⁷⁷ (2) 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 give all the benefits

¹⁷² Feeley, *supra* note 43, at ___.

¹⁷³ *Id.*

¹⁷⁴ Feeley, *supra* note 43, at ___.

¹⁷⁵ See ABA Standard 305-3.

¹⁷⁶ James H. Backman, *Law School Externships: Reevaluating Compensation Policies To Permit Paid Externships*, 17 CLINICAL L. REV. 21, 55-56 (2010) (PAPERS FROM THE EXTERNSHIPS 4 & 5 CONFERENCES). Note that the ABA Standards Committee was considering deletion of Standard 305-3 (prohibiting paid externships) . The Committee on Clinical Skills comments recommended that Standard 305-3 *not* be deleted and takes the position that the FLSA is not violated if the externship is a true learning experience primarily for the benefit of the student. See 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 Student Learning Outcomes Draft for January 8-9, 2010 Meeting Prepared by the Student Learning Outcomes Subcommittee, 8-9 (2010).

¹⁷⁷ The DOL six-factor test itself is clear but it is simply a guideline, it is 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 is questionable. Further, the test is applied on a case-by-case basis.

of the traditional externship relationship.

On the other hand, even setting aside the difficulties of how to apply the FLSA, the problem with these arrangements remains the profit-motive – the law firm makes a profit from using the unpaid labor, but it now has the shield of “law school credit” to protect it from legal claims. Further, the extern potentially displaces entry level attorneys and he now has to pay for tuition/credit. But, if the law school attaches strict conditions and requires the type of supervision and training envisioned by the six-part test and/or the law student is the “primary beneficiary,” this type of arrangement might deter unscrupulous attorneys looking for a free labor source with no strings attached. Any attorney who has ever 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, go back over the research to check it, and to provide appropriate and meaningful feedback.

The leading case on point is *Solis v. LaurelBrook*,¹⁷⁸ which involved a non-profit Seventh Day Adventist school which had a work/trainee program for its boarding students. The school setting makes the case somewhat analogous to the law-school sponsored externship in that both arrangements are an integral part of the education. 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 the FLSA, but affirmed the district court’s application of the ‘primary benefit’ test – “which party (school or student) receives the primary benefit of the work the student performs.”¹⁷⁹ The Sixth Circuit expressly rejected the DOL’s six-part test as too rigid because it is an “all-or-nothing” approach, whereas the Sixth Circuit opined that a “totality of the circumstances” approach should be used.

The Sixth Circuit subsequently denied the DOL’s request for rehearing en banc on the issue of deference to the DOL’s interpretation of the FLSA, essentially rejecting the six-part test in favor of the primary benefit test.¹⁸⁰ 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 employees, not

¹⁷⁸ *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518 (6th Cir. 2011).

¹⁷⁹ *Id.* at 528.

¹⁸⁰ *Rehearing denied by, Rehearing, en banc, denied by Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 2011 U.S. App. LEXIS 14678 (6th Cir., July 6, 2011)

trainees, was not substantially justifiable.¹⁸¹ 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-part test; the district court held that the DOL's conclusion was not sustainable even under the six-part test, awarding \$____ in fees and \$___ in costs.¹⁸² This ruling may chill the Wage and Hour Division of 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 three-step analysis to determine the "employee" status of educational:

- (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;
- (4) the primary benefit test applies to these situations, not the DOL six-factor test because it is not faithful to the Supreme Court's interpretation of "employee" in *Portland Terminal*.

As stated, *Laurelbrook* involved a non-profit school which had a work/trainee program for its boarding students, so is partially analogous to the law-school sponsored externship in that both arrangements are an integral part of the education. The case *might* also have application to law students working *outside* the school-sponsored setting because: (1) the Sixth Circuit rejected the DOL six-part test and the all-or-nothing approach; (2) it embraced the primary benefit test; and (3) in applying the primary purposes test, the court stressed the same types of benefits to the students at issue that law students in an internship would find (being meaningfully engaged, learning useful skills), and found that the benefit to the defendant was secondary. Moreover, *Laurelbrook* found that the DOL was not substantially justified in its position and should not have relied on the six-factor test. 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 in opposing an award of attorneys' fees but the court also rejected the claim that the DOL should get any leeway due to its role in as a safety net to ensure worker safety.¹⁸³

¹⁸¹ *Chao v. Laurelbrook Sanitarium & Sch., Inc.*, 2012 U.S. Dist. LEXIS 70880 (E.D. Tenn. May 21, 2012).

¹⁸² *Id.* at *_.

¹⁸³ *Solis v. Laurelbrook Sanitarium & School, Inc.*, 642 F.3d 518 (6th Cir. 2011).

Indeed, *Laurelbrook* is not an outlier. Other courts have also 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/which party is the "primary beneficiary."¹⁸⁴

2. Non-Law-School-Sponsored Unpaid Internships at For-Profit Law Firms

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., *supra*, a person may only do volunteer work in a not-for-profit organization, if that organization is set up and operates strictly for charitable, educational or religious purposes.¹⁸⁵ Other organizations may not use unpaid volunteers, and the DOL/FLSA does not recognize volunteer legal interns at for profit law firms.¹⁸⁶

Nomenclature makes it difference, so it seems. Courts are confused as to whether to analyze putative 'volunteers' and 'interns' under the independent contractor tests (and the federal courts apply a variety of tests to determine independent contractor status),¹⁸⁷ or some other test,¹⁸⁸ such as the DOL six-factor test. Regardless of whether the DOL test is applied or the "primary benefit" test is applied, unpaid interns at for-profits are typically employees and are not excluded from the definition of 'employee' under the DOL six-part 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 the *Portland Terminal* case where the trainees worked in a school-like setting *for their own advantage* on the premises of another.¹⁸⁹ *Laurelbrook* fell squarely within this paradigm because the work performed was an integral component of the educational setting and the educational

¹⁸⁴ *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) ("... the district court's balancing [of relative benefits] analysis appears to us to be more appropriate."); *see also Isaacson v. Penn Comm'y Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971); *Wirtz v. Wardlaw*, 339 F.2d 785, 788 (4th Cir. 1964).

¹⁸⁵ *See* Part __, *supra*.

¹⁸⁶ *See* DOL Fair Labor Standards Act Advisor - Volunteers, *available at* <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp>.

¹⁸⁷ *See, e.g., Okoro v. Pyramid 4 Aegis*, Case No. 11-C-267, 2012 U.S. Dist. LEXIS 56277 (April 23, 2012) (right to control).

¹⁸⁸ For example, in *Roman v. Maietta Constr.*, 147 F.3d 71 (1st Cir. 1998), the court held that a stock car enthusiast was a volunteer since he did it for his own enjoyment and not primarily for the defendant's benefit, begging the question of whether the court was applying a primary benefit test or a new pleasure/enjoyment test.

¹⁸⁹ *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

mission of the school and indeed the religion. The paradigm may extend to the law-school externship setting, too. In the typical for-profit law firm setting, however, the intern is completely detached from the law school's educational component and may lack any indicia of training beyond the supervisor's feedback on an assignment. The for-profit independent arrangement is more likely to be a mutually beneficial arrangement – the law student is working for their own advantage in part but their work product directly benefits the law firm. Most of these law firm internships will fail at least four of the DOL's six-factors, as explained below.

- (1) *“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.”*

Some law school training is experiential, as described in Part II, *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 clients. It would be the rare for-profit setting that would approximate the law school experiential setting. Even the 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. Nevertheless, some arrangements could be fine-tuned to further approximate the school-sponsored experience.

- (2) *“The training is for the benefit of the trainees or students.”*

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 hands-on 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.

- (3) *“The trainees or students do not displace regular employees, but work under their close observation.”*

As with the other factors, this factor will vary from firm to firm, but 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 was given her 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, etc.

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

Any attorney who has supervised a junior attorney encounters frustrations when the supervision and direction required seem disproportionate to the work product – it seems easier to just do it yourself. But, having to postpone a teleconference to find a sample set of interrogatories for the intern to review is a small price to pay for the advantage of having that intern actually review the case documents and draft the interrogatories. Having an intern do some initial research on a legal question is almost always to the immediate advantage of the law firm.

- (5) *“The trainees or students are not necessarily entitled to a job at the conclusion of the training period.”*

It is probably almost always the case that the law student intern comes on board knowing that they are not entitled to a job with that law firm – nevertheless, they probably lived in hope and a potential job offer may sometimes be dangled in front of them to entice the student to take the position. If this criteria was deemed to be 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.

- (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.”*

Obviously, the law student will always understand from the outset that they are not going to be paid for the internship, but again, if this

criteria were deemed dispositive or given much weight, it would be simple for the law firm to avoid FLSA liability with 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 is an employee under the DOL six-factor test. Even under the more forgiving “primary benefit” test, this arrangement is unlikely to 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, 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. 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 filed three recent lawsuits alleging violations of the FLSA and New York Labor laws in analogous circumstances.¹⁹⁰ The lawsuits focus on interns in the media and entertainment business (Hearst, Searchlight, Charlie Rose), and will test the current view of the federal courts on this issue if any of the lawsuits proceed.¹⁹¹ They are bell weathers for what an unpaid law student intern might expect but, for now, the message is clear – former interns have found a champion and are ready to litigate their claims.¹⁹²

¹⁹⁰For details of the lawsuits, visit the website of the Outten & Golden law firm, at www.unpaidinterns.com. The Wang/Hearst complaint is located at: [http://unpaidinternslawsuit.com/documents/Hearst Corporation Complaint %28AMEND ED%29_032312.pdf](http://unpaidinternslawsuit.com/documents/Hearst_Corporation_Complaint_%28AMEND_ED%29_032312.pdf)

¹⁹¹The Charlie Rose Show settled the lawsuit against it, agreeing to pay \$250,000 to a class of 189 former interns. See Outten & Golden website, Case News and Announcements, dated Dec. 20, 2012, <http://unpaidinternslawsuit.com/charlie-rose-show-agrees-to-pay-up-to-250k-to-settle-interns-lawsuit>.

¹⁹²Whether these intern cases are suitable for class action is a related question. See Fed. R. Civ. Pro. 23; FLSA Section 216(b) (addressing class actions). Cases involving AOL 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. AMERICA ONLINE CASES, 2005 Cal. App. Unpub. LEXIS 4663 (Cal. App. 6th Dist. May 26, 2005) with Hallissey v. Am. Online, Inc., 2008 U.S. Dist. LEXIS 18387 (S.D.N.Y., Feb. 19, 2008) (granting class action certification). See also Reab v. Elec. Arts, Inc., 214 F.R.D. 623, 629 (D. Col. 2002) (conditionally certifying class for on-line fantasy

IV. OTHER STATUTORY VIOLATIONS

Professor David Yamada and others have addressed the problem of whether other employment laws, notably harassment/discrimination, apply to interns, and this Article does not intend to replicate that work. Rather, this section 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.¹⁹³ Thus, Professors Bowman & 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.¹⁹⁴ The utility of these theories to potential FLSA violations by a non-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 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.¹⁹⁵ Employers who violate the 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.¹⁹⁶ Professor Sachin Pandya has shown how employers

“volunteers” claiming FLSA violations, stating Plaintiffs' subjective belief as to their status under the FLSA is irrelevant to the question whether to conditionally certify a class”).

¹⁹³ 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 \(2000\)](#) (exploring legal remedies available to student interns who are sexually harassed).

¹⁹⁴ *Id.*

¹⁹⁵ See Gregory, *supra* note __, at n.11 (citing *I.R.C. 3401* (1994) (withholding tax), Federal Unemployment Tax Act, *I.R.C. 3306* (1994) (Payroll tax), Federal Insurance Contributions Act, *I.R.C. 3102(a)* (1994) (FICA)).

¹⁹⁶ See Gregory, *supra* note __, at n.12 (noting that employer 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

who underpay workers may be liable for unreported income or disallowed business expense deductions.¹⁹⁷ 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.'¹⁹⁸

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 who misclassify employees as interns should consider whether they have violated their state rules of professional responsibility. For example, the Model Code has 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.¹⁹⁹ 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.

V. THE ROLE OF THE LAW SCHOOL

Law schools obviously have a vested interest in ensuring that their 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 non-profits and government agencies. Credit-bearing externships at for-profit companies may be problematic, unless they scrupulously adhere to the guidelines set forth in the DOL six-factor test, and most programs will do so.²⁰⁰ But what is the law school's responsibility to its students when it comes to for-profit non-sponsored internships?

responsible for declaring federal and state taxes on amounts received from the employer, and for federal self-employment tax. Gregory, *supra* note __, at n.12.

¹⁹⁷ Sachin Pandya, *Tax Liability for Wage Theft*, __ COLUM. J. TAX. LAW __ (20--)(available on SSRN).

¹⁹⁸ *Id.*

¹⁹⁹ ABA Model Rule of Professional Conduct 8.4(c) (it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

²⁰⁰ I am setting aside, for now, the problematic ethical issue of placing students in for-profit law firms in the knowledge that the law firm is benefiting economically from the work done by that law student.

Some unpaid for-profit internships will be arranged wholly outside of the law school's involvement and/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 a law school career services website, and employers may advertise for unpaid interns through such sites. And sometimes local lawyers contact law professors and ask for recommendations for unpaid interns. In these types of situations, the law school may not have a legal responsibility but arguably has an ethical and moral responsibility to protect its students from potential abuse.

A. Joint Employer Doctrine

From its inception, the FLSA has contemplated joint employer liability and such liability has been expansively defined and applied by the DOL and courts:

‘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.²⁰¹

As early as July 1939, the Department of Labor issued Interpretive Bulletin Number 13, which contained an interpretation of joint employer status with respect to the overtime compensation requirements of the FLSA.²⁰² 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.²⁰³

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

The Department of Labor regulations, not surprisingly, apply a case-by-case assessment of whether employment is to be considered joint employment or separate and distinct employment under the FLSA.²⁰⁴ If the

²⁰¹ 29 U.S.C. § 203(d); 29 C.F.R. § 791.2(a) (2012) (emphasis added).

²⁰² Interpretive Bulletin No. 13 (1940).

²⁰³ *Id.*

²⁰⁴ 29 C.F.R. § 791.2(a) (2012) (“A determination of whether the employment by 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.²⁰⁵ The DOL provides examples of joint liability that do 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.²⁰⁶

1. Joint Employer Status – The Economic Realities Test

The question of whether a party is an employer or joint employer for purposes of the FLSA is essentially one of fact. The Supreme Court instructs lower courts to make the factual determination by considering the total employment situation and the economic realities of the work relationship.²⁰⁷ Thus, lower courts routinely apply the ‘economic realities’ test to determine joint employer status,²⁰⁸ rather than relying on an employer’s formalistic labels, subjective intent, or a good-faith belief that an employer-employee relationship does not exist. Under the “economic realities” test the court will evaluate the totality of the circumstances, and no single factor will be determinative.²⁰⁹

Courts have developed a number of factors to consider in determining

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.”).

²⁰⁵ *Id.*

²⁰⁶ 29 C.F.R. § 791.2(b).

²⁰⁷ See *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28 (1961); see also *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

²⁰⁸ See, e.g., Richard J. Burch, *A Practitioner's Guide to Joint Employer Liability Under the FLSA*, 2 HOUS. BUS. & TAX L. J. 393, 405 (2002).

²⁰⁹ See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (holding that “the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity”).

joint employer status, starting with a four factor test as articulated by the Ninth Circuit in *Bonnette v. California Health & Welfare Agency*.²¹⁰ The court in *Bonnette* addressed the issue of whether a state welfare agency was a joint employer of domestic in-home caregivers, looking 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.”²¹¹ The Ninth Circuit found that the welfare agency “exercised considerable control” by determining the hours a caregiver would work and the tasks a caregiver would perform, choosing the rate and directly or indirectly choosing the method of paying the caregivers, and maintaining the caregivers' employment records.²¹² Although the evidence was disputed 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 the FLSA.²¹³ Other circuits have built on or expanded the test to incorporate other factors to evaluate functional control,²¹⁴ using the economic realities test, thereby

²¹⁰ 704 F.2d 1465, 1470 (9th Cir. 1983).

²¹¹ *Id.* at 1470. The Ninth Circuit has subsequently incorporated other factors into the joint employer test in some other cases. *See, e.g., Moreau v. Air France*, 343 F.3d 1179, 1184-85 (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 passed from one labor contractor to another without material changes; (3) whether the premises and equipment of the employer were 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 was an integral part of the alleged employer's business) (citing *Torres-Lopez v. May*, 111 F.3d 633, 640 (9th Cir. 1997)).

²¹² 704 F.2d at 1470.

²¹³ *Id.* Layton v. DHL Exp. (USA), Inc., 686 F.3d 1172, 1178-81 (11th Cir. 2012). “No one factor is dispositive and the existence of a joint employer relationship depends on the economic reality of the circumstances.” *Id.* at 1177.

²¹⁴ *See, e.g., Zheng v. Liberty Apparel Co., Inc.*, 355 F.3d 61, 71 (2d Cir. 2003). 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 joint employer. *Id.* at 72. *See also*

aligning the joint employer analysis with the analysis courts typically use to determine whether an individual is an employee or independent contractor. None of these tests alter the fundamental inquiry relevant to a law school's control over the employment of law student externs and interns.

The Eleventh Circuit, for example, applies an eight-factor test to analyze whether a defendant is a joint employer under the FLSA:

(1) the nature and degree of control of the workers; (2) the degree of supervision, direct or indirect, of the work; (3) the power to determine the pay rates or the methods of payment of the workers; (4) the right, directly or indirectly, to hire, fire, or modify the employment conditions of the workers; (5) preparation of payroll and the payment of wages; (6) ownership of facilities where work occurred; (7) performance of a specialty job integral to the business; and (8) investment in equipment and facilities.²¹⁵

2. Law Schools As 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 tests for joint employer liability because the law school is so far attenuated from the law firm in all respects. In a credit-bearing externship, the law school has a much closer relationship to the law firm but typically would not meet any of the factors that point toward control over the law student sufficient to meet the economic realities test, to the extent such a test makes sense in an uncompensated educational situation.

Most courts, applying the factors from *Zheng* and *Bonnette*, would likely find that: (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

Barfield v. New York City Health and Hosp. Corp., 537 F.3d 132, 143-145 (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 "functionally 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.*, Civ. No. _____, 2011 WL 666145 at *4 (S.D. Fla. _____ 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).

²¹⁵ See, e.g., *Aimable v. Long & Scott Farms*, 20 F.3d 434, 437 (11th Cir. 1994).

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 ABA does not permit compensation in a credit-bearing externship); (5) the employer determines the pay roll; and (6) the law school does not own the facilities or equipment used by the law student on-site at the law firm.

B. Although The Law School Is Not A Joint Employer, It Has Other Obligations To Law Students

Although the law school is probably not responsible for FLSA compliance as a joint employer, the law school arguably has an obligation to take affirmative steps to educate and assist its law 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 University of Maryland, Francis King Carey School of Law Job Posting Policy:

To facilitate ethical hiring practices that comply with the Fair Labor Standards Act (FLSA), the Career Development Office will only list unpaid law clerk or intern positions affiliated with School of Law academic programs or positions posted by public service and nonprofit organizations, public interest law firms or public interest organizations providing legal services for underrepresented people or causes. For information on FLSA, please visit the U.S. Department of Labor website at: <http://wdr.doleta.gov/directives> and <http://www.dol.gov/compliance/laws/comp-flsa.htm>. The Career Development Office reserves the right not to post position listings that are inconsistent with its policies.²¹⁶

Other law schools post unpaid internships on behalf of law firms but issue a clear warning to the prospective employer that they should check the FLSA on this point. Seton Hall, for example, states on its website that it strongly prefers that interns be paid, tells employers it is their responsibility to check, and gives a link to the DOL criteria,²¹⁷ but also points out to

²¹⁶ University of Maryland, Francis King Carey School of Law, Job Posting Policy, <http://www.law.umaryland.edu/students/careers/policies.html> (last visited July 26, 2012)..

²¹⁷ Seton Hall School of Law, Career Center, <http://www.shu.edu/offices/career-center/paid-unpaid-internships.cfm> (last visited July 26, 2012) (“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.”).

employers the opt-out of a stipend.²¹⁸ 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.²¹⁹ Other law schools have no policy or statements on the matter.

The Maryland approach is the most protective of students because employers who seek unpaid interns are simply not allowed to post their unpaid positions on the law school website. The Maryland approach also ensures that the law school is not even remotely 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 their own situation.

The disclaimer/warning approach possibly deters 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 and at least this approach alerts them to check the law before proceeding. The generic approach is less effective in this regard – 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 approach is an indirect method of educating students. Employers will seek out unpaid law students through other methods, and students will seek out unpaid positions by other methods; therefore best practices should be developed by law schools to include student education on their basic employment rights.

VI. PROPOSALS

The myriad ways that law students gain work experience reflects contemporary changes in law school education, the legal job market, and

²¹⁸ *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.”).

²¹⁹ *See, e.g.,* Florida Coastal School of Law, Career Services, <http://www.fcsf.edu/career-services/our-services-0> (last visited July 26, 2012) (“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.”).

the legal profession itself. The analysis of whether these law student workers should be paid should change. The FLSA neglects a broad swath of these workers and the DOL has simply not filled the gap. 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.

The 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, simply expecting law firms to pay up is not realistic and efforts to force them to do so may have reverberating practical and policy implications. A solo practitioner handling cases on a contingency basis is simply 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 and thereby deprive willing students of valuable work experience.

If law firms are operating in a legal and ethical grey area, they should react accordingly, but how can they be encouraged to do? The top-down regulatory approach is the first line of “encouragement” using a stick approach. However, the DOL is unlikely to engage in enforcing the FLSA against law firms – like every other agency they are overburdened, underfunded and have a long list of other priorities. Private enforcement also seems unlikely – good luck finding a law student who is willing to sue a law firm and risk her chances of future employment in the legal field.²²⁰

The “carrot” approach, borrowing from New Governance principles, may be moderately effective. Law schools can play an important role by taking a few simple steps: (1) proactively take a position by researching the law (reading this Article and the many 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) law schools can make it crystal clear to prospective employers that they will not advertise unpaid positions, using the University of Maryland model of disclaimer. The “carrot” under this proposal is a thinly veiled attempt to shame potential employers into doing the right thing, but also has the

²²⁰ 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 probably only has a solo or small number of interns. The author thanks Professor Alan Morrison for pointing out these realities.

advantage of educating employers on their legal obligations and potential legal exposure.

Another option is the student-learner certification extension to other types of student interns, including law students.²²¹ The advantage of this approach is that certified learners would earn a wage and that 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, the DOL has lots of 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 downside of this approach is that student learners must still be paid under the FLSA, and even though it is sub-minimum wage, it is still 95% of the minimum wage²²² so there really is no incentive for an employer to jump through the required certification hoops – they will likely choose to either pay the prevailing minimum rate or continue current practices of not paying their interns.

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 hugely significant role in that regard, but many prospective employers in the private sector probably want to hire law students with experience in practice areas that are not necessarily found in clinics and likely prefer some experience working in a law firm setting. One possibility is a law school non-profit law firm working 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/training that law firms traditionally used junior associates and clients are no longer willing to pay. The law school for-profit externship might also fulfill this role but until Congress or the DOL regulate on this issue, these externships fall into the regulatory vacuum and might be best avoided.

The discussion thus far leads inexorably to the problem of definitions – the term “intern” is ambiguous and is not even a term used in the FLSA. The FLSA exempts public agency “volunteers,”²²³ and federal agencies have picked up the same terminology by exempting certain “volunteer”

²²¹ 29 U.S.C. § 214.

²²² 29 U.S.C. § 214(b)(1)(A) (authorizes Secretary of Labor to issue a regulation to provide a wage rate of not less than 80% of the applicable wage rate); 29 C.F.R. § 520.408 (setting rate at 95%).

²²³ 29 U.S.C. § 203(e)(4)A).

services.²²⁴ The problem with this terminology is that a volunteer is typically seen as someone who is working on an ad hoc basis for humanitarian or civic reasons, so it simply does not capture the essence of the modern intern. Similarly, the DOL definition of an intern under the six-factor test²²⁵ 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 non-profit – 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 – that their internship will offer real-world experience, a boost to their resume and maybe even result in 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.

Thus, 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 excludes volunteers and interns from the definition of employee from employment laws as follows: “Unless otherwise provided by law, for purposes of laws governing protections, benefits, and obligations in the employment relationship, an individual is a volunteer and not an employee *if the individual renders uncoerced services without being offered a material inducement.*”²²⁶ Although the drafters include interns in this exclusion, this section 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 source of the opportunity for experience that is greater than is the value of the intern's enhanced learning.²²⁷

²²⁴ 5 U.S.C. § 3111.

²²⁵ DOL fact Sheet #71.

²²⁶ Proposed Restatement of Employment Law Section 1.02, “Volunteers Are Not Employees for Purposes of Laws Governing Employment Relationship” (emphasis added).

²²⁷ Dennis R. Nolan, Theodore J. St. Antoine, Joseph E. Slater, Alvin Goldman, *Proceeding: Working Group On Chapter 1 Of The Proposed Restatement Of Employment Law: Existence Of Employment Relationship*, 13 EMPL. RTS. & EMPLOY. POL’Y J. 43, 56 (2009) (suggesting definition of ‘intern’ under Comment (d) to Section 1.02).

It could be argued that the “primary benefit” test employed by courts such as the Sixth Circuit already functionally applies this definition. That is fine for lawyers and interns in the Sixth Circuit – at least they know where they stand, sort of. But other federal circuits apply different standards and different tests, so the lack of uniformity is a major problem. Even in jurisdictions applying the DOL six-factor test, the stakeholders operate in a constant state of uncertainty because the DOL test is merely a Fact Sheet, not a regulation, and a federal court could decline to defer to the test at any time. The proposed “intern” definitions discussed above have 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 the 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 the FLSA’s underling purpose to protect vulnerable workers from wage and hour abuse.²²⁸

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,²²⁹ 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-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, State Bars, law schools, and law students should all have a voice (law students might find their voice through

²²⁸ Another way of saying this is ‘why exactly do we think that Congress meant that employers are free to not pay workers?’ A. Hyde, *Classification of U.S. Working People and Its Impact on Workers' Protection: A Report Submitted to the International Labour Office* (January 2000) at § 7.1.4, online: ILO <www.ilo.org/public/english/dialogue/govlab/pdf/wpnr/usa.pdf> (date accessed: 28 July 2002) (“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?”).

²²⁹ See generally IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* (1992) (arguing that regulation needs to find a new way to combine command-and-control regulation with deregulation).

the SBA).

Law schools have an important role to play in educating students and prospective employers about the FLSA, and in advocating for their students to be paid a fair day's pay for a fair day's work. State Bars similarly have an important role to play in educating their members as to their legal and ethical obligations, and perhaps could be harnessed to gather data on the frequency and type of law firms using law students' free labor. And the Department of Labor, Wage and Hour Division, is not off the hook – enforcement is only one of its functions, education and advising is a major key function. It is indeed true that the DOL six-factor test is an inadequate source of authority and the DOL could use its rule-making power to promulgate updated regulations dealing with the various types of interns, upon notice and comment.²³⁰ But it is equally true that traditional regulatory and enforcement mechanisms need to be supplemented (not supplanted) by voluntary compliance efforts that need to begin with education and awareness.²³¹

²³⁰ See, e.g., Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531 (2010) (setting forth a proposed rule that will create an explicit “intern-learner” exemption to the FLSA, similar to the current “learner” exemption). See C.F.R. § 520.300 (2009) (“*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.”). Note that “student-learners” require a certification and are then allowed to be paid sub-minimum wages. See 29 C.F.R. § 519.1-519.19 (2009).

²³¹ The author has previously advocated a new governance approach to using OSHA to address the problem of workplace bullying. 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 (2010). 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 the FLSA which comes complete with a private cause of action, and appropriate civil penalties including liquidated damages and attorneys' fees.