NOTE: UNPAID INTERNS & THE PRACTICE OF UNPROTECTED WORKING: BUILDING FROM A HISTORY OF LEARNING ON THE JOB

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UNPAID INTERNS & THE PRACTICE OF UNPROTECTED WORKING: BUILDING FROM A HISTORY OF LEARNING ON THE JOB

A Note by Troy D. Warner

Abstract

Student interns are provided protection from gender discrimination and sexual harassment in their student capacity by Title VII of the Civil Rights Act of 1964 (CRA), and as employees by Title IX of the CRA. However unpaid student interns are not considered students nor employees, and thus slip through the cracks of coverage provided by Titles VII & IX. They are working unprotected by the law from sexual harassment and sexual discrimination. The Department of Labor has two classifications created by regulations, which provide protections to workers not legally employees, just as unpaid interns are not employees.

The Department of Labor should create a classification with regulations, which would provide discrimination and sexual harassment protection to unpaid student interns and provide clarification of the requirements for an intern to be unpaid without violating Wage and Hour law.*

There are currently two classification of workers that are not employees but are provided protection by DOL regulations. These regulations are needed because:

1) student interns currently have a greater chance of being a victim of sexual harassment as an intern than either as a student or employee, both of which have protection by the CRA, and

2) there is a great deal of uncertainty in the law, including Circuit splits as to when an unpaid worker is or is not an employee, that has bred a large number of class action lawsuits over the past year. This confusion likely has also resulted in massive amounts of minimum wage violations by employers, which will spawn detrimental litigation upon those employers.

I. INTRODUCTION

Kristen was 19 years old and wanted to be a police officer after graduating from State University.¹ She thought she was on the perfect path when she scored an

* The topic of wages and the philosophical, ethical, and moral debate over whether interns should be paid or not is outside the scope of this Note.

¹ Although the following scenario is based upon a 2013 case, Doe v. Lee, which exposed the vulnerability of all interns and the lack of protection they receive under current employment law, it is
unpaid internship with the local police department the summer following her freshman year of college. Lt. Jones was Kristen’s direct supervisor. After a few weeks Kristen was offered the opportunity to work with the liquor enforcement team. In exchange for her helping the team, the department told Kristen they would get rid of

a theme that has been repeated. See Doe v. Lee, 11 C 6102, 2013 WL 1883288 (N.D. Ill. 2013). See also Wang v. Phoenix Satellite TV US, Inc., 2013 CIV. 218 PKC, WL 5502803, *1 (S.D.N.Y. Oct. 3, 2013) (unpub.) (finding an unpaid intern to not be an employee, and thus may not assert claims under the cited provisions of the New York City Human Rights Law (NYCHRL), New York State Human Rights Law (NYSHRL), and Title VII of the Civil Rights Act). While Wang was working on her master’s degree in media communications, she began an unpaid internship with the New York bureau. Id. at *2. She hoped to get a permanent offer of employment upon completion of the internship. Id. She alleged that Liu, the Phoenix bureau chief for Phoenix Satellite Television, subjected her to a hostile work environment, quid pro quo sexual harassment, and retaliation. Id. at *1,*2. Liu, the Phoenix bureau chief, had been very encouraging to Wang in her efforts at work. Id. at *2. He had told her that she would most certainly land a full-time position. Id. Following a business lunch in New York, Liu took Wang to his hotel stating that he needed to get something from his room before returning to work. Id. Liu and Wang stopped and got coffee in the hotel lobby, where he began to discuss the sexual prowess of black men and stamina required of a woman to be with a man of that prowess. Id. Liu also began to talk of Wang’s beauty and her great future with the company. Id. Liu eventually got Wang to up stairs to his room with him to retrieve the bag he needed. Id. In the room, Liu began to undress and forcibly grabbed Wang, squeezing and kissing her. Id. The Court concluded that interpretations of wording and legislative history in Title VII, the NYSHRL, and the NYCHRL all confirm that the protection of employees does not extend to unpaid interns and Wang’s claims were all dismissed. Id. at *9. The Wang court based its decision on the precedential case of O’Connor v. Davis, where the Second Circuit Court of Appeals found a student social work intern who alleged that she was sexually harassed by a staff psychiatrist was not an employee and thus not protected by Title VII. 126 F.3d 112, 114, 119 (2d Cir. 1997).

In O’Connor, the plaintiff was a student at Marymount College and was required, as part of her social work major, to perform field work in the form of internships at college-approved locations. Id. at 113-14. During her internship at Rockland Psychiatric Center, O’Connor alleged that a physician employed by Rockland sexually harassed her. Id. at 114. Although O’Connor complained to staff at Rockland, and later to her Marymount advisor, the harassment was slow to be remedied. Id. Eventually, O’Connor left Rockland, completed her internship elsewhere, and then brought suit against the harassing physician, Marymount College, Rockland Psychiatric Center, and the State of New York. Id. After the physician and Marymount College were dismissed from the suit, Rockland Psychiatric Center and the State of New York moved for summary judgment on the grounds that O’Connor was not an employee of either Rockland or the State under Title VII. Id. The district court agreed and granted the motion. Id. On appeal, the Second Circuit affirmed, holding that the question of the plaintiff’s “hiring” by the defendants was dispositive of the claim. Id. at 115. The court reasoned that in the absence of a “hiring” or of some sort of economic benefit, no employment relationship existed. Id. at 115–16. The court held that in “the absence of either direct or indirect economic remuneration or the promise thereof,” O’Connor was not a Rockland employee under Title VII. Id. at 116.
some parking tickets she owed the city. The liquor team had Kristen going into liquor stores and bars in an effort to find establishments that were selling to minors.

Following a sting one night, Lt. Jones took Kristen into a bar and bought her a number of drinks and shots. Her superior officer, while on duty, got Kristen drunk and forced her to have sex with him. Kristen was afraid and did not report the rape.

In addition to the rape, Kristen was unable to get out from under the thumb of Lt. Jones. For the remainder of her internship, she was openly sexual harassed by Jones and other officers. Kristen was groped, touched, and forcibly bent over a bench in front of room full of officers as part of a joke. She was given “free time” by Jones so that he could take her off alone, where she was eventually raped again. Kristen finally decided to seek legal counsel. Unfortunately the attorney informed Kristen that under the Fair Labor Standards Act, as an intern she was not an employee of the police department and was not protected against gender discrimination or sexual harassment.2 She did not have a cause of action against the police department or any

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2 See Doe v. Lee, 943 F. Supp. 2d 870, 875 (N.D. Ill. 2013) (granting summary judgment for the police department because it found the department exercised insufficient control over Doe’s working conditions as an intern for her to be found to be an employee). The court did find that Doe’s work on alcohol stings was done in a separate capacity from her internship. Id. at 877. The court stated the department had trained Doe for the stings, used department money for the stings, and the defendant Lee had controlled when, where and how the stings would take place. Id. The court found there was an issue of material fact whether Doe could be classified as an employee while conducting the sting operations. Id. See generally Tara Kpere-Daibo, Employment Law-Antidiscrimination-Unpaid and Unprotected: Protecting Our Nation’s Volunteers Through Title VII, 32 UALR L. REV. 135, 136 (2009) (arguing that the mere fact that one intern may receive minimum wage and another intern does not should not diminish the right of the unpaid intern to seek a remedy for discriminatory treatment). Daibo states that there are sixty million volunteer workers that are vital to the nation’s economy and non-profit sector. Id. at 135. Daibo proposes alternate methods, other than Congressional action, of protecting these sixty million volunteers and other unpaid workers from discriminatory treatment and sexual harassment. Id. at 136.
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of its officers for the hostile work environment or sexual harassment. Since she was not considered an employee by law, she was working unprotected and could not bring a legal claim that other employees in her situation could have brought.

Recent lawsuits have focused attention upon unpaid internships. However, two important problems regarding unpaid internships still go ignored. An intern is susceptible to sexual harassment without any recourse against a culpable employer, and there is rampant confusion regarding internships and wages, which have lead to the violations that are the subject of the lawsuits. This Note proposes that a new third category of employee under the FLSA exemptions, a “student intern” should be created to provide protection to students and adequate guidance to employers and

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3 Infra Part II.C; see also Juino v. Livingston Parish Fire Dist. No. 5, CIV.A. 11-466, 2012 WL 527972 (M.D. La., Feb. 14, 2012) aff’d, 717 F.3d 431 (5th Cir. 2013) (holding that a volunteer firefighter who was stalked, sexually harassed, and threatened with termination by her supervisor if she reported any of allegations, was not an employee and thus had to recourse of action against her harasser, her supervisor, the department, or the city); Keller v. Niskayuna Consol. Fire Dist. 1, 51 F.Supp.2d 223, 232(N.D.N.Y. 1999) (determining that volunteer firefighters did not receive any benefit from the fire department and thus were not employees, therefore the department did not have the required number of fifteen employees in order to be an “employer” and could not be sued under Title VII).

4 See infra Part II.C. See also generally Cynthia Grant Bowman & Mary Beth Lipp, Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment, 23 HARV. WOMEN’S L.J. 95, 96-112 (2000) (exposing how a student intern falls through the crack between Title IX protections for students and Title VII protections for employees). Bowman and Lipp provide an in-depth discussion of the Title VII protections that employees receive, and of the Title IX protections that are afforded to students in an educational setting. Id. at 96-98, 112-18.

5 See infra note 19 (discussing the dozens of lawsuits brought by current and former interns arguing that they are really employees under the FLSA and are entitled to wages for the unpaid work they did).

6 The philosophical, ethical, and legal considerations regarding whether it is proper to pay, or not pay, an intern is not within the scope of this Note.

7 Infra Part III.
protections to students.\textsuperscript{8} Part II of this Note explains the current state of employment law regarding interns and existing gender discrimination protections for employees and students.\textsuperscript{9} Additionally, Part II describes two classes of employees that also are not considered employees, but are working with protections.\textsuperscript{10} Next, Part III analyzes the lack of gender discrimination and sexual harassment protection provided to unpaid interns.\textsuperscript{11} Further, Part III examines the uncertainty in the law due to circuit splits and differing court opinions.\textsuperscript{12} Lastly, Part IV proposes new regulations modeled after existing Apprenticeship and Learner regulations, which will provide guidance and stability to the law, as well as discrimination and harassment protections to unpaid student interns.\textsuperscript{13}

II. BACKGROUND

The Department of Labor (DOL), the Fair Labor Standards Act (FLSA), and case law provide differing legal definitions of an employee.\textsuperscript{14} A worker that does not

\textsuperscript{8} See infra Part IV. (including a model text of regulation to be adopted by the Department of Labor).

\textsuperscript{9} See infra Part II.B., II.C. (discussing the law regarding employees who are provided protection under Title XII and Title IX of the Civil Rights Act of 1964)

\textsuperscript{10} See infra Part II.D. (describing the apprentice and learner classification exemptions of the Fair Labor Standards Act, which provide Equal Employment Opportunity and discrimination protections to those classes of workers, as they are not employees).

\textsuperscript{11} See infra Part III.A. (proposing that Title VII should apply to all workers, even though who are not paid)

\textsuperscript{12} See infra Part III.B-C. (discussing the confusion and examining the resulting litigation due to the uncertainty).

\textsuperscript{13} See infra Part IV. (providing a model Code for the United States Department of Labor based upon existing Code of Federal Regulations for apprentices and learners).

\textsuperscript{14} See infra Part II.B. (examining the mesh of statute, case law and DOL regulations that create the guide for a determination to whether an intern is an employee provided protections of law or is working unprotected).
qualify legally as an employee is not entitled to certain protections and standards.\textsuperscript{15} An unpaid intern is not an employee according to these standards.\textsuperscript{16} Since over half of interns are not legally employees, they are provided with no traditional protections of employment law.\textsuperscript{17} This pseudo-employment relationship leaves the majority of interns exposed and unprotected from discrimination and harassment without a cause of action against a culpable employer.\textsuperscript{18} Additionally, uncertainty in the law has lead to a rash of lawsuits against employers by their former unpaid interns.\textsuperscript{19} There are currently dozens of large class actions, in which unpaid interns are challenging the notion that they are not employees and thus not entitled to

\textsuperscript{15} \textit{Id. See also infra} Part II.C. (exposing the crack in gender discrimination law that the unpaid intern falls through).

\textsuperscript{16} \textit{See infra} Part II.B. (explaining the myriad of tests and circuit splits on the matter).

\textsuperscript{17} \textit{Infra} Part III.C.

\textsuperscript{18} \textit{Infra} Part III.B.

\textsuperscript{19} \textit{Infra} Part III.C. \textit{See also} Blair Hickman and Casey McDermott, \textit{2013: The Year of the Intern?}, \textit{New Pittsburg Courier} (Jan 12, 2014) available at \url{http://newpittsburghcourieronline.com/2014/01/12/2013-the-year-of-the-intern/} [Hereinafter \textit{Year of the Intern} (taking a look back at the “slew of cases brought by current and former interns”)]. The most high profile case of the year was the \textit{Black Swan} case. \textit{Id.; see also infra} note 42. Hickman states that the results of the 2013 cases were mixed, but they are still being litigated, seventeen additional class actions were filed in New York following the June 2013 \textit{Black Swan} decision. \textit{Year of the Intern}. As a result of the media attention brought to the lawsuits, numerous companies have ended their practice of unpaid internships, but have not replaced them with paying internships. \textit{Id. See also} Deborah L. Jacobs, \textit{Unpaid Intern Lawsuits May Reduce Job Opportunities}, \textit{Forbes Online}, Sept. 24, 2013, \url{http://www.forbes.com/sites/deborahljacobs/2013/09/24/unpaid-intern-lawsuits-may-reduce-job-opportunities/} (stating that once common place opportunities to work for free in exchange for experience may no longer be a viable option for students following the rash of class action lawsuits). Jacobs describes a few of the most covered internship wage cases of 2013 and highlights the benefits of unpaid internships to students following the lawsuits. \textit{Id. For a list of over thirty intern wage lawsuits, including current updates on the status or decisions by the court see} Stephen Suen and Kara Brandeisky, \textit{Tracking Intern Lawsuits}, \textit{ProPublica} (first published June 25, 2013, last updated Oct. 8, 2013) \url{http://projects.propublica.org/graphic/intern-suits}. 
compensation. Section II.A will discuss the great growth of the institution of internships. Part II.B will then discuss the maze of ways in which to determine whether an intern is actually an employee is made. Part II.C discusses the protections currently available to employees and to students under certain Titles of the Civil Rights Act of 1964, which do not cover unpaid interns that are not employees. Finally, the last section of Part II discusses two existing categories of workers, which like interns are not considered employees, however they are protected by employment laws.

A. The Intern Revolution

Although the phenomenon of internships is a relatively new concept, the numbers of interns have grown at tremendously in the past decades.

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20 The first of the lawsuits, and the most publicized, involves Fox Searchlight Pictures and interns that worked on its motion pictures without pay. See Eric Glatt, Why I Sued Hollywood on Behalf of Unpaid Interns Everywhere, QUARTZ (Sept. 21, 2013 9:58pm), available at http://qz.com/123717/why-i-sued-hollywood-on-behalf-of-unpaid-interns-everywhere/ (explaining that the practice of using unpaid interns in many industries has become simply a tool of using workers for the absolute lowest possible wage, and worker is ignorant to his own exploitation due to either desperation or eagerness to earn a paying position which never materializes). Id; Glatt v. Fox Searchlight Pictures Inc., 11 Civ. 6784WHP, 2013 WL 2495140 (S.D.N.Y. June 11, 2013). See also supra notes 42, 43.

21 Infra Part II.A.

22 See infra Part II.B. (examining the mesh of statute, case law and DOL regulations that create the guide for a determination to whether an intern is an employee provided protections of law or is working unprotected).

23 See infra Part II.C. (exposing the crack in gender discrimination law that the unpaid intern falls through).

24 See infra Part II.D. (describing the apprentice and learner classification exemptions, discrimination protections because they are not employees and thus are not covered under Title VII).

25 See Andrew Mark Bennett, Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 295 (2011) (stating that results of a 1981 survey revealed only one in thirty-six respondents had participated in an internship). There is no hard government data on internships and number vary widely. Id. Some estimates are as high two million students work and internship each year. ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE
Approximately one-third of college students worked an internship during the late 1990s, as compared to almost two-thirds of students in 2013. A recent survey of 11,000 student interns, from 150 universities, reported that 51.3% of their internships were unpaid. The report further found an increase in the percent of students that had worked an internship for the fifth year in a row. Almost half of all internships nationally are unpaid.

BRAVE NEW ECONOMY, 27 (1st ed. 2011). A 2012 survey by the National Association of Colleges and Employers estimates that 63 percent of 2013 college graduates worked an internship at some point of their schooling. Jim Snyder & Christine Smythe, Sleeping-Giant Issue of Unpaid U.S. Interns Get Scrutiny, BLOOMBERG NEWS June 27, 2013, available at http://intern.bloomberg.com/news/2013-06-27/sleeping-giant-issue-of-unpaid-interns-gets-scrutiny.html. See also INTERNATION, at 30-34 (providing a detailed historical summary of the development of medical internships in the United States and the reasoning and basis for the original creation of internships). Due to vast exploitation of medical intern, the American Medical Association in 1904 created standards to govern the practice within the medical profession, in particular by hospitals. Id. at 30. Critics of the early medical internship programs claim that interns were often overworked and unsupervised, as hospitals squeezed as much cheap labor from the young medical students as they could. Id. at 31. The internships were also seen as a way to limit who could enter the profession and was often used as a tool to discriminate and exclude minorities. Id.

26 See David L. Gregory, The Problematic Employment Dynamics of Student Internships, 12 NOTRE DAME J.L. ETHICS & PUB. POLICY 227, 240 (1998) (discussing the boom of internship during the 1990s). Gregory analyzes unpaid internship as labor exploitation. Id. at 229. Gregory considers the practice through the paradigm of catholic social justice and in relation to the “living wage” campaigns of the late 1990s. Id. at 229-32.

27 Press Release, Intern Bridge, 2012 INTERNSHIP SALARY REPORT, 1 (Feb. 7, 2013), available at http://intern.prweb.com/pdfdownload/10400332.pdf. Intern Bridge conducts research and releases reports regarding the compensation structure of internship programs. Id. at 3. Intern Bridge has taken the position that all internships, with few exceptions, should offer monetary compensation. Id. This opinion is based on detailed review of economic and business principles, in addition to education best practices and Intern Bridge data. Id. The Salary Report contains over 100 pages of pure compensation-related data. Id. All of the numbers and data presented are based on the 2009 National Internship and Co-op Study conducted by Intern Bridge. Id.

28 Id. Over 25,000 students from more than 250 universities participated in this research project. Id. The report seeks to add another layer in the complicated decision of whether or not to offer monetary compensation to interns. Id. As such, it contains editorial pieces and commentary about the unpaid internship environment. Id. See also generally Intern Bridge, 2010 INTERNSHIP SALARY REPORT, 1 (Feb. 12, 2011), available at http://utsa.edu/careercenter/pdfs/2010salaryreport.pdf (providing estimated numbers of interns, paid and unpaid for the year 2010).

29 See Perlin, supra note 25, at 24 (discussing the proliferation of internships and making note that at the very same time the number of paid entry positions were shrinking). Opponents of unpaid internships argue they shift the cost of labor from the employer, relieve the employer of a significant
tax burden, and many schools subsidize this free labor. Gregory, supra note 26, at 232. They argue the primary reason companies use interns is money. Perlin, supra note 25, at 124. U.S. Companies saved upwards of two billion dollars in labor cost alone in 2010 by using unpaid interns. Perlin, supra note 25, at 124. Perlin arrives at the $2 billion amount by using an estimate of 500 million unpaid interns being paid at the 2010 minimum wage [$7.25/hour]. Id. This figure could be even higher if a consideration of over-time pay were also included. See Gregory, supra note 26, at 242 (stating that companies frequently work unpaid interns over 40 hours a week knowing that they can do so and avoid paying time-and-one-half). Two-billion-dollars-worth of free labor is greater than the GDP of Liberia. CIA, World Facts, Global GDP Figures (Sept. 28, 2013), https://www.cia.gov/library/publications/the-world-factbook/fields/2195.html. It is an economic decision based upon huge cost savings. Perlin, supra note 25, at 72 (stating that it is not a coincidence that the boom in unpaid internships occurred at the same time period that Wage and Hour was stripped of its investigators ability to enforce the law). The indirect savings could be almost as substantial as the direct savings. Perlin, supra note 25, at 127; see also Gregory, supra note 25, at 232-34 (discussing employer tactic of treating paid intern as an independent contractor to avoid tax obligations).

Companies obtain savings by avoiding tax obligations on the free labor. Perlin, supra note 25, at 127. Social Security, Workers Compensation, state and local governments all receive substantially less in funding than they would have the employer had to actually pay for the true cost of the labor output. Id. On the $2 billion dollar estimated above, Social Security alone would receive FICA payments of $124 million, and Medicare payments of $29 million. Id. This is calculated by using figure of $2 billion in wages at a FICA tax rate of 6.2% and a Medicare tax rate of 1.45%. Society is supplementing this enrichment of the intern employer. How this deficiency in funds affects the rest of society is a broader question not addressed in this discussion. It is one which many opponents of Wal-Mart argue; is society supplementing Wal-Mart when it pays wages such that its’ employees must depend upon government assistance. See Alejandro Lazo, Wal-Mart’s wages drive employees onto public benefits, report says, L.A. TIMES, June 7, 2013 (discussing a report finding that tax payers subsidize roughly $5,815 in safety net benefits to the average Wal-Mart worker).

In addition, significant saving can be found by a removal of training and recruiting costs. Perlin, supra note 25, at 136-38. A company saves approximately $15,000 per hire by selecting from their in-house interns. Id. at 136. The savings derives from the existing training that the intern has already received, and the time and money not spent on the hiring search. Id. at 136-37. The savings is increased at larger corporations that use professional recruiters or headhunters. Id. at 137. Interns save employers thousands of dollars before they even start. Id. at 136-37.

Lastly, many educational institutions financially supplement the pool of free labor for the employers. Id. at 81-94; see generally Perlin, supra note 25, Chapter Five Cheerleaders on Campus! (discussing the role of universities in promoting and profiting from unpaid internships). Many schools require internships in particular fields. See Perlin, supra note 25, at 86 (stating that in survey of over 700 schools, 95% posted or publicized unpaid internships). See also id. at 86, 89 (discussing the role of schools in perpetuating their students working for free). Schools commonly partner with employers by giving the student class credit for their free labor forcing the student to pay to work unpaid for the employer. See id. at 85 (arguing that schools have put themselves in a conundrum by receiving an economic benefit from the free labor of the students, and also being responsible for ensuring that a proper and high quality education is received at the same time). Some schools have gone to paying the student for working the unpaid internships, in hopes that this arrangement might not be a violation of the law. Id. at 90. However, the DOL has recently stated that this fact alone does not give the employer a pass from paying the intern. Id. Although many programs are structured to ensure the student receives education from the employer that coordinates with their class learning, without any standards or regulations it is an open-invitation to exploitation. See id. at 85 (alleging that unpaid internship are often a “dirty little secret” of school placement offices). Perlin states that the schools know the standards required in order for the intern to not be an employee, and thus not be paid, but they put their head in the sand in order to reap the financial benefit of requiring credit. Id. The schools charge the same per credit for externship or internship course credit, but they have to spend little to
Further, having internship experience is becoming a necessary credential that employers require on your resume. In addition to a listing on the resume, internships provide valuable benefits to students. Students get a peak behind the working world curtain. They get to test out a potential career path and gain a more detailed understanding of the profession they are considering. Further, internships provide students the opportunity to hone their skills before entering a career full-time. Companies promote and use internship programs in order to reach out to the no money on professor salary, or classroom space. Id. See generally Perlin, supra note 25, at Chapter Eight, The Futures Market, (discussing the new boom of the for-profit business of selling unpaid internships to students, along with course credit which does not transfer to any accredited higher learning institution).

See Eric M. Fink, No Money, Mo’ Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical, 47 U.S.F. L. REV. 435, 441 (2013) (discussing the competition for employment and the fear of internships to complain or demand paid as the law requires); Perlin, supra note 25, at 72 (explaining that collegiate credentialing is ingrained in the culture of schools and students). On campuses there is a hurried rush to offer yourself up for a short-term sacrifice of making coffee and copies in exchange for big bucks in the future. Id. See also Gregory, supra note 26, at 241(stating that in an attempt to stand out in glut of job applicants students are willing to work for free to distinguish themselves from the other one million graduates coming from school).

See Sarah Braun, Comment, The Obama "Crackdown:” Another Failed Attempt to Regulate the Exploitation of Unpaid Internships, 41 SW. L. REV. 281, 284 (2012) (arguing that internship have become vital to post graduation employment). Braun contends that internships are a necessary stepping stone, providing hands-on-experience that employers hiring have come to expect. Braun also argues that internship experience can also lead to higher pay due to the employer are ready knowing what type of worker they are getting. Id.

Kathryn Buschman Vasel, Will Businesses Be Too Scared to Offer Unpaid Internships?, FOX BUSINESS ONLINE, June 26, 2013 (balancing the risk of a potential class action lawsuit versus the benefit which is mainly for the intern).

See id. (stating that it allows students to “test drive a career”). Vasel also provides statistic from the National Association of Colleges and Employers (NACE) that reveal that students with paid internship on their resume are more likely to have an advantage when seeking full-time permanent employment. Id.

Id. Vasel quotes an education solutions director stating student get the advantage of seeing “how the skills and information they’ve been learning at school applies in the workplace, and see how” others have applied what they “learned in college in the real world.” Id. Additionally, the director states that student got an opportunity to discover their “weaknesses before they are in the working world full-time and have little opportunity to fix those weaknesses.” Id.
future workforce and as a recruitment tool.\textsuperscript{35} Supporters of unpaid internships argue that the recent rash of lawsuits will irreparably damage the entire institution for all students.\textsuperscript{36} Additionally, supporters argue that in reality companies receive little benefit unpaid interns and the programs are about giving to the future of the workforce.\textsuperscript{37}

\textbf{B. ABC's of Internship Employment Law}

The FLSA provides protections in the workplace, including a wage and hour protections.\textsuperscript{38} The FLSA establishes minimum wages that an employer must pay to its employees.\textsuperscript{39} The Wage and Hour Division (WHD) of the United States Department of Labor (DOL) has also issued guidance in the form of opinion letters

\begin{footnotesize}
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\item[\textsuperscript{35}] Id. See also supra note 29 (examining the financial advantages to the employer of using unpaid interns).
\item[\textsuperscript{36}] See id. (stating that instead of paying interns, many employers may decide to eliminate internship program altogether “and just tell everyone to work a little bit harder.”)
\item[\textsuperscript{37}] See Nona Willis Aronowitz, \textit{Rallying Cry Against Unpaid Internships Grow}, CNBC.COM, Sept. 3, 2013, available at http://intern.cnbc.com/id/101004784 (discussing the growing number of cases of former unpaid interns suing their former employers and the effect of that upon the institution of unpaid internships). Aronowitz counters that in our market economy only things that profit a corporation will flourish. Id. If interns were not profitable for companies, there would not be the enormous growth that has taken place over the past two decades. Id. The only reason for that growth is that companies are using interns for access to free and cheap labor, not to foster development in students. Id.
\item[\textsuperscript{38}] 29 U.S.C. §§ 201-219 (2006). See generally Jessica L. Curiale, Note, \textit{America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change}, 61 HASTINGS L.J. 1531 (2010) (providing an extensive background and summary of the FLSA, along with administrative and judicial interpretations of the act). Curiale urges the Department of Labor to promulgate a rule that benefit both interns and businesses, by clarifying that employers that create a DOL approved “intern-training” program allowing employers to pay less than minimum wage. Id. at 1531. Curiale delves into many of the pitfalls of having an unpaid and powerless worker. Id. at 1535-39. Additionally, Curiale argues that the original intent of the FLSA was to protect all workers, not just those paid a wage. Id. at 1548.
\item[\textsuperscript{39}] 29 U.S.C. §§ 201-219 (2006); see also infra note 49 (providing the text of the minimum wage statute of the FLSA).
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and a Fact Sheet providing six factors used by the WHD. In addition, courts have created additional guidance in making a determination whether an unpaid worker is an employee under the FLSA. One recent highly publicized case, involving interns from the Fox Pictures movie Black Swan, might provide an opportunity to end the debate regarding wage requirements for interns. The District Court ruled in favor of the former unpaid interns of Fox Searchlight Pictures in June 2013, finding that they were employees by law and thus were owed back wages with interest. The

40 Wage & Hour Div., U.S. Dep’t of Labor, Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act 1 (2010), available at http://intern.dol.gov/whd/regs/compliance/whdfs71.pdf, [hereinafter Fact Sheet #71]; see also infra note 84 (providing the text of the six-factors used by the WHD to help determine whether interns must be paid the minimum wage and overtime, in compliance with the requirements of the FLSA, for services which they provide to “for-profit” private sector employers).

41 No Federal Appeals Court has yet made a determination about the employment relationship of an unpaid intern, though the Black Swan case was granted certiorari in the Second Circuit. See infra notes 42-43 and accompanying text.

42 See supra note 20. Glatt was an intern for Fox Picture’s “Black Swan” movie. Glatt, supra note 20, at 1. The picture was staffed heavily with unpaid interns. The industry positioned itself to take advantage of ideology of today’s youth labor market, which is that you must have experience on your resume and distinguish yourself with impressive internships if you ever want to be employed. Id. Glatt and other former interns of Fox Picture’s and its subsidiaries in the motion picture business filed a class-action suit alleging they were victims of a common policy and plan perpetrated by Fox that violated their rights under the FLSA by denying them minimum wages, overtime wages, spread-of-hours wages, and call-in pay, and by taking unlawful deductions. Id.; Glatt v. Fox Searchlight Pictures Inc., 11 Civ. 6784WHP, 2013 WL 2495140 (S.D.N.Y. June 11, 2013).

The picture grossed $300 million dollars and was produced for $13 million dollars. Id. Glatt argues that those that support unpaid internships really do not understand what they are and the extent to how corrupt and exploitive the practice has become. Glatt, supra note 20 at 1. Glatt states that if unpaid internship function like most of its supporters believe they do, they would not be such and evil practice. Id. However, entire industries have poisoned their labor market by using unpaid workers for large portion of their productions. Id. Glatt says employers are dangling promises of valuable learning experience to students, unrealistic opportunities of getting hired to recent graduates and even luring experienced workers work for free as a “transition opportunity” into a new lucrative field. Id.

43 The lower court found that Glatt and the interns were employees. Glatt v. Fox Searchlight Pictures Inc., 11 Civ. 6784WHP at *18. The court used an analysis including the formal control test, functional control test, and the DOL six-factor-test. Id. at *6-*14. The court declined to use the primary-benefit test, stating that it was subjective and unpredictable and has little support from the Supreme Court’s standard bearing decision in Walling, 330 U.S. at 153 (1947). Id. at *11. The judge gave deference to the WHD six-factors and adopted all six in the opinion. Id. at *12. For more on the six-factors see supra note 78-80 and surrounding text. Glatt states that his decision to sue Fox was based on only receiving the wages he was owed, and to deter employers from engaging in the toxic practice. Glatt,
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*Black Swan* case is due to be heard before the Second Circuit Court of Appeals early in 2015 and could end up before the Supreme Court in 2016.\(^4^4\)

Lastly, case law also provides guidance as to whether an intern is an employee and protected from discrimination under the Civil Rights Act of 1964, Title VII.\(^4^5\)

However, in this regard to this determination the circuits are split as to what constitutes an employee.\(^4^6\) This section will first discuss the FLSA and the *Walling* case, then the interpretations of the DOL and the WHD six-part-test, and lastly the differing court interpretations.\(^4^7\)

1. FLSA Employee Protections & the Benchmark Case

\(^4^4\) Ben James, *2nd Circ. To Tackle Fox, Hearst Intern Wage Claims*, LAW 360 (Nov. 26, 2013, 8:22PM ET), [http://www.law360.com/articles/491974/2nd-circ-to-tackle-fox-hearst-intern-wage-claims](http://www.law360.com/articles/491974/2nd-circ-to-tackle-fox-hearst-intern-wage-claims). The Second Circuit granted petitions for leave to purpose appeal in both the *Fox Searchlight Pictures* and *Hearst Publishing* cases which resulting in conflicting opinions by different District Court Judges. *Id*. The two cases will be heard in tandem under docket number 13-2616. *Id*. No additional information is available regarding the process of the interlocutory appeal as of Jan. 12, 2015.

\(^4^5\) 42 U.S.C. § 2000e (2012). *See generally* Bowman, *supra* note 4, at 96-112 (exposing how a student intern falls through the crack between Title IX protections for students and Title VII protections for employees). *See also Varlesi v. Wayne State University*, 909 F.Supp.2d 827 (E.D. Mich. 2012) (holding that a student terminated from her field placement internship because she was unwed and pregnant, and dismissed from university graduate program as a result of being terminated from her internship had no cause of action against the internship program under Title VII or Title IX); *Lippold v. Duggal Color Projects, Inc.*, 1998 WL 13854 (S.D.N.Y. 1998) (unpub.) (ruling that a student training to be a teacher and receiving $25,000 a year in scholarship and grant money from the state of New York was not an employee and thus not provided a cause of action by Title VII regarding sexual harassment and sexual discrimination she received from her training supervisor).

\(^4^6\) *See infra* Part II.B.2. (discussing the different court interpretation that one trying to understand the law is faced with).

\(^4^7\) *See infra* Part II. (providing insight into the mesh of statutes, case law, regulations, and DOL opinions that form the law of internships).
The FLSA was passed in 1938.48 The law provides a minimum wage for employees.49 The FLSA defines an employee as an “individual employed by an employer.”50 The first case in which the Supreme Court tried to further expand upon this circular definition was in 1947.51 The Court held that a trainee who under goes


49 FLSA, supra note 48, at § 206:

(a)...Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) except as otherwise provided in this section, not less than--

(A) $5.85 an hour, beginning on the 60th day after May 25, 2007;

(B) $6.55 an hour, beginning 12 months after that 60th day; and

(C) $7.25 an hour, beginning 24 months after that 60th day;

The minimum wage has not been raised since 2009. Id.

50 FLSA, 29 U.S.C. § 203(e)(1) (2012); see also infra note 59.

51 Walling v. Portland Terminal Co., 330 U.S. 148, 149 (1947). In Walling, the Court held that trainees of railroad seeking to qualify as yard brakemen were not “employees” within Fair Labor Standards Act. Id. at 153. The trainees worked with full crew during their training period of two weeks or less, without pay. Id. If the trainees qualified at end of training period they are eligible to then work as a brakeman. Id. at 149-50. The railroad could not require trainees to work and was not bound to employ them. Id. at 153. The Court reasoned that had the trainees taken courses in railroading at a vocational school, completely separate from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Id. at 152-3. The Court further reasoned the trainees also could not have been considered as employees of the railroad merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees. Id. at 153. The Court summarized that “the Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.” Id. The Court reasoned that had the trainees taken courses in railroading at a vocational school, completely separate from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Id. at 152-3. The Court further reasoned the trainees also could not have been considered as employees of the railroad merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees. Id. at 153. The Court summarized that “the Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.” Id.
training only for his own benefit is not an employee.\textsuperscript{52} Walling is the benchmark case regarding a determination of employee status creating the “immediate advantage” test.\textsuperscript{53} This is now part of the DOL six-factor test.\textsuperscript{54} It would be simple if it stopped there, but since Walling things have gotten complicated with numerous different interpretations of how to determine if a worker is an employee.\textsuperscript{55} There are five separate distinction tests developed.\textsuperscript{56} Some courts use more than one, some require all the factors and some use them as part of a totality of circumstances test.\textsuperscript{57}

2. Court Interpretations & Circuit Splits

A Federal court has never directly addressed whether an unpaid intern qualifies as an employee under the FLSA, and there is not one established test for an employment relationship.\textsuperscript{58} The majority of circuits have adopted different hybrids of tests looking at the employment relationship between the employer and the unpaid

\textsuperscript{52} See generally David C. Yamada, The Employment Law Rights of Student Interns, 35 CONN. L. REV. 215, 217, 224, 239 (2002) (quoting the court that the FLSA “did not stamp all persons as employees who, without an express or implied compensation agreement might work for their own advantage on the premises of another. Otherwise all students would be employees of the school or college they attended”).

\textsuperscript{53} The Court found that because the railroad has received no “immediate advantage from any work” of the plaintiffs, there was no reason to find the railroad has made the plaintiff suffer to work. Walling, 330 U.S. at 153. The FLSA defines “employ” as “to suffer or permit to work.” Id. at 153; Yamada, supra note 52, at 226.

\textsuperscript{54} See infra notes 83-91 (describing the test and listing the six-factors)

\textsuperscript{55} See infra Part II.B.2. (explain the split of the circuits and the various tests they have used)

\textsuperscript{56} See infra notes 63-67 and accompanying text (examining the differing tests applied by the varying courts and the divergent application of the tests)

\textsuperscript{57} See infra notes 63-67 (discussing that no two circuits apply the same approach, and even one case in which the court applied all the approaches)

\textsuperscript{58} Yamada, supra note 52, at 230. See also id. (discussing two differing Circuit Court of Appeals regarding the application of the six-factors).
worker. The traditional common law approach to agency considers the relationship of the master and servant. The case law no longer focuses upon the traditional common law, but still gets to the essence of control and benefit. Instead, there have emerged a few tests, which are used in varied degrees when making a determination of an employment relationship. Four basic applications can be found from the different approaches:

1. Requiring all of the WHD six-part-test.
2. Using the parts of the six-part-test only as factors to make a determination.
3. Using a primary beneficiary test.

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59 See id. at 232 (stating that there “are many ways to determine whether a worker is an “employee”…”); see also Curiale, supra note 38, at 1539 (quoting the Court, in United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945), “[that] “employee” is said to be “the broadest definition that has ever been included in any one act”)  

60 Restatement (Second) of Agency § 220 (1958) “A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right to control.” The common law test hinges upon the right of the master to control the work of the servant, which benefits the master. Id. See generally Yamada, supra note 52, at 230 (comparing the factors of control to the test which have developed by the courts, which also in essence also determine control and benefit).  

61 Id. at 233-34 (examining the differing approaches used by the court in making the determination of any employment relationship with regards to unpaid workers).  

62 Id.; see also Curiale, supra note 38, at 1542 (describing the differing approaches that have developed as “unclear”). Curiale points out that there has been no guidance from the Supreme Court on the issue of internship, the only clarity has come from the DOL in issuance of the Fact Sheet #71 and its opinion letters. Id.  

63 Donovan v. Am. Airlines, Inc., 686 F.2d 267, 273 (5th Cir. 1982) (requiring all of the factors of the DOL Fact Sheet #71). See generally Curiale, supra note 38, at 1543 (discussing the differing approaches used by court to make a determination of whether one is an “employee”).  

64 Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026-27 (10th Cir. 1993) (using the factor as a totality of the circumstances test). See generally Curiale, supra note 38, at 1543 (discussing the differing approaches used by court to make a determination of whether one is an “employee”).  

65 McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989) (declining to use the DOL factors and establishing the primary benefit test for the Fourth Circuit). The court cited a Fourth Circuit precedent, Wirtz v. Wardlaw, 339 F.2d 785, 787-88 (4th Cir. 1964), which considered which party received the primary benefit of the relationship. Id. 1209.
4. Using an “economic realities” test of the relationship.\textsuperscript{66}
5. Using agency theory of control, the master and servant relationship.

The majority of cases use a hybrid of the tests and factors, depending upon the facts the court has to work with.\textsuperscript{67}

The Fifth Circuit in \textit{Atkins v. Gen. Motors Corp.} used the WHD six-part-test requiring all six-parts.\textsuperscript{68} The Fifth Circuit had the year before in \textit{Donovan v. American Airlines} applied two different tests.\textsuperscript{69} The court in \textit{Donovan} first applied a three-prong test based upon agency law, and then also applied the six-part-test following the guidance of the DOL, requiring all six-parts.\textsuperscript{70} The court in \textit{Atkins} eliminated the agency prongs reasoning that the same analysis took place in the DOL.

\textsuperscript{66} \textit{Tony & Susan Alamo Foundation v. Secretary of Labor}, 471 U.S. at 290 (1985). The Court in \textit{Alamo Foundation} reasoned that the volunteers worked in expectation of a benefit and thus were employees entitled to economic benefits they had been promised. \textit{Id.} at 306-07. \textit{See also infra} note 76.

\textsuperscript{67} \textit{See} Curiale, \textit{supra} note 38, at 1543 (stating that even following the 1985 Supreme Court use of the “economic realities” test circuits continued to use a potpourri of analysis methods).

\textsuperscript{68} \textit{See Atkins v. Gen. Motors Corp.}, 701 F.2d 1124, 1127-8 (5th Cir. 1983) (citing directly to the WHD six-factors).

\textsuperscript{69} \textit{Donovan v. Am. Airlines}, 686 F.2d 267 (5th Cir. 1982). The court in \textit{Donovan} held trainees in an airline-training course were not employees. \textit{Id.} at 268-70. The court drew a direct analogy with \textit{Walling}. \textit{Id.} For information on \textit{Walling} see \textit{supra} note 51.

\textsuperscript{70} \textit{Donovan}, 686 F.2d at 271. The court in \textit{Donovan} used three criteria extracted from citing Judge Black’s opinion in \textit{Walling}: (1) whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee's work. \textit{Id.} at 271-2. The court did admit that there had never been any consensus regarding the second prong of benefit. \textit{Id.} at fn 5. The court then went on to find the trainees did not displace existing workers and the trainee acquired the primary benefit while the airline received little benefit. \textit{Id.} at 272. Lastly the court provided a quick discussion of the WHD six-factors concluding that the WHD analysis tool supported the above conclusion of the court. \textit{Id.} at 273.
six-part-test.\textsuperscript{71} The Tenth Circuit has used the WHD six-part-test, but did not use the all or nothing approach implied by Fact Sheet \#71.\textsuperscript{72}

The primary beneficiary test has also been called the primary purpose test.\textsuperscript{73} It focuses on the purpose of the relationship and who is the relationship intended to benefit.\textsuperscript{74} The economic realities test grew out of the primary purpose test, looking at the benefit or purpose focusing the economics of the relationship.\textsuperscript{75} The economic reality test expands on the common law concept of control and looks at the economic relationship to determine if sufficient control exists by the employer, or a transaction of exchange takes place.\textsuperscript{76} The Supreme Court, in \textit{Tony & Susan Alamo Foundation} stated that the determination of employment under FLSA is one of an “economic

\textsuperscript{71} See Atkins \textit{v. Gen. Motors Corp.}, 701 F.2d 1124, 1127-8 (5th Cir. 1983) (relying upon the precedent of \textit{Donovan}, but deciding that the agency factors used by the \textit{Donovan} court were incorporated in the WHD six-factors and thus were not necessary).

\textsuperscript{72} Reich \textit{v. Parker Fire Prot. Dist.}, 992 F.2d 1023 (10th Cir. 1993). The court used the factors as part of a totality of circumstances test. \textit{Id.} at 1029. Reich again was a trainee case, in which the court found that the firefighter trainees were not employees even though they had an expectation of employment. \textit{Id.} at 1029. The court found the primary benefit was not the work received by the fire department, but rather the training received by the trainee and the opportunity to obtain employment after completion of the training. \textit{Id.} at 1029-31.


\textsuperscript{74} See Rubinstein, \textit{supra} note 73, at 163 (discussing the flaws of the test, which later lead to the economic realities test). The \textit{Hearst} court believed that the best way to make any employment relationship determination was to look at the purpose of the relationship. \textit{Hearst Publ’ns}, 322 U.S. at 123.

\textsuperscript{75} See Rubinstein, \textit{supra} note 73, at 164-5 (discussing the court created the test as result of a need to determine if an unpaid work as a matter of economic reality are dependent upon the business to they work).

\textsuperscript{76} \textit{Tony & Susan Alamo Foundation v. Secretary of Labor}, 471 U.S. at 290 (1985). See also Rubinstein, \textit{supra} note 73, at 165 (stating that \textit{Alamo} is the only case in which the Supreme Court has determined whether a volunteer is an employee).
realism.” The Eleventh Circuit has followed the economic realities test in a determination of employment relationship in a Title VII case. The Seventh Circuit has used both the economic reality test, as well as the agency determination of master-servant control. There is no set case law guidance for making a determination whether an intern to be paid or not. Additionally, the guidance of the WHD of the DOL diverges from the differing case law. The law is a muddied mess creating confusion for employers and interns alike, and it gets even worse when the guidance of the DOL WHD is thrown into the mix.

3. WHD Guidance

The WHD of the DOL is responsible for enforcement of the FLSA. The WHD position can be summed up easily, if the employer is receiving a benefit of production

77 Alamo Foundation, 471 U.S. at 303. In Alamo, the court made a determination that volunteers for a non-profit were in fact employees because they had “an expectation of compensation.” Id. at 300. Though the volunteers were not paid, they were to be compensated with room, board and other benefits. Id. at 303. The court examined the “underlying economic facts” to determine that the volunteers took on the position expecting the promised compensation for food and a place to sleep. Id. at 300-1. The court stated that the fact that the compensation came in a form other than cash was immaterial; it was still an expected compensation. Id. at 301.

78 Cuddeback v. Florida Board of Ed., 381 F.3d 1230 (11th Cir. 2004). See generally Rubinstein, supra note 73, at 167 (stating the court held a graduate student who did research for a professor was an employee because the graduate student received economic benefits in the form of a stipend and other perks which were of value to the student in regard to a Title VII claim).

79 See Rubinstein, supra note 73, at 167 (citing Secretary of Labor v. Lauritzen, 835 F.2d 1529 (7th Cir. 1987), and the different factors used by the court in its analysis).

80 Curiale, supra note 38, at 1540. See also Anthony J. Tucci, Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies, 97 Iowa L. Rev. 1363, 1367 (2012) (stating that although there is little guidance regarding the determination of an intern, the law could “be best understood through the prism of how the FLSA applies to trainees”).

81 Infra Part II.B.3.

from the intern, then the intern should be paid. The WHD has created a six-part test regarding unpaid interns. The test was first put out in field operations handbooks in 1993. The six-factors used are drawn from Walling. The six-part-test was also issued broadly by the DOL in 2010 as Fact Sheet #71. It was released in response to confusion about the when interns should be paid in an effort to clarify things for employers and interns. The DOL has stated if all of the factors listed above are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern. However,

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83 See Perlin, supra note 25, at 66 (stating the DOL is concerned with protecting workers and ensuring that adequate training of interns is taking place, therefore the DOL requires the employer “derives no immediate advantage from the activities of the intern”).

84 See Fact Sheet #71 supra note 40.

The following six criteria must be applied when making this determination:
(1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
(2) The internship experience is for the benefit of the intern;
(3) The intern does not displace regular employees, but works under close supervision of existing staff;
(4) The employer that provides the training and derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
(5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
(6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship. Id.

85 The six-factor test was first put out by the DOL in the department’s field operations handbook § 10(b)11 since at least 1993, available at http://intern.dol.gov/whd/FOH/FOH_Ch10.pdf. Braun, supra note 31, at 290-3.

86 See supra notes 51-53 and accompanying text (describing the Walling case and the “immediate advantage” test).

87 Fact Sheet #71, supra notes 40, 84.

88 Id. The requirement to pay wages only apply to for-profit private sector employers, thus allowing the government and courts system to continue to have access to unpaid students. Id.

89 Id. The fact sheet goes more in-depth into some of the most commonly discussed factors. Id.
it does not state that if a factor is not met there is automatically an employment relationship. Some circuits have used the WHD six-part-test as an all-or-nothing test, and some circuits have used it as only factors not requiring that each one be satisfied.

Additionally, interpretation can be gathered in WHD opinion letters released providing guidance to employers regarding the determination of whether a worker is an employee. The letters were all written after issuance of the six-part-test in 1993 and closely followed those criteria. The first of which, in 1994, uses the Walling concept of an “immediate advantage.” The letter in response to a youth hostel, states the interns of the non-profit organization would be considered employees under the FLSA because “the employer derives an immediate advantage from the duties performed by the interns.” A second letter, from 1995, stated that the Division was unable to make a determination whether the “internship is predominantly for the benefit of the” student. To make this determination the Division stated that a burden on the employee from training and supervision would offset any gain it

90 Id. See also Yamada, supra note 52, at 227 (stating that when the WHD applies the six-factors if they are not all met than the intern is entitled to receive wages).

91 See supra Part II.B. (discussing the varying ways that courts have applied the six-factors).

92 See Yamada, supra note 52, at 227-30 (providing an overview of three opinion letters regarding applying the six-factors of Fact Sheet #71 regarding student interns).

93 Yamada, supra note 52, at 228.

94 Id.

95 Id.

96 Yamada, supra note 52, at 229.
received from the intern productivity.97 A third letter in 1996 involved a college internship program.98 The Division determined that where the intern receives academic credit and interns in a setting that provides “the students with an educational experience unobtainable in a classroom” the intern is not an employment relationship with the employer.99 Once a determination of whether an intern is an employee is made, then a determination whether the intern is covered by discrimination and sexual harassment protection can be made.100

C. Discrimination and Harassment Protection

Title VII of the Civil Rights Act of 1964 (CRA) provides protection from discrimination and harassment in the workplace.101 Title VII provides employees a

97 Id.
98 Id.
99 See Yamada, supra note 52, at 227-30 (combining the separate decisions of the opinion letters). Yamada concludes that when put together it can be likely found that in an internship independent of an educational program where the intern provides an immediate advantage there is an employment relationship requiring protection of FLSA. Id. at 229-30. Yamada also surmises that where there is an educational program providing academic credit there is likely no employment relationship between the employer and the intern. Id. at 230.

100 See Kpere-Daibo, supra note 2, at 136 (discussing that Title VII coverage hinges upon being an employee). If a worker is a worker by definition than they are excluded from protection against gender discrimination and sexual harassment protection by Title VII). See also infra note 101 (quoting Title VII of the CRA).

101 42 U.S.C § 2000e (2012):

It shall be an unlawful employment practice for an employer-- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin. Id.

The court has also held that Congress intended Title VII to make whole those who are victims of discrimination. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975).
cause of action against employers due to discrimination and harassment, which deprives one of employment opportunities because of race, color, religion, gender, or national origin. Title VII provides a cause of action where there is a hostile work environment due to harassment based upon race, color, religion, sex, or national origin. Title VII only provides protection for employees, thus generally excludes unpaid workers. The act uses a circular definition: an employee is “an individual employed by an employer.” The Congressional purpose of Title VII was to

102 Id.

103 In Meritor Sav. Bank, FSB v. Vinson, the Supreme Court held a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. 477 U.S. 57, 66 (1986). The Meritor Court quoted an Eleventh Circuit decision;

“Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.” Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

104 An employee is defined as an “individual employed by an employer.” 42 U.S.C § 2000e(f) (2012). See also Juino v. Livingston Parish Fire Dist. No. 5, 717 F.3d 431, 438 (5th Cir. 2013) (finding that a volunteer firefighter was not an employee and thus had no right to a cause of action under Title VII) Juino started volunteering with District 5 in November, 2009. Shortly after becoming a volunteer firefighter, Juino alleges that another male firefighter began to sexually harass her. Id. at 432. He would frequently call her cell phone and follow her around the fire department. Id. In addition, he allegedly bragged to other firefighters that he was “sleeping with” Juino. Id. Juino began to fear for her personal safety after he harasser jerked her head from side to side and pulled her air pack valve off her face mask in a confrontation. Id. Juino reported the harassment to her Captain and the Fire Chief. Id. Neither allegedly took any action to discipline the harasser or to ensure that he stopped the harassing conduct. Id. Juino claimed that the Chief told her that if she continued to complain she could ‘drop her gear’ and leave the department, stressing that she had to learn to get along with the men. Id. at 433. The harassment continued and Juino soon left the department. Id.

See generally Kpere-Daibo, supra note 2, Part II.D. (discussing the legislative intent behind Title VII). The author quotes a 1944 Supreme Court case considering the meaning of “employee,” in which the court stated the word should derive meaning from the context of the statute. Id. at 140-41. Kpere-Daibo quotes the court stating the term “must be read in light of the mischief to be corrected and the end to be attained.” Id. at 141.

105 See text accompanying supra note 49-50 regarding the discussion of the FLSA definition of employee; see also Kpere-Daibo, supra note 2, at 140 (arguing that the statutory definition provides no guidance to what is an “employer” or “employee,” or what is meant by “employment”).
eliminate discrimination in the employment relationship. That creates the question of whether an internship is an employment relationship. The precedential case *O'Connor v. Davis* first exposed the hole in the law for unpaid workers in regard to Title VII. Courts have continually failed to find unpaid workers within the protections of Title VII. The 1985 Supreme Court case of *Alamo Foundation* was one of the few exceptions.

In addition to Title VII, Title IX also provides protections against gender discrimination within educational programs. Congress has specified application of Title IX to any “operations” of a college, university, or post-secondary institution any

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106 *See Kpere-Daibo, supra* note 2, at 140 (stating the Congressional purpose of Title VII was to protect the right of person to be free from discrimination).

107 *See id.* (discussing the results of the court limiting Title VII to a make whole provision and only to those discriminatory acts which cause economic, severe, or outrageous harm).

108 *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997). The Second Circuit held that unpaid interns and volunteers are not within the statutory definition of Title VII and are not covered employees entitled to protection. *Id.* at 116. The court dismissed the Title VII claim finding plaintiff was an unpaid intern and not an employee. *Id.* at 115-6. The court stated that where a hire did not occur it would not undertake a common law analysis. *Id.* at 115. The court expanded by stating that an employment relationship could only where there is compensation. *Id.* at 116. See also *Wang v. Phoenix Satellite TV US, Inc.*, 2013 CIV. 218 PKC, WL 5502803, *1 (S.D.N.Y. Oct. 3, 2013) (unpub.) (finding an unpaid intern to not be an employee, and thus she may not assert claims under the cited provisions of the New York City Human Rights Law (NYCHRL), New York State Human Rights Law (NYSHRL), and Title VII of the Civil Rights Act).

109 See James J. LaRocca, Note, *Lowery v. Klemm: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131, 134 n.21 (2006) (citing a litany of case in which courts have found unpaid interns and volunteers were not employees because they received no compensation).

110 *Alamo Foundation*, 471 U.S. at 303; see also *supra* notes 66, 76-77.

111 20 U.S.C. § 1681 (2012): “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
part of which is extended federal financial assistance.\textsuperscript{112} Violation of Title IX can result in the loss of federal funding to the entire institution.\textsuperscript{113} The Court has held sexual harassment is prohibited discrimination within Title IX.\textsuperscript{114} In addition, the Court has held individuals are entitled to a right of private action under Title IX.\textsuperscript{115}

\textit{D. Employees Not Considered Employees}

Interns are simply a new twist upon the age-old concept of apprentices and masters.\textsuperscript{116} The regulatory definition of an apprentice is created to cover skilled

\textsuperscript{112} Civil Rights Restoration Act, 20 U.S.C. § 1681 (2012). “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” \textit{Id. See generally} Bowman, \textit{supra} note 4, at 112 (providing a brief background on Title IX and its application to student interns).

\textsuperscript{113} \textit{Id.}

\textsuperscript{114} \textit{Franklin v. Gwinnett County Public Schools}, 503 U.S. 60 (applying Title IX in a hostile environment sexual harassment case).


\textsuperscript{116} The institution of apprenticeship came over to the American colonies from England. Christopher T. Wonnell, \textit{The Contractual Disempowerment of Employees}, 46 STAN. L. REV. 87, 117 (1993) [Hereinafter \textit{Contractual Disempowerment}]. Before industrialization, it was the method which a youth could learn a skill, trade, or art. \textit{Id.} Typically an apprentice was a minor, and all of the early states had law allowing children to bind themselves in contract as apprentices. \textit{Id.} The relationship between master tradesmen to the apprentice was viewed as one of a surrogate parent. \textit{Id.} This relationship eased the worries of parents who often sent their children off to other villages or towns to learn a craft. \textit{Id.} However, the reality was that apprentices were often beaten, abused, starved, and treated as poorly as slaves. \textit{Id.; see also} Akhil Reed Amar & Daniel Widawsky, \textit{Child Abuse As Slavery: A Thirteenth Amendment Response to DeShaney}, 105 HARV. L. REV. 1359, 1367 (1992) [Hereinafter \textit{Child Abuse As Slavery}]. Many apprentices were often forced servants, unable to leave the master due to the contractual obligation. \textit{Contractual Disempowerment}. At 117; \textit{Child Abuse As Slavery} at 1367. Congress struck down language to the Thirteenth Amendment that would have exempted the master and apprentice from any application of the Thirteenth Amendment. \textit{Child Abuse As Slavery} at 1367 (quoting Cong. Globe, 38th Cong., 2d Sess. 528 (1865)). Though a 1897 Supreme Court decision stated in dicta that apprenticeships are a traditional relationship to which the involuntary servitude clause of the Thirteenth Amendment does not apply, many current scholars believe that forced or coerced apprenticeships would be in violation. \textit{Contractual Disempowerment}. At 117-18.

Racial and gender discrimination have been historically prevalent within the apprenticed trades and crafts in the United States. \textit{Contractual Disempowerment}. At 116-19; \textit{see also generally} Dominic Ozanne, \textit{Who Promised Fair? The Construction Industry: Part I}, LABOR LAW JOURNAL, Vol. 62, Issue No. 4 (Winter 2011) [Hereinafter \textit{Who Promised Fair}]. Throughout the eighteenth and nineteenth century only males were taught trades and could become craftsmen. \textit{Contractual Disempowerment}. at
trades, typically within the building and construction trades. The apprentice and employer, or certified training committee, signs an agreement for the terms and conditions of the apprenticeship. Apprenticeships are prohibited in the occupations of marketing; sales administration; administrative support; executive and managerial; or professional and semi-professional occupations. Professional and semi-professional occupations are one in which entrance requirements customarily include college level education. A formal apprenticeship is a form of

117. Even now, estimates are that women make up only two percent of skilled trades. Who Promised Fair? at 7. The crafts have traditionally also excluded blacks and other ethnic minorities. Who Promised Fair? at 2-7; see also generally David Bernstein, The Davis-Bacon Act: Vestige of Jim Crow, 13 Natl. Black L.J. 276 (1994). The discrimination of blacks in employment was upheld by the Supreme Court in 1883. Civil Rights Cases, 109 U.S. 3 (1883). It was not until 1941, when President Roosevelt issued an executive order outlawing racial discrimination by all government contractor supplying the war effort was any attempt made to remedy racial discrimination with the apprenticed crafts. Who Promised Fair? at 10; Exec. Order No. 8802, 6 FR 3109 (June 25, 1941). It would then not be 23 years later until the Civil Rights Act of 1964 outlawed racial discrimination throughout all employment, although apprenticed crafts still experienced significant racial discriminatory practices. Id. at 11-18.


120 29 C.F.R. § 520.300 (2013).
education and on-the-job training in occupations that require a wide and diverse range of skills and knowledge.\textsuperscript{121} They generally involve structured training on the job under supervised guidance, often combined with coordinated classroom instruction.\textsuperscript{122} Apprenticeship programs typically are from one to five years in duration and provide for scaled increases in wages and benefits over the course of the apprenticeship.\textsuperscript{123} The programs are designed to provide the employer with workers who gain the classroom knowledge specific to the job at the same time the employer provides the applicable day to day skills needed for the particular profession.\textsuperscript{124}

Apprentices have been found to cover by Title VII Sexual Harassment and Discrimination protections even though they are exempt from FLSA and not considered employees.\textsuperscript{125} The court found two points on which provide an intent to provide Title VII protection to apprentices.\textsuperscript{126} First, the court found the text of Title

\textsuperscript{121} See generally Cihan Bilginsoy, The Hazards of Training: Attrition and Retention in Construction Industry Apprenticeship Programs, 57 Indus. & Lab. Rel. Rev. 54, 54 (2003) (providing background on the working and requirements of DOL approved apprenticeship programs).

\textsuperscript{122} See id. (describing the exchange in which an apprentice works for a lower wage in return for an education in the trade at no cost). The employer typically pays for the apprentice to attend classroom training in addition to the on-the-job training the apprentice receives. Id.

\textsuperscript{123} Id.

\textsuperscript{124} See id. (stating that for a majority of young worker this exchange of training for labor is the only realistic opportunity to receive a skills or training for a career).

\textsuperscript{125} See Herrera v. Intl. Broth. of Elec. Workers Union, Loc. 68, 228 F. Supp. 2d 1233, 1242 (D. Colo. 2002) (stating that Title VII Training Program Provision makes it “unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of ... sex ... in admission to, or employment in, any program established to provide apprenticeship or other training”).

\textsuperscript{126} See id.
VII provides a basis. The court held the plain language of the Training Program provision prohibits sex discrimination against an individual who is “employed in” an apprenticeship-training program. The court further cited DOL Apprenticeship Equal Employment Opportunity regulations as support. Second, the court found basis of Title VII protection in Equal Employment Opportunity Guidelines. The court pointed to EEOC Compliance Manual, 29 C.F.R. § 1604.11(a), which instructs that a “covered entity may not discriminate with respect to an apprenticeship or other training program, regardless of whether the program is the product of an employment relationship.” The court held that Title 29 Part 30 of CFR, individual subjected to sexual harassment while employed in a training program, either during in-class or


(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

128 Herrera, 228 F. Supp. 2d at 1242.

129 See id. (stating 29 C.F.R. § 30.1 prohibits discrimination on the basis of sex in apprenticeship programs); see also 29 C.F.R. § 30.1 (2013) (stating “the purpose of this part is to promote equality of opportunity in apprenticeship by prohibiting discrimination based on race, color, religion, national origin, or sex in apprenticeship programs, by requiring affirmative action to provide equal opportunity in such apprenticeship programs, and by coordinating this part with other equal opportunity programs”).

130 Herrera, 228 F. Supp. 2d at 1242.

131 See id. The court further stated that EEOC guidelines provide that sexual harassment constitutes “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when ... such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11(a) (2002); Herrera, 228 F. Supp. 2d at 1242.
on-the-job training, may assert a claim under Title VII if the harassment is severe and pervasive enough to constitute a hostile work environment.\textsuperscript{132}

There was also a category entitled student-learner deleted in 1997, which covered students 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.”\textsuperscript{133}

The exception for apprentices in the FLSA was part of the original act passed in 1937.\textsuperscript{134} A formal apprenticeship program is registered and run under regulations established by state and federal apprenticeship agencies.\textsuperscript{135} The WHD is provided with authority within the FLSA to create new categories of trainee covered by the regulations promulgated under the FLSA.\textsuperscript{136}

\textsuperscript{132} Herrera, 228 F. Supp. 2d at 1243.

\textsuperscript{133} 29 C.F.R. § 520.300 (2013); Employment of Student-Learners, Employment of Apprentices, Employment of Learners, Employment of Messengers, and Employment of Student Workers, 62 FR 64956-01, Tuesday, December 9, 1997.

\textsuperscript{134} Aug. 16, 1937, c. 663, § 1, 50 Stat. 664.

\textsuperscript{135} 29 C.F.R. § 29 (2013); Title 29, Code of Federal Regulations, Part 29.4 defines an apprenticeable occupation as one which is specified by industry and which must:

1. Involve skills that are customarily learned in a practical way through a structured, systematic program of on-the-job supervised learning;
2. Be clearly identified and commonly recognized throughout an industry;
3. Involve the progressive attainment of manual, mechanical or technical skills and knowledge which, in accordance with the industry standard for the occupation, would require the completion of at least 2,000 hours of on-the-job learning to attain; and
4. Require related instruction to supplement the on-the-job learning.

III. ANALYSIS

Unpaid interns toil away without pay ignorant to the fact that they are working unprotected. The intern lacks legal protections of employment law, including most notably the FLSA as well as anti-discrimination provisions provided to workers in Title VII. Two separate studies show that interns have a greater chance of being sexually harassed than either students or employees. The current system also fails to ensure that the unpaid intern receives any benefits. Interns suffer great

The Secretary, to the extent necessary in order to prevent curtailment of opportunities for employment, shall by regulations or by orders provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages, under special certificates issued pursuant to regulations of the Secretary, at such wages lower than the minimum wage applicable under section 206 [minimum wage provisions] of this title and subject to such limitations as to time, number, proportion, and length of service as the Secretary shall prescribe.

137 See Perlin, supra note 25, at 64 (stating that interns are society’s youngest and “least likely to be wise in the ways of the workplace have zero legal voice”). Perlin states that unpaid interns are working in “legal limbo” effectively unable to bring lawsuits against employers, since they are not considered an employee by many courts. Id. Bowman and Grant argue that interns are working in legal limbo because as student they would receive Title IX protection and as an employee they would receive Title VII protection, but as an intern they fall between the cracks of those two statutes). Bowman, supra note 4, at 96.

138 See Yamada, supra note 52, at 215, 217, 224, 239 (discussing the numerous ways unpaid volunteers and interns “fall through the cracks” and are without protection in the workplace). Yamada discusses the gamete of protections not provided to interns; worker’s compensation, tort remedies, National Labor Relations Act, Unemployment Insurance, FLSA, and Title VII. Id. See generally Bowman, supra note 4, at 96-112 (discussing in detail situations of intern sexual harassment and potential causes of action under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972).

139 See Yamada, supra note 52, at 220 (discussing the sexual culture that has developed around the institution of internships). Yamada discusses the culture of Washington D.C. in which a new crop of interns are viewed as potential sexual targets. Id. Yamada quotes one D.C. insider stating that the young women come here unable to resist the power and prestige of the men who are supposed to their boss, but end up treating them only as “flesh.” Id.

140 See Curiale, supra note 38, at 1531 (arguing that the system regulating is broken and proposing a new system based upon existing exemptions to the FLSA). See generally Braun, supra note 31, at 281-87 (providing two intern narratives and calling for change due to lack of clarity and exploitation). Braun argues that the DOL efforts to fix the problem will only chill employers on internships and result in fewer opportunities for students. Id. at 286. Braun states a DOL crackdown is an inefficient and counteractive effort. Id. She proposes fixing the problems from the inside. Id. at 300. Braun
exploitation for their free labor.\textsuperscript{141} Additionally, all parties involved are generally
dazed and confused as to the laws covering internships.\textsuperscript{142} Finally, Congress and the
DOL have created two categories to allow for protections of other workers learning
on the job but have failed to do so for interns, even though interns vastly outnumber
the two existing categories.\textsuperscript{143} These existing categories can provide a template for
internships to solve the problems and clarify the law.

A. Unpaid Interns Have No Discrimination and Sexual Harassment Protections

Unpaid interns are burdened with the danger of working unprotected.\textsuperscript{144} As with
the young woman described in the introduction, the vast majority of students do not

\textsuperscript{141} Fink, \textit{No Money}, supra note 29, at 435-42; see also Curiale, \textit{supra} note 38, at 1538 (concluding
that the confusion and lack of conformance to the law suggests that the law is not working).

\textsuperscript{142} \textit{Infra} Part III.B.3.

\textsuperscript{143} See \textit{supra} Part II.; see also Curiale, \textit{supra} note 38, at 1531 (proposing that WHD promulgate a
“intern-learner” set of rules, which would clarify more exactly when interns must be paid). \textit{See generally}
LaRocca, \textit{supra} note 109, at 134 (arguing that the Massachusetts Supreme Court erred in
overturning a state appeals court decision which granted interns anti-discrimination protection under
state statute). In 2005, in \textit{Lowery v Klemm}, the Massachusetts appeals court held Massachusetts’ law
provides a right of action of a claim of sexual harassment to a volunteer worker. \textit{Id} at 137. The court
reasoned that to not allow unpaid volunteer workers to sue for sexual harassment would be unfair and
bring about absurd results. \textit{Id}. The decision would have allowed unpaid interns anti-discrimination
and sexual harassment protections. \textit{Id}. The Supreme Court of Massachusetts later overturned the
appeals court decision, determining that the law applied only in the employment relationship and
there is no employment relationship in regard to unpaid volunteers and interns. \textit{Id}. at 139-40.
LaRocca proposes courts should consider broadening the definition of an employee to include those
that do not receive compensation or alternately that the Massachusetts Legislature should enact
legislation to broaden protections to unpaid volunteers and interns. \textit{Id}.

\textsuperscript{144} \textit{Supra} Part II.C.; see also Perlin, \textit{supra} note 25, at 78 (calling it the “double injustice” of no pay
and no standing as an employee); LaRocca, \textit{supra} note 109, at 132-137 (discussing the void of
employment protections that would cover interns if they were considered employees or were paid).
LaRocca states courts have found that Title VII of Civil Rights Act of 1964, the Age Discrimination in
Employment Act, or the Americans with Disabilities Act do not cover unpaid interns. \textit{Id}. LaRocca
additional cites cases that the court has been unwilling to extend protections of state law in regard to
discrimination in employment situation to unpaid interns. \textit{Id}. \textit{See generally} Bowman, \textit{supra} note 4,
at 96 (stating that unpaid student interns might fall into a void of sexual harassment protection in
between Title VII and Title IX). Title IX protects students in an education environment, but a court
Unpaid Interns & The Practice of Unprotected Working:
Building From A History of Learning On the Job

know they are not protected by the traditional civil rights laws granted to all other employees. \(^\text{145}\) Only after they have been sexually harassed or discriminated against because of their gender, disability, or age is the intern made aware that they have no standing in a claim of civil rights violations. \(^\text{146}\) The after-the-fact discovery cheapens the role the intern has chosen to play. \(^\text{147}\) Many students have chosen to work an unpaid internship in an effort to assist the employer and show that they are an eager learner. \(^\text{148}\) The intern is rewarded by having their basic civil rights violated and with no civil rights cause of action against the employer. \(^\text{149}\) The essence of Title VII is to provide a workplace free from discrimination and sexual harassment, yet fails to for the least protected of workers. \(^\text{150}\)

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\(^\text{145}\) See Dr. Phil Gardner, Intern Bridge, THE DEBATE OVER UNPAID COLLEGE INTERNSHIPS (2011) (finding that women are 77 percent more likely to work an unpaid internship than men). See generally Bowman, supra note 4, at 100 (providing a definition of sexual harassment and discussing three types of harassment; gender harassment, seductive behavior, and solicitation of sexual activity). Bowman and Lipp analyze extensively sexual harassment in an education setting where the student role is that traditional inferior and subject to control of teacher. Id. at 99-105.

\(^\text{146}\) See LaRocca, supra note 109, at 132, 143 (discussing the inherent inequitable result of placing interns in the work environment as a pseudo employee, yet excluding them from an employment protections).

\(^\text{147}\) See id.

\(^\text{148}\) Id. at 131 (arguing that the majority of interns are completely unaware of their lack of protection and would think twice if the employer was to make them aware that they could be discriminated against and sexually harassed while an intern and have no recourse of action against the employer who was complicit).

\(^\text{149}\) Id.

\(^\text{150}\) See generally Kpere-Daibo, supra note 2, Part II.D. (discussing the legislative intent behind Title VII). The author quotes a 1944 Supreme Court case considering the meaning of “employee,” in which
The proper fix will not come from the courts. The courts have already failed time and again to provide adequate gender discrimination protection to unpaid interns, or to even craft a uniform standard.™ In order to provide adequate protections from sexual harassment in the workplace, it is time for the WHD to promulgate regulations for internships.™ Congress has given the authority to WHD to craft the regulations and in the past the WHD has added and changed the regulations in order to apply to current situations.™ It is time to create regulations to standardize the practice of the two million interns working unprotected each year. The regulations should be based upon the regulatory standards for apprentices, incorporate the DOL six-factor-test, and have affiliation to a certified higher education institution.™

B. Confusion Regarding Internship Law

™ the court stated the word should derive meaning from the context of the statute. Id. at 140-41. Kpere-Daibo quotes the court stating the term “must be read in light of the mischief to be corrected and the end to be attained.” Id. at 141. Kpere-Daibo acknowledges that this was before Title VII, but given the inherent remedial nature of Title VII courts should consider the term in employee taking into account the mischief to be correct in the attainment of workplaces free from discrimination and sexual harassment. Id.

™ See supra note 136 (citing DOL authority to create new exempted categories for trainees). See infra Part IV.B. (providing a proposed model set of regulations for internship programs).

™ The WHD has already done so in creation of the Student-Learner category. 29 C.F.R. § 519.1 (2013). The Student-Learner category covers employment of “of full-time students in retail or service establishments, or in agriculture.” 29 C.F.R. § 519.1 (2013).

™ See infra Part IV.B. for a complete text of the regulations this Note proposes.
The laws for interns are ambiguous and confusing.\textsuperscript{155} Nothing makes the law more vague than a circular definition.\textsuperscript{156} Vagueness in the law equals litigation.\textsuperscript{157} This is complicated by the differing interpretations of the courts and the sparse case law on the topic.\textsuperscript{158} All of the cases, except one are before 1990, and none of the cases deal directly with internships.\textsuperscript{159} One Second Circuit decision attempts to use all the above to decide the question of an employment relationship.\textsuperscript{160} The Archie opinion exposes the struggles that employers and employment attorneys go through in analyzing the legality of their own internship programs.\textsuperscript{161} Additionally, there is a

\textsuperscript{155} See \textsc{Intern Bridge} 2010 \textsc{Internship Salary Report} \textit{supra} note 27, at 11. 

\textsuperscript{156} See Rubinstein, \textit{supra} note 73, at 160, fn 65 (providing example after example of opinions of the court that have declared that the definition of an employee is circular and useless).

\textsuperscript{157} See \textit{id.} at 160 (stating that the lack of clarity is shocking). Rubinstein further concludes the “consequences to an employer for misclassifying an employee can be enormous. If an employee has been mischaracterized as an independent contractor, for example, the employer may owe its employees large sums of monies because employees are generally entitled to fringe benefits, which can be substantial.” \textit{Id.}

\textsuperscript{158} See \textit{supra} Part II.B. (discussing the numerous splits, interpretation, and tests currently in use); \textit{see also} \textsc{Intern Bridge} 2010 \textsc{Internship Salary Report} \textit{supra} note 27, at 11 (discussing the confusion in the law due to the many tests and factors which have been used by the various courts and the WHD); Braun, \textit{supra} note 31, at 290 (discussing the void of a majority approach and the circuit splits).

\textsuperscript{159} Curiale, \textit{supra} note 38, at 1539-48. \textit{See also supra} Part II.B. (discussing the various opinion regarding unpaid worker and Title VII).

\textsuperscript{160} Curiale, \textit{supra} note 38, at 1545 (discussing the \textit{Archie v. Grand Central Partnership Inc} court incorporating all of the available tests, but providing very little guidance as to weight).

\textsuperscript{161} \textit{Archie v. Grand Cent. Partn., Inc.}, 997 F. Supp. 504 (S.D.N.Y. 1998) A group of homeless and jobless participants in an employment program brought action against three non-profit entities,
misconception that interns can sign away their FLSA rights. This is wrong; a party cannot stipulate to waive the law, or any other law for that matter. Lastly, academic credit alone does not ensure accordance with the FLSA definition of an employee. This confusion and lax regulation has led employers by the thousands to expose themselves to potentially billions of dollars of liability.

C. Employers Have Existing Exposure to Billions of Dollars in Potential Liability

alleging that the entities unlawfully paid them sub-minimum wages in the program, in violation of the Fair Labor Standards Act (FLSA) and the New York State Minimum Wage Act. Id. at 507. Justice Sotomayor of the District Court held defendants the participants engaged in commerce or in the production of goods for commerce, thus satisfying the interstate commerce requirement for applicability of the FLSA and were not “trainees”, but rather, were “employees” of the enterprise, and were thus covered by the minimum wage and overtime provisions of the FLSA. Id. at 536-37. The justice began the analysis following the Alamo Foundation, then applied the WHD six-factors but considered the factors separately in at totality of the circumstances. Id. at 525-34.

162 See Curiale, supra note 38, at 1539-48:

Another example of a muddled interpretation of the law regarding unpaid internships is the practice of having interns sign agreements indicating they understand that they are not employees per the WHD's six-factor test. This is presumably meant to protect the business from liability under the FLSA. However, it is well settled that, as a matter of law, employees cannot waive their federal minimum wage rights. Thus, such an agreement is meaningless under the WHD's six-factor and primary beneficiary tests and would not be dispositive under the economic reality test.

See also Tony & Susan Alamo Found., 471 U.S. at 301.

163 “As a matter of law, federal rights to minimum wages cannot be waived by contract or other agreement.” Chellen v. John Pickle Co., 344 F. Supp. 2d 1278, 1292 (N.D. Okla. 2004).

164 See supra Part III.B.2.; see also Perlin, supra note 25, at 84 (quoting the Secretary of Labor stating that educational credit alone is not sufficient to make a finding that an employer is not required to pay wages to an intern); Vasel, supra note 32 (stating that if an employer cannot afford to pay an intern they should partner with a learning institution to provide course credit in order to be in compliance).

165 See generally Perlin, supra note 25, Ch.5 A Lawsuit Waiting To Happen (discussing in his 2011 book, when interns began to comprehend that they are doing work that others used to get paid for and that they should be getting paid, the lawsuits finally begin and will not stop for some time). See also supra note 19 (describing 2013 as the year of the intern).
One follower of the institution of internships predicted in 2011 that when the lawsuits that it would create an explosion. Then 2013 was dubbed the Year of the Intern. Employment attorneys have been warning companies that unpaid internships are a legal uncertainty and strongly warned to avoid them. State and local governments, and schools are also being warned to make sure that they comply with the six-factors-test or at least the primary benefit test.

The entire issue has become a “sleeping giant” because approximately 50 percent of internships are unpaid and notoriously benefit primarily employers. Employer violations of the minimum wage law are an estimated six hundred million dollars each year. The total estimated employer potential liability exposure could be as

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166 See Perlin, supra note 25, at 74 (quoting one internship expert in 2011 theorizing that an intern lawsuit explosion will happen: “I think it’s going to come. It’s just going to blow up”).

167 See supra note 19 (discussing the 2013, the year of intern litigation).

168 Shlomo D. Katz, To Hire, Or Not? Uncertainty High as Intern Season Kicks Off, 333 FAIR LAB. STANDARDS HANDBOOK FOR STATES, LOC. GOV’T & SCH. NEWSL. 1 (June 2013). See generally Gregory, supra note 26, at 229 (discussing the downside of internships for students). In 1998, David Gregory discussed the employment dynamics and exploitation of student internships. Id. Gregory posits the exploitation will only end through collective action, with students becoming “a constituency to be reckoned with.” Id. Former interns are leading the creation of the constituency and seeking their reckoning with the filing of major class act suits seeking back wages and damages, as Glatt did in the Black Swan case. Id. For more on Black Swan see supra notes 42-43, 20.

169 See generally Katz, supra note 168.

170 See Snyder & Smythe, supra note 25 (stating the economic downturn has created an environment which interns have been exploited and now given the legal uncertainty is a powder keg waiting for someone to light).

171 Perlin, supra note 25, at 174.
high as two-point-four billion dollars.\textsuperscript{172} In addition to the wages owed, employers could be on the hook for treble damages.\textsuperscript{173}

This amount of exposure to liability due to confusion in the law, combined with interns being forced to work unprotected, warrants a clarification that would set detailed standards for employers using internships. The DOL has had such standards for the similar positions of apprentices for decades.\textsuperscript{174} It is time for the good of interns and employers to promulgate standards in a new category modeled after the apprenticeship standards that would govern internships.

\textbf{D. No Regulation Leads to Exploitation}

Exploitation is “the action of taking unjust advantage of another for one’s own benefit.”\textsuperscript{175} For the estimated two billion dollars a year in free labor interns provide, they are guaranteed nothing in return.\textsuperscript{176} This treatment closely parallels the definition of exploitation. Often the promise is made of gaining valuable experience

\textsuperscript{172} This amount is estimated using a standard four-year statute of limitations. Failure to abide by the minimum-wage laws can subject an employer to multiple damages as well as attorney fees. Judith A. Malone, Esq., and Robert G. Young, \textit{Hiring Unpaid Interns Could Prove Costly}, 21 No. 25 ANDREWS EMPLOYMENT LITIG. REP. 2 (JULY 3, 2007).

\textsuperscript{173} \textit{Id.}

\textsuperscript{174} 29 C.F.R. § 520 (2013). There are three classification exemptions of the FLSA within the C.F.R; messengers, learners, and apprentices. \textit{See} 29 C.F.R. § 520.400 (providing definitions of all three classifications). Workers within those three classifications are considered employees, and thus are not provided protection under Title VII. 29 C.F.R. § 520.201 (2013). These workers are provided with protection by regulations with Title 29 of the C.F.R.. \textit{See supra} notes 116-28 and accompany text (discussing the EEO protections provided).

\textsuperscript{175} \textsc{Black’s Law Dictionary} 660 (9th ed. 2009).

\textsuperscript{176} Perlin, \textit{supra} note 25, at 124. Perlin argues that interns are working to build their reputation and stake their name. \textit{Id.} at 24. Perlin quotes an employer who loves that interns are eager to please: “[you] can get more out the person if they are an intern.” \textit{Id.}
or getting a “foot in the door.”¹⁷⁷ In return for being exploited, the intern receives no protections of law that employees traditionally receive.¹⁷⁸

Instead of being prepared for the working world, the majority of interns spend their time on menial and mindless work.¹⁷⁹ A recent survey showed students’ primary reasons for working an internship is to gain hands-on experience and become better prepared for future employment in the field.¹⁸⁰ However, the study also revealed that 65 percent of interns felt their internship needed improvement.¹⁸¹ This coupled, with response averaging 4.2 on a scale of 5.0 when asked if the employer had benefited, reveals student benefits do not often result while the employer significantly gains.¹⁸² For some employers, the term “intern” is only a buzzword used

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¹⁷⁷ See id. at 23 (stating the significance of the word intern lies in it ambiguity, it has a broad indefinable aura about it). Perlin states the word intern itself is mysterious and full of “rhetorical flavors.” Id. Attached to the word intern like documents in an email come the terms: “foot in the door,” “paying your dues,” “resume builder,” and a “win-win” for students and employers alike.” Id.

¹⁷⁸ Infra Part III.A.1.

¹⁷⁹ See Fink, supra note 29, at 437 (stating that interns routinely are put to work making coffee, getting lunch, stapling, stuffing envelopes, and answering phones, none of which they need to go to school for).

¹⁸⁰ INTERN BRIDGE 2010 INTERNSHIP SALARY REPORT supra note 27. Intern Bridge conducts research and releases reports regarding the compensation structure of internship programs. Id. at 3. Intern Bridge has taken the position that all internships, with few exceptions, should offer monetary compensation. Id. This opinion is based on detailed review of economic and business principles, in addition to education best practices and Intern Bridge data. Id. The Salary Report contains over 100 pages of pure compensation-related data. Id. All of the numbers and data presented are based on the 2009 National Internship and Co-op Study conducted by Intern Bridge. Id. Over 25,000 students from more than 250 universities participated in this research project. Id. The report seeks to add another layer in the complicated decision of whether or not to offer monetary compensation to interns. Id. As such, it contains editorial pieces and commentary about the unpaid internship environment. Id.

¹⁸¹ Id. at 9.

¹⁸² Id.
to draw in young workers for their free labor.\textsuperscript{183} In the past, employers invested in employees for the long term, providing training and security.\textsuperscript{184} Now employers want workers to learn on the job while receiving no pay and working with no protections.\textsuperscript{185}

Employers use interns as a double edge sword to reduce costs.\textsuperscript{186} First, employers use large pools of interns to crowd out salaried full-time workers.\textsuperscript{187} Interns are a low-cost or free method of getting routine and menial tasks done.\textsuperscript{188} Second, employers also use the reduced labor cost to undercut existing wages.\textsuperscript{189} The intern then becomes cheap in-house competition against seasoned higher-paid workers.\textsuperscript{190}

\begin{small}
\textsuperscript{183} Perlin, supra note 25, at 24.

\textsuperscript{184} Id. at 30.

\textsuperscript{185} Id.

\textsuperscript{186} See Gregory, supra note 26, at 231, FN 9:

The double edge of the sword is that the injured independent contractor worker, unlike the statutory employee, may sue in tort, whereas the injured employee is usually limited to recovery pursuant to the workers' compensation statute. Temporary workers are often regarded as independent contractors--as "contract" workers--who work for the temporary service agency provider. Thus, the temporary service agency provider is regarded as the employer, and is subject to the employer provisions of the workers' compensation statute. \textit{See, e.g., Goodman v. Sioux Steel Co.}, 475 N.E.2d 563 (S.D. 1991).

\textsuperscript{187} See Gregory, supra note 26, at 242 (finding that in era of downsizing and doing more with less employer have dramatically increased their intern usage in an effort to "reduce if not avoid altogether, labor costs"). \textit{See generally} Tucci, supra note 80, at 1378 (stating interns generally do the work of regular employees but without compensation). Tucci also points to Oregon increasing enforcement of its law due to interns displacing regular workers but without pay or benefits such as healthcare. \textit{Id.}

\textsuperscript{188} See Gregory, supra note 26, at 242 (finding that in era of downsizing and doing more with less employer have dramatically increased their intern usage in an effort to "reduce if not avoid altogether, labor costs"). \textit{See also} Tucci, supra note 80, at 1379-81 (citing a study that unpaid internship are reducing salaries at all levels, and especially for the intern themself). Tucci argues that the tendency to work for free lowers the earning power for ten to fifteen years. \textit{Id.}

\textsuperscript{189} See \textit{id}. (finding that many unemployed graduates are working unpaid internships in hopes it leads to regular employment but just over one-third end up getting a job from unpaid internship).

\textsuperscript{190} See Gregory, supra note 26, at 242 (stating internship programs give the employer a chance to "audition" the student and training them without paying them). The employer can then bring in the
\end{small}
Also, many experienced unemployed workers have taken internships in the desperate hope of finding work.\textsuperscript{191} Further, as hundreds of thousands of workers are replaced with interns, their unemployment places downward pressure upon the labor market creating a corrosive aftershock for all workers, even the interns after their plunge into the labor pool.\textsuperscript{192}

\textbf{E. Interns Do Not Fit into Existing Apprentice or Learner Categories}

Internships and the concept of learning on the job in a working environment are not a new and unique concept.\textsuperscript{193} From the early days of the colonies young workers exchanged their labor for education and support.\textsuperscript{194} Often have employer tried to distort the relationship to one which the apprentice gave it labor with no exchange other than the privilege of learning, but time again society righted the balance of power to ensure that the master was receiving the benefit of free labor.\textsuperscript{195} Since the

\begin{itemize}
  \item trained graduate ready to be productive on day one for sixty percent of the cost of the average worker with ten years experience. \textit{Id.}
  \item \textit{See} Braun, \textit{supra} note 31, at 285 (stating that even middle aged professionals are taking internship in hopes of plugging a gap in their resume during a time of unemployment). Braun states that jobs are so scare that workers who have long since graduated are accepting unpaid internship in hopes that it will land them a paying job. \textit{Id.} For workers who have experienced long term unemployment and have depleted their unemployment insurance benefits it is often their own hope of employment. \textit{Id.}
  \item Perlin, \textit{supra} note 25, at 71.
  \item \textit{See generally} James D. Schmidt, "\textit{Restless Movements Characteristic of Childhood"}: \textit{The Legal Construction of Child Labor in Nineteenth-Century Massachusetts}, 23 L. & Hist. Rev. 315, 317 (2005) (discussing the role that apprenticeships played in protecting children from labor in early colonial America). Schmidt argues that the courts eventually forced the removal of these protections and helped create a free market in labor for children, one that reformers in state legislatures as well as judges themselves would eventually seek to limit or abolish outright. \textit{Id.}
  \item \textit{Id.} at 321.
  \item \textit{Id.}
\end{itemize}
vast majority of interns are students at collegiate level, internship programs could not fit into the existing format of the apprentice category.

The FLSA gives the DOL the authority to exempt learners from the act.\textsuperscript{196} However, interns also do not fit within the definition established as a learner.\textsuperscript{197} The key conflict is the requirement that learners be outside of the “office and clerical” occupations.\textsuperscript{198} Further, the possibility is additionally restrained by the requirement an employer show “adequate supply of qualified experienced workers is not available for employment in those occupations” and that “reasonable efforts must have been made to recruit workers paid at least the minimum wage in those occupations in which certificates to employ learners at subminimum wages have been requested.”\textsuperscript{199}

\textsuperscript{196} 29 U.S.C. § 214(a) (2012).

\textsuperscript{197} See 29 C.F.R. § 520.300 (2013):

> Learner means a worker who is being trained for an occupation, which is not customarily recognized as an apprenticeable trade, for which skill, dexterity and judgment must be learned and who, when initially employed produces little or nothing of value. Except in extraordinary circumstances, an employee cannot be considered a “learner” once he/she has acquired a total of 240 hours of job-related and/or vocational training with the same or other employer(s) or training facility(ies) during the past three years. An individual qualifying as a “learner” may only be trained in two qualifying occupations.

\textsuperscript{198} See 29 C.F.R. § 520.401(c) (2013): “No certificates will be granted authorizing the employment of learners at subminimum wage rates as homeworkers; in maintenance occupations such as guard, porter, or custodian; in office and clerical occupations in any industry; or in operations of a temporary or sporadic nature.” See also 29 C.F.R. § 520.401(b): “All applications for special certificates authorizing the employment of learners at subminimum wage rates in the manufacture of products in the following industries shall be denied (definitions for all listed activities can be found in subpart C of this part): (1) In the apparel industry: (i) Rainwear (ii) Leather and sheep-lined clothing (iii) Women’s apparel division of the apparel industry for the manufacture of women’s, misses’, and juniors’ dresses; (iv) Robes (2) Shoe manufacturing industry (3) Men’s and boys' clothing industry.”

\textsuperscript{199} 29 C.F.R. §§ 520.404(d), (e) (2013).
IV. CONTRIBUTION

The FLSA, in amendments, has two sections that create two classes of workers, which like interns are not employee but that have limited rights under the FLSA: a Learner classification and an Apprentice classification. The requirements and language of these classifications can be adapted into a new category covering internship programs. These classifications provide protection from sexual harassment to apprentices and learners, which like interns are not employees under the FLSA.

A. DOL Should Create a FLSA Exemption Category for Internships

The confusion over law, the division of the circuits, and sexual harassment of interns in the workplace all warrant a fix by the WHD. The proper fix will not come from the courts. The courts have already failed time and again to provide adequate gender discrimination protection to unpaid interns, or to even craft a uniform standard. In addition, standards for internships would give guidance to employers, students, and universities as to the requirements necessary to ensure that the law is clear and understandable and internships are done in compliance with the law. The WHD is provided with authority within the FLSA to create new categories of

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200 Supra Part II.D. (detailing the apprentice and learner classifications)

201 Infra Part IV.A.

202 Infra Part II.D. (covering the EEO protections provide by DOL regulations).

203 Supra Part II.B. (describing the lack of any clear directive regarding the law).

204 Infra Part IV.A.
learners covered by the regulations promulgated under the FLSA. In order to provide adequate protections from sexual harassment in the workplace, it is time for the WHD to promulgate regulations for internships. Congress has given the authority to WHD to craft the regulations and in the past the WHD has added and changed the regulations in order to apply to current situations. It is time to create regulations to standardize the practice of the two million interns working unprotected each year. The regulations should be based upon the regulatory standards for apprentices, incorporate the DOL six-factor-test, and have affiliation to a certified higher education institution.

1. The DOL Should Establish an Intern Category to Provide Regulations Covering Internship Programs

Title 29 Part 520.300 provides the definitions of the classes established as employees exempt from the FLSA. The proposed regulations provide the following definitions to be added:

An Intern is a student of an accredited higher learning institution who in conjunction with classroom education takes part in a workplace based learning program in pursuit of occupational experiences, knowledge and skills to obtain a basic understanding and of the occupation and workplace. Additionally, an Intern shall only maintain the status of unpaid Intern with an employer for no more than 160 hours.

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205 See supra note 136 (citing 29 U.S.C. § 214(a) (2012)).

206 See infra Part IV.B. (providing a proposed model set of regulations for internship programs).

207 The WHD has already done so in creation of the Student-Learner category. 29 C.F.R. § 519.1 (2013). The Student-Learner category covers employment of “of full-time students in retail or service establishments, or in agriculture.” 29 C.F.R. § 519.1 (2013).

208 See infra Part IV.B for a complete text of the model regulations this Note proposes.

209 The definition and further explanation would need to be added in multiple locations within Title 29. For example all the exempt classification are additionally listed and described in Part 520.201
An Internship Employer is an employer that partners with a higher educational learning institution that provides learning opportunities for student and receives no financial benefit from the work of the students unless the students are paid at least the proper minimum wage as designated by federal and state laws. Additionally, an Internship Employer shall have an intern in the position of unpaid for no more than 160 hours of time with that employer.

Additionally, the DOL should establish Title 29 Part 520.600 of the CFR, entitled Subpart F, to provide guidance in regard Interns. The first section in new Subpart F includes a restatement of the definitions of an intern and an internship employer. The proposed includes regulations prohibiting intentional discrimination and sexual harassment of interns, and standards of duties for interns.

2. DOL Should Use Apprenticeship Regulations, Title 29 Part 30 of CFR, as a Model for Internship Regulations to Provide Discrimination and Sexual Harassment Protection Under Title VII

In the creation of an intern category the WHD has the ability to use the existing apprenticeship regulations for template. The Department of Labor can establish regulations mirroring Part 30 of the CFR that prohibits discrimination recruitment and selection of interns, and to all conditions of employment and training during

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entitled How are those classifications of workers which may be paid subminimum wages under section 14(a) of the Fair Labor Standards Act defined? 29 C.F.R. § 520.201 (2013).

210 Currently Part 520 ends with Subpart E § 520.508.

211 This repetition is merely for clarity. It is a restatement of the definition provided in Title 29 Part 520.300. See supra Part IV.A.1 (providing model definitions).

212 Supra note 200; see also Curiale, supra note 38, at 1548 (stating that the DOL has the statutory authority to modify and create new exemptions to the FLSA as needed and citing 29 U.S.C. § 214(a) (2012)).
Unpaid Interns & The Practice of Unprotected Working: Building From A History of Learning On the Job

The language of 29 C.F.R. § 30.1 shall be used to create a proposed § 520.560 which will provide equal opportunity in internships and prohibit discrimination based upon race, color, religion, national origin, or sex.

3. Incorporation of Six-Factor-Test

The regulations should be established incorporating the six-factor-test and requiring any unpaid internship shall meet all factors of the six-factors. The WHD six-factor-test is based upon the Walling holding and has not been overruled by the Court. They have been promulgated by the DOL since 1982, as such employers and their counsel have had notice regarding the WHD interpretation of the laws regarding unpaid interns.

4. A Certificate to Pay Subminimum Wages Shall be Obtained and All Proper Records Kept

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213 See supra note 120 (quoting the language 29 C.F.R. 30.1). See also supra note 118 (citing title 42 section 2000e-2, which prohibits discrimination in training programs); supra note 120 (citing DOL regulation title 29 section 30.1, which has also been found by the court to prohibit discrimination in training programs); see generally supra notes 116-123 (examining the discrimination protection provides to apprentices)

214 For the proposed language see Part IV.B. § 520.560 Equal Opportunity in internships.

215 See supra note 84. The six-factors are:

(1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;
(2) The internship experience is for the benefit of the intern;
(3) The intern does not displace regular employees, but works under close supervision of existing staff;
(4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
(5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
(6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

216 Supra notes 84-85.

217 Supra note 87.
Following the process set by the established exempt categories; those wishing to use an internship program and pay less than the established minimum wage must apply to do so.\textsuperscript{218} Employers wishing to employ interns at subminimum wages or unpaid must apply for authority to do so from the Administrator at the Wage and Hour Division's Regional Office having administrative jurisdiction over the geographic area in which the employment is to take place.\textsuperscript{219} Applications to pay subminimum wages to interns may also be submitted by the sponsoring institution of higher learning that the student is attending. On the application the applicant must certify that the issuance of an internship certificate must not tend to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage rates or working standards of experienced workers performing work of a like or comparable character in the industry.\textsuperscript{220} The application will also require

\textsuperscript{218} This is set out in multiple regulations. \textit{See ex. 29 C.F.R. § 520.402 (2013), How do I obtain authority to employ messengers, learners, or apprentices at subminimum wages?}

\textsuperscript{219} \textit{See ex. 29 C.F.R. § 520.402 (2013), How do I obtain authority to employ messengers, learners, or apprentices at subminimum wages?}

(a) Employers wishing to employ messengers, learners, or apprentices as defined in subpart C of this part at subminimum wages must apply for authority to do so from the Administrator at the Wage and Hour Division's Regional Office having administrative jurisdiction over the geographic area in which the employment is to take place. To obtain the address of the Regional Office which services your geographic area, please contact your local Wage and Hour Office (under “Department of Labor” in the blue pages of your local telephone book).

(b) In the case of messengers, such application may be filed by an employer or group of employers. Preferential consideration will be given to applications filed by groups or organizations which are deemed to be representative of the interests of a whole industry or branch thereof.

\textsuperscript{220} This is modeled upon paragraph (b) in 29 C.F.R. § 520.404 (2013).
other information, including the number of interns positions the employer is applying for and other information about the labor force of the employer. 221

In addition, there must be no serious outstanding Wage and Hour violations by the employer. There must also be no serious outstanding violations involving the intern for whom a certificate is being requested nor any serious outstanding violations of a certificate previously issued, nor any serious violations of the FLSA which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.222 A certificate for to pay interns subminimum wages is good for one year, and may be revoked at any time by the Regional Wage and Hour department which issued the certificate.223 When an employer or educational institution’s certificate is revoked it must be done with 30 days notice and agency adjudication and judicial review shall be made available to the revoked internship employer. The interns paid subminimum wages shall all be grouped together in the employer’s payroll records, which shall be retained by the employer for three years.224

The employer shall keep accurate and honest records of each intern for a period of three years.225 The documents shall contain record of all hours worked, a statement signed by each intern showing all applicable experience which the learner had in the

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221 This is modeled upon 29 C.F.R. § 520.408 (2013).
222 This is modeled upon paragraph (intern) in 29 C.F.R. § 520.404 (2013).
223 This is modeled upon paragraph (a) in 29 C.F.R. § 520.410 (2013).
224 This is modeled upon paragraph (a) in 29 C.F.R. § 520.412 (2013).
225 This is modeled upon paragraph (f) in 29 C.F.R. § 520.412 (2013).
employer's industry, during the preceding three years. The statement shall contain the dates of such previous employment, names and addresses of employers, the occupation or occupations in which the intern was engaged and the types of products upon which the Intern worked. The employer shall keep and make available for inspection all required records for at least three years from the expiration date of the certificate.

B. Text of Proposed Rule of new Internship category

- **Proposed Additions to 29 CFR § 520.300 Definitions**

  An Intern is a student of an accredited higher learning institution who in conjunction with classroom education takes part in a workplace based learning program in pursuit of occupational experiences, knowledge and skills to obtain a basic understanding and of the occupation and workplace. Additionally, an Intern shall only maintain the status of unpaid intern with an employer for no more than 160 hours.

  An Internship Employer is an employer that partners with a higher educational learning institution that provides learning opportunities for student and receives no financial benefit from the work of the students unless the students are paid at least the proper minimum wage as designated by federal and state laws. Additionally, an internship employer shall have an intern in the position of unpaid for no more than 160 hours of time with that employer.

  An institution of higher learning is defined by 29 CFR §§ 519.11 – 519.20.

- **Proposed Additional New Subpart F**

  **Title 29 Section 520 Subpart F - Interns**

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226 This is modeled upon paragraph (b) in 29 C.F.R. § 520.412 (2013).

227 This is modeled upon paragraph (b) in 29 C.F.R. § 520.412 (2013).

228 This is modeled upon paragraph (f) in 29 C.F.R. § 520.412 (2013).

229 The definition and further explanation would need to be added in multiple locations within Title 29. For example all the exempt classification are additionally listed and described in Part 520.201 entitled How are those classifications of workers which may be paid subminimum wages under section 14(a) of the Fair Labor Standards Act defined? 29 C.F.R. § 520.201 (2013).
§ 520.600 Who Are Interns?
The term intern and internship employer are defined in subpart C of this part.

§ 520.601 Are there any industries, occupations, etc. that do not qualify for a certificate to employ interns at subminimum wages?
No certificates will be granted authorizing the employment of interns at subminimum wage rates as homeworkers; in maintenance occupations such as guard, porter, or custodian; in skilled construction trades; in retail sales; in the food service industry; or in a manufacturing position or piece work industry; in operations of a temporary or sporadic nature.

§ 520.602 How do I obtain authority to employ interns at subminimum wages?
Employers wishing to employ interns as defined in subpart C of this part at subminimum wages must apply for authority to do so from the Administrator at the Wage and Hour Division's Regional Office having administrative jurisdiction over the geographic area in which the employment is to take place. To obtain the address of the Regional Office that services your geographic area, please contact your local Wage and Hour Office (under “Department of Labor” in the blue pages of your local telephone book).

§ 520.603 What information is required when applying for authority to pay less than the minimum wage?
(a) A separate application must be made for each plant or establishment requesting authorization for employment of intern at subminimum wages, on the official form furnished by the Wage and Hour Division, containing all information required by the form including:
(1) Information concerning efforts made by the applicant to obtain experienced workers in occupation(s) for which interns are requested;
(2) The occupations/industry in which the messenger(s) and/or learner(s) are to be employed;
(3) A statement explaining the duties and requirements expected of the intern;
(4) The number of interns the applicant anticipates employing at subminimum wages under special certificate;
(5) The number of interns hired at subminimum wages during the twelve-month period prior to making application;
(6) Total number of nonsupervisory workers in the particular plant or establishment for which a certificate is requested;
(7) The type of skills and learning expected to be gained by the intern.
(8) Any applicant may also submit such additional information as may be pertinent. Applications that fail to provide the information required by the form may be returned to the applicant with a notation of deficiencies and without prejudice against submission of a new or revised application.
§ 520.604 What must I demonstrate in my application for an internship certificate to receive a favorable review?

(a) The application must demonstrate who will obtain the primary benefit of the internship, employer or the Intern.

(b) The issuance of an intern certificate must not tend to create unfair competitive labor cost advantages nor have the effect of impairing or depressing wage rates or working standards of experienced workers performing work of a like or comparable character in the industry.

(c) There must be no serious outstanding violations involving the intern for whom a certificate is being requested nor any serious outstanding violations of a certificate previously issued, nor any serious violations of the FLSA by the employer which provide reasonable grounds to conclude that the terms of a certificate may not be complied with, if issued.

§ 520.606 What happens once I have submitted my request for authorization to pay interns subminimum wages?

(a) All applications submitted for authorization to pay wages lower than those required by section 6(a) of the FLSA will be considered and acted upon (issued or denied) subject to the conditions specified in §§ 520.603 and 520.604 of this part.

(b) If available information indicates that the requirements of this part are satisfied, the Administrator shall issue a special certificate, which will be mailed to the employer. If a special certificate is denied, the employer shall be given written notice of the denial. If a certificate is denied, notice of such denial shall be without prejudice to the filing of any subsequent application. The employer shall additionally be provided with opportunity for review of the application.

§ 520.607 What are the requirements for an unpaid intern?

An intern who is unpaid by the employer must fulfill all the factors required by the WHD. The six-factors are:

(1) The internship, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment;

(2) The internship experience is for the benefit of the intern;

(3) The intern does not displace regular employees, but works under close supervision of existing staff;

(4) The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;

(5) The intern is not necessarily entitled to a job at the conclusion of the internship; and
(6) The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.\footnote{Wage & Hour Div., U.S. Dep't of Labor, \textit{Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act} 1 (2010), available at http://intern.dol.gov/whd/regs/compliance/whdfs71.pdf.}

\textbf{§ 520.608} What is the subminimum wage for interns and what must I do to comply with the terms of my certificate?
(a) Any internship paying subminimum wage must comply with all six-factors in \textbf{§ 520.607}.

\textbf{§ 520.610} How long does a certificate remain in effect?
(a) Certificates may be issued for a period of not longer than one year.
(b) Each certificate shall specify the conditions and limitations under which it is granted, including the periods of time during which subminimum wage rates may be paid.
(c) No certificate may be issued retroactively.
(d) The Administrator may amend the provisions of a certificate when necessary to correct omissions or defects in the original certificate or reflect changes in this part.

\textbf{§ 520.611} Does a certificate authorizing payment of subminimum wages to interns remain in effect during the renewal process?
(a) Application for renewal of a certificate shall be made on the same form as described in this section and employees shall be advised of such renewal application. No effective certificate shall expire until action on an application for renewal shall have been finally determined, provided that such application has been properly executed in accordance with the requirements, and filed with and received by the Administrator not less than fifteen nor more than thirty days prior to the expiration date. A final determination means either the granting of or initial denial of the application for renewal of a intern certificate, or withdrawal of the application. A “properly executed application” is one, which contains the complete information required on the form, and the required certification by the applicant.
(b) A renewal certificate will not be issued unless there is a clear showing that the conditions set forth in section 520.404 of this part still prevail.

\textbf{§ 520.612} What records, in addition to those required by Part 516 of this chapter and section 520.203 of this part, must I keep relating to the employment of interns under special certificate?
(a) Each intern employed under a certificate shall be designated as such on the employer’s payroll records. All such interns shall be listed together as a separate group on the payroll records.
(b) At the time interns are hired, the employer shall also obtain and keep in his/her records a statement signed by each intern showing all...
applicable experience, which the intern had in the employer’s industry, including vocational training, during the preceding three years. The statement shall contain the dates of such previous employment, names and addresses of employers, the occupation or occupations in which the intern was engaged and the types of products upon which the intern worked. If the intern has had no applicable experience or pertinent training, a statement to that effect signed by the intern shall likewise be kept in the employer's records.

(c) The employer shall maintain a file of all evidence and records, including any correspondence, pertaining to the filing or cancellation of job orders placed with the local State or Territorial Public Employment Service Office pertaining to job orders for occupations to be performed by Interns.

(d) The records required in this section, including a copy of the application(s) submitted and any special certificate(s) issued, shall be kept and made available for inspection for at least three years from the expiration date of the certificate(s).

§ 520.560 Equal Opportunity in internships

This section sets forth policies and procedures to promote equality of opportunity in Internships programs certified by U.S. Department of Labor. These policies and procedures apply to the recruitment and selection of interns, and to all conditions of employment and training during internship. The purpose of this part is to promote equality of opportunity in internships by prohibiting discrimination based on race, color, religion, national origin, or sex in internship programs, by requiring affirmative action to provide equal opportunity in such internship programs, and by coordinating this part with other equal opportunity programs. All certified internships shall comply with EEOC Guidelines of Title 29 CFR Chapter XIV.

V. CONCLUSION

The institution of internships has exploded across the county with no checks or regulations covering the practice. Unpaid interns, in particular, are subject to working unprotected. Since they do not receive compensation courts do not find them to be employees and thus have no traditional protections of employment law. The most concerning is the lack of Title VII protection from discrimination and sexual harassment. An Intern who is subjected to sexual harassment, which is intentional
discrimination based upon sex, has no cause of action against the employer in situation where the employer was on notice of the harassment and acted with deliberate indifference. The intern would be left with only tort actions against the harasser even when the employer was liable for action or inaction.

In addition, one of the largest problems is confusion regarding the law. Many employers, schools, and students do not understand when an intern must be paid and when it is legal to not provide compensation. This has lead employers to commit widespread violations of the law and expose themselves to millions of dollars of potential liability in unpaid wages to former and current interns.

The Wage and Hour Department of the U.S. Department of Labor has the authority to create a category of worker exempt from the FLSA in its regulations and has done so in the past. The WHD should now create another category of regulations for internships. The regulations can be easily modeled after existing regulations in Title 29. The WHD should create a new Title 29 Subpart F beginning with section 520.600. The regulation should provide discrimination protection for interns using the language in Part 30 of Title 20 of the regulations. The regulations should also continue to allow the practice of unpaid internships; these provide value to the students and opportunities that are necessary and relevant. These proposed regulations would provide protections and stabilize the institution of Internships and give guidance to employers, schools, and students regarding the law and the next time an unpaid intern like Kristen is sexually harassed or raped they will have a recourse of action.