

THE STUDENT WORKER DILEMMA: THE EMPLOYER PERSPECTIVE

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ABSTRACT

In difficult economic times, one way in which employers may try to reduce costs is by using unpaid student interns. A general assumption has always been that employment laws do not apply because the interns are students. Is this a correct statement of the law, and should it be? What is the appropriate classification of student workers--if not employees, then volunteers, or independent contractors, or something else? What are the deeper legal implications surrounding unpaid student internships? This paper addresses these issues, especially from the employer perspective.

I. THE BASIC DILEMMA

Angela was an accounting major at State University. She had heard about the benefits of participating in an internship while still in school, so she was delighted when she was offered an unpaid accounting internship with a manufacturing firm close to her home. She had interviewed with the Senior Accountant and thought she would learn a great deal. **Once she started, however, she was surprised to learn that the Senior Accountant** was the only person in the accounting department, and he was overwhelmed with work. He assumed that Angela already had the skills to perform many tasks such as the ⁱpreparation, control and verification of monthly, quarterly, and annual financial and operational management reporting, performing all bookkeeping functions, including A/R, A/P, payroll, tax filings, and coordinating with the manufacturing company's outside CPA as needed. The Senior Accountant did not have the time to mentor her. Angela tried to do the work, and did have some learning gains, but as expected, made errors, and suffered daily frustrations. After she graduated, Angela was not offered a position with the firm as she had hoped she would be. Additionally, she soon learned that another student from State University was participating as an unpaid intern at the manufacturing company.

Angela's scenario is repeated many times due to economic turmoil and high unemployment. Competition for jobs is intense. The Federal Reserve estimates that it would take net gains of around 100,000 payroll jobs each month to reduce the official unemployment rate by a tenth of a percentage point. The projection for 2010

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was that product markets would be extremely competitive, strong incentives to control costs would remain, and hiring would be sluggish. In addition, the recession has increased race and gender divisions within the workforce, even among the most highly educated and well-paid workers.¹ In the first quarter of 2012, an average of 226,000 jobs were added per month. The second quarter averaged about 75,000 per month.² With all the current economic problems, employers are looking for ways to cut costs. One partial solution would be to use unpaid student interns. The students, while unpaid by the employer, still pay tuition and sometimes earn credits and grades for the internship. Some employment attorneys report an increase in recent months of employers using unpaid interns as a way of saving money.³

In many academic fields, an internship is an expectation. This is especially true in the entertainment and marketing industries.⁴ Colleges recommend internships, which help students to find jobs and build their resumes.⁵ "The primary purpose of the internship is to complete the student's education and have a 'real world' experience on the resume and a professional reference is invaluable to the subsequent job search."⁶ USAIntern.com, a website used for finding an internship, has 10,000 registered interns and saw a spike starting in 2009. Additionally, even more intern sites are being created all the time.⁷ With the unemployment rate hovering near 8-9%,⁸ job-search sites like CareerBuilder and Monster.com are reporting increases in the number of postings for internships.⁹ Research conducted in 2008, by the National Association of Colleges and Employers (NACE) found that eighty-three percent of graduating students had held internships.¹⁰ In 2011 NACE reported a nearly threefold increase over nineteen years in the number of graduates who had held internships.¹¹ The Association's 2012 report projected an 8.5% increase over the previous year.¹² The College Employment Research Institute puts it at

¹ Fay Hansen, *Wage, Employment Gap Grows*, WORKFORCE MANAGEMENT, at 16-17 (Feb. 2010).

² Martin Crutsinger, *Fed: Spending, Jobs Creation Still Sluggish*, Associated Press, (Aug. 2, 2012), available at http://www.tulsaworld.com/site/printerfriendlystory.aspx?articleid=20120802_48_E3_WSIGOh465369&PrintComments=1.

³ Eve Tahmincioglu, *Working For Free: The Boom in Adult Learners*, TIME, Apr. 12, 2010, at 63-64.

⁴ Sarah Braun, *The Obama "Crackdown": Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281 (2012).

⁵ Laurie Pike, *The Full-time Non-employee*, ENTREPRENEUR, 80, 84-86 (Apr. 2010).

⁶ Nick Carrabine, *Students, Educators Find Unpaid Benefits with Internships*, THE NEWS HERALD, June 6, 2010.

⁷ Pike, *supra* note 5, at 84.

⁸ The Bureau of Labor Statistics reports that the unemployment rate for July 2012 was 8.3%, available at <http://www.bls.gov/cps/>. For 20-24 year olds, it is 13.2% in May of 2012. See, e.g. Steven Greenhouse, *The Uses and Misuses of Unpaid Internships*, N.Y. TIMES, May 7, 2012.

⁹ Tahmincioglu, *supra* note 3.

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

¹¹ 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, 1365 (2012).

¹² The Nat'l Ass'n of Colls. and Emp'rs., *2012 Internship & Co-op Survey*, Executive Summary available from www.naceweb.org.

closer to 75%.¹³ A study by Millennial Branding, a Gen-Y research and management consulting firm based in Boston found that 91% of 225 employers think that students should have between one and two internships before they graduate, and the internships should last at least three months for students to gain enough experience.¹⁴

Student complaints about internships seem to fall into two main categories. One involves the situation in which the intern does only menial work and learns little.¹⁵ The other involves situations where interns are given more advanced work with little or no supervision and may in fact be taking a job from a paid employee. However, the overriding question is--Are interns truly students and not employees? This is the assumption and the hope, but some areas of the law may not support this. Officials in Oregon and California have fined employers for violating minimum wage laws.¹⁶ The New York Labor Commissioner has ordered investigations of several firms, and the Federal Department of Labor's Wage and Hour Division is cracking down on firms that fail to pay interns properly.¹⁷ The Economic Policy Institute has issued a Policy Memorandum calling for reformation of the regulations of student internships.¹⁸ The uncertainty surrounding the Wage and Hour Divisions test for minimum wage and overtime also impacts eligibility for workers compensation and whether interns are protected from harassment and discrimination. The current system often fails to protect interns and encourages employers to replace regular workers with unpaid interns.¹⁹

In order to examine the dilemma further, this article analyzes in greater depth various state and federal laws. The central questions are whether the laws do or do not apply to unpaid student interns. The article also raises issues, especially from an employer perspective, related to whether the principles of law should, or should not, apply to unpaid student interns. The article concludes with suggestions for further research, and the need for further examination from the perspective of the student-worker, and the sponsoring institution, aside from the employer.

II. DEFINITIONS OF "INTERN" AND "EMPLOYEE"

It is difficult if not impossible to find a specific definition of an "intern" in any statute. However, one workable definition might be,

¹³ Roger Hodge, *Less than Zero*, ARTFORUM, (June-Aug. 2011) 16-17.

¹⁴ *Millennial Branding Student Employment Gap Study*, available at <http://millennialbranding.com/2012/05/millennial-branding-student-employment-gap-study/>

¹⁵ See Greenhouse, *supra* note 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Econ. Policy Inst., Policy Memorandum #160, (2010), available at http://epi.3cdn.net/f7d635c8f7380fff0_8sm6bxrzk.pdf.

¹⁹ *Id.*

An intern is someone whose uncompensated efforts primarily provide that person with tutelage and experience that are transferable in serving other persons or entities and do not to a material degree give value to the source of the tutelage or the source of the opportunity for experience that is greater than is the value of the intern's enhanced learning.²⁰

Finding a definition of an "employee" is even more of a problem because the various federal and state laws do not all use the same tests or definitions to determine who is an employee.

For example, the National Labor Relations Act (NLRA) defines an employee as follows:

"The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.... ." ²¹

The Fair Labor Standards Act (FLSA) defines an employee as "any individual employed by an employer." ²² Mitchell H. Rubinstein notes that the Employee Retirement Income Security Act (ERISA) of 1974,²³ the Family and Medical Leave Act (FMLA) of 1993,²⁴ the Civil Rights Act of 1964, Title VII,²⁵ the Age Discrimination in Employment Act (ADEA),²⁶ and the Americans with Disabilities Act (ADA)²⁷ all define employees in the same manner, and various state statutes concerning workers compensation, wage and hour laws, and anti-

²⁰ Dennis R. Nolan, Theodore J. St. Antoine, Joseph E. Slater, & Alvin Goldman, *Proceeding: Working Group on Chapter 1 of the Proposed Restatement of Employment Law: Existence of Employment Relationship*, 13 EMPL. RTS & EMPLOY. POL'Y J. 43, 56 (2009).

²¹ The National Labor Relations Act, 29 U.S.C.S. § 152(3) (2010).

²² The Fair Labor Standards Act, 29 U.S.C. § 203(e)(1) (2010).

²³ The Employee Retirement Income Security Act, 29 U.S.C. § 1002(6) (2010).

²⁴ *Id.* at § 2611(3).

²⁵ 42 U.S.C. § 2000(e)(f) (2010).

²⁶ *Id.* at § 630(f).

²⁷ *Id.* at § 12111(4).

discrimination statutes utilize similar definitions.²⁸ Rubinstein also notes that even where it is clear which test of employee status should be utilized, courts have found that it is not easy to apply the definitions contained in those tests to specific facts.²⁹ Further examination is required to evaluate Angela's internship relationship.

A. JUDICIALLY CREATED TESTS

Courts have developed different tests for determining if someone is an employee. These have often been used to determine if a worker is an employee or an independent contractor. The tests have also been used to determine if the discrimination laws apply.³⁰

1. COMMON LAW AGENCY TEST FOR EMPLOYEE STATUS

The common law standard can be found in the Restatement (Second) of Agency §220.³¹ The Supreme Court has described the common law test as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.³²

This is sometime also called the "right-to-control" test. Courts frequently use this particular test with Title VII cases.³³

²⁸ Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147 (2006).

²⁹ *Id.* at 158-59.

³⁰ Craig J. Ortner, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2626-27 (1998).

³¹ THE RESTATEMENT (THIRD) of AGENCY was published in 2006, but it omitted the "independent contractor" terminology asserting that it was confusing because some independent contractors are agents while others are non-agents. RESTATEMENT (THIRD) of AGENCY § 1.01 cmt. c (2006). Consequently, courts cannot use the RESTATEMENT (THIRD) to determine the difference between the independent contractor and employee.

³² *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992).

³³ Tara Kpere-Daibo, *NOTE: Employment Law--Antidiscrimination—Unpaid and Unprotected: Protecting Our Nation's Volunteers Through Title VII*, 32 U. ARK. LITTLE ROCK L. REV. 135, 143 (2009).

2. ECONOMIC REALITY TEST

Use of the common law test, especially in Title VII cases, is considered by many to be inappropriate due to its rigid classifications.³⁴ Other cases have taken a different approach, and relied on the economic reality test, which considers factors such as whether an employer controls the employment opportunities. The economic realities test, focusing on how economically dependent the individual is on the work he performs, was first formulated by the Supreme Court of the United States in *Bartels v. Birmingham*,³⁵ a Social Security tax case in which the Supreme Court said that courts need to examine employees, "who as a matter of economic reality are dependent upon the business to which they render service."³⁶ The Court further indicated that the totality of circumstances must be considered when determining employee status.³⁷ Often, the economic realities test is framed as a balance of power argument,³⁸ and whether the alleged employee is in a position in which he or she may be subject to the effects of unlawful discrimination.³⁹

3. HYBRID TEST

Some courts have essentially developed a hybrid test that combines the elements of both the common law test reflected in the Restatement of Agency and the economic reality test. Rubenstein suggests that a majority of the circuit courts appear to have adopted the hybrid test.⁴⁰ It has been used in whistle-blowing cases, Title VII cases, ADEA cases, and Civil Service Act cases.⁴¹ With the increasing number of unpaid student interns, issues surrounding liability exposure to employer, intern, and third parties can also be expected to increase. Unpaid student internships now account for over 50% of the college internships.⁴² Scenarios similar to Angela's then may also be on the increase.

B. SHOULD INTERNS BE TREATED THE SAME AS VOLUNTEERS?

Cases involving volunteers are frequently analogized to cover interns. However, in wage and hours cases, Department of Labor (DOL) regulations make a distinction and define a volunteer as, "An individual who performs hours of

³⁴ Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM AND MARY L. REV. 75, 102 (1984).

³⁵ *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947).

³⁶ *Id.*

³⁷ *Id.*

³⁸ Kpere-Daibo, *supra* note 33, at 144.

³⁹ Dowd, *supra* note 34, at 102.

⁴⁰ Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147, 168 (2006).

⁴¹ *Id.* at n. 106

⁴² Interview with Sanford Dennis, Career Coordinator, College of Business, Clayton State University, in Morrow, GA. (Aug. 29, 2012).

service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered . . .”⁴³ The DOL does not generally find employee status for unpaid volunteers at nonprofits when they donate their time without pay,⁴⁴ and §203(e)(4)(A) of the FLSA exempts unpaid volunteers at public agencies.⁴⁵ Accordingly, arguments are potentially weakened when dismissing the need to compensate interns because they might carry a volunteer classification. Perhaps both the employer and Angela viewed her involvement as a volunteer, but the following arguments do not support this classification.

III. LIABILITY TO THE INTERN

A. DISCRIMINATION

Three federal laws are central to most employment discrimination. First, Title VII of the Civil Rights Act of 1964 ("Civil Rights Act")⁴⁶ prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin."⁴⁷ Secondly, The Age Discrimination in Employment Act ("ADEA") prohibits discrimination on the basis of age, with individuals 40 or over constituting the protected class.⁴⁸ Finally, the Americans with Disabilities Act ("ADA") prohibits discrimination on the basis of disability.⁴⁹ Student interns, like any other potential plaintiffs, must meet the statutory definition of "employee" in order to raise a claim under these statutes.⁵⁰ Title VII says only that an employee is "an individual employed by an employer."⁵¹ Though it is nowhere stated in the law, Courts have often required that an employee be a person who works for compensation, and they have denied federal discrimination protection to unpaid interns.⁵² Courts, however, have not specified the type that the compensation must be.⁵³

The U.S. Supreme Court provided a definition of an employee in determining the applicability of the Americans with Disabilities Act in *Clackamas Gastroenterology Associates, P.C. v. Wells*.⁵⁴ The ADA's definition, in 42 U.S.C.

⁴³ 29 CFR §553.101(a).

⁴⁴ 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, 1372 (2012).

⁴⁵ *Id.* at 1373.

⁴⁶ The Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17(2010).

⁴⁷ *Id.* at § 2000e-2(a).

⁴⁸ The Age Discrimination in Employment Act, 29 U.S.C. §§ 621-34 (2010).

⁴⁹ The Americans with Disabilities, 42 U.S.C. §§ 12101-213 (2010).

⁵⁰ 29 U.S.C. § 630(f) (ADEA); 42 U.S.C. § 2000e-2(f) (Title VII); 42 U.S.C. § 12111(4) (ADA).

⁵¹ 42 U.S.C. §2000e(b) (2010).

⁵² James J. La Rocca, *Lowery v. Klemm: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U.PUB. INT. L. J. 131 (2006).

⁵³ *Id.* at 133.

⁵⁴ *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 123 S.Ct. 1673, 155 L. Ed. 2d 615 (2003).

§12111(4), of an "employee" is the same as in Title VII. It is an "an individual employed by an employer." The Court determined in *Clackamas* that the common-law element of control was the principal guidepost that should have been followed in the case. The Court also endorsed the Equal Employment Opportunity Commission's (EEOC) standard in Equal Emp. Oppt'y Comm'n Compliance Manual § 605:0009 (2000) in determining whether a shareholder-director is an employee:

Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work

Whether and, if so, to what extent the organization supervises the individual's work

Whether the individual reports to someone higher in the organization

Whether and, if so, to what extent the individual is able to influence the organization

Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts

Whether the individual shares in the profits, losses, and liabilities of the organization.⁵⁵

The previously discussed economic realities test has also been used to identify employees in discrimination cases. In her research concerning the economic realities test and Title VII, Nancy E. Dowd notes that the result of applying an economic realities test in discrimination cases has been to bring within the statute entities that might not otherwise have been considered employers but nevertheless exert substantial control over employment opportunities or the terms and conditions of employment. "Courts have based the liability of these entities for discriminatory conduct on their control of employment opportunities ranging from the power to block all access into a particular profession to the ability to deny access to a single employment opportunity at various stages in the employment relationship."⁵⁶ Courts have applied the test where a defendant, subject to Title VII, interferes with an individual's employment opportunities with another employer.⁵⁷ Courts have also applied the test to licensing bodies, professional associations, and to the administrators of employers' pension plans.⁵⁸ However, the test has not been extended to the employers of unpaid student interns.

A leading case dealing with the applicability of discrimination laws to an intern is *O'Connor v. Davis*.⁵⁹ Bridget O'Connor was a social work major in

⁵⁵ *Id.* at 450.

⁵⁶ Dowd, *supra* note 34, at 105, 106.

⁵⁷ *Gomez v. Alexian Bros. Hosp. of San Jose*, 698 F.2d 1019 (9th Cir. 1983).

⁵⁸ Dowd, *supra* note 34, at 105, 106.

⁵⁹ 126 F.3d 112 (2d Cir. 1997).

college, and she was placed as an intern in Rockland Psychiatric Center as part of her course of study. During the internship, she was allegedly sexually harassed by one of the doctors and was never able to finish the internship. She brought suit under Title VII of the Civil Rights Act. The trial court granted summary judgment to the defendants. The Court of Appeals for the Second Circuit affirmed.⁶⁰ The Court found that O'Connor was not an employee under Title VII because she did not receive any remuneration. The Second Circuit held that it was inappropriate to consider if O'Connor was an employee under common law agency rules because this ignored the issue of whether she was ever "hired."⁶¹ In considering *O'Connor v. Davis*, Craig J. Ortner, in his article discussing the application of Title VII to interns, suggests that the court's decision does not lead to the inevitable conclusion that unpaid interns must be considered more like volunteers rather than employees.⁶² Instead, he proposes that "compensation" could include benefits as a form of compensation rather than wages.⁶³ He additionally addresses the suggestion that volunteers are not susceptible to the same types of economic pressures as employees and thus do not suffer the same effects of discrimination as employees.⁶⁴ However, Ortner argues that student interns have their own economic pressures that include experience, course credit, and references.⁶⁵

The Court of Appeals for the Sixth Circuit made an interesting ruling more aligned with Ortner's analysis in a case involving a fire department that had "members" of various classifications. Although not paid wages, "volunteer" firefighters received workers compensation coverage, insurance coverage, gift cards, personal use of the department's facilities and assets, training, and access to an emergency fund. Contrary to holdings from other circuits, the Sixth Circuit held that remuneration was not an independent antecedent to the common law agency test in finding one to be an employee.⁶⁶ In another case, a graduate student was held to be an employee in a decision from the Eleventh Circuit. The appellate court used the economic realities test in a discrimination claim in which the student received a stipend, benefits, and sick and annual leave; her relationship with the university was covered by a comprehensive collective bargaining agreement, the university provided equipment and training, and she was terminated for employment and not academic reasons.⁶⁷ Other federal actions have provided little guidance on direction of principles of law.

⁶⁰ She also brought an action under Title IX, which was likewise dismissed because the Psychiatric Center was not an educational institution.

⁶¹ Ortner, *supra* note 30, at 2632, n. 94, 150, comparing the Court's analysis to that in *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 73, which noted that the legislative history of Title VII explicitly provides that the dictionary definition should govern the definition of employer under Title VII, and therefore the term "employee" should be treated similarly.

⁶² Ortner, *supra* note 30, at 2640.

⁶³ *Id.*

⁶⁴ *Id.*, discussing *Smith v. Berks Cmty. Television*, 657 F. Supp. 794, 795 (E.D. Pa. 1987).

⁶⁵ *Id.*, at 2640.

⁶⁶ *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348 (6th Cir. 2011).

⁶⁷ *Cuddeback v. Fla. Bd. of Educ.*, 381 F.3d 1230 (11th Cir. 2004).

In an interesting twist in a case from the northern district of Illinois, an employee tried to argue that interns were employees in order to meet the Title VII's jurisdictional requirement that the employer have 15 employees in order for the law to apply.⁶⁸ The court relied on *Norman v. Levy*,⁶⁹ and found that the lack of compensation or any other benefit resulted in the interns not being considered employees. This follows the view of the *O'Connor* court, and is the view taken by most courts.

B. STATE DISCRIMINATION LAWS

Unpaid workers have not fared much better in the few discrimination cases heard in state courts. In *Lowery v. Klemm*,⁷⁰ the Massachusetts Court of Appeals decided that a sexually harassed *volunteer* was protected under state law. However, the Supreme Judicial Court of Massachusetts reversed that decision⁷¹ stating that the protection only applied in employment or academic settings. The court ignored the fact that the statute used the term "person" rather than "employee."⁷² In a case from California, Peter Mendoza brought an action for wrongful termination and employment discrimination under the California Fair Employment and Housing Act against the Town of Ross, where he served as an uncompensated volunteer community service officer.⁷³ The Court found that Mendoza was not an "employee," because he was not appointed to an employment position by the Town Council as was required by local ordinance, and because he was not remunerated.

Recently, the Supreme Court of New York in New York County awarded summary judgment against an intern who claimed violations of whistle-blowing and discrimination laws. The court found that not only did the plaintiff not have the evidence to support her claim, but that she was not an employee under New York State's Whistleblower Act because she was not performing services for wages or other remuneration.⁷⁴ Likewise, a United States District Court held that an unpaid intern was not an employee under the District of Columbia Human Rights Act because she was not compensated.⁷⁵

⁶⁸ *Pavlik v. Kornhaber*, 1996 U.S. Dist. LEXIS 8732 (N.D. Ill. 1996).

⁶⁹ *Norman v. Levy*, 756 F.Supp. 1060 (N.D. Ill. 1990).

⁷⁰ *Lowery v. Klemm*, 825 N.E.2d 1065 (2005).

⁷¹ *Lowery v. Klemm*, 446 Mass. 572, 845 N.E.2d 1124 (2006).

⁷² *LaRocca*, *supra* note 52, at 138-139.

⁷³ *Mendoza v. Town of Ross*, 128 Cal. App 4th 625, 27 Cal. Rptr. 3d 452 (2005).

⁷⁴ *Greenberg v. Fielding Graduate University and Steinway Child and Family Services, Inc.*, 2010 N.Y. Misc. LEXIS 1848 (2010); NY CLS Labor § 740(1)(a) (2010).

⁷⁵ *Evans v. The Wash. Ctr. for Internships and Academic Seminars*, 587 F.Supp. 2d 148 (2008).

IV. ON THE JOB INJURIES

A. WORKER'S COMPENSATION

Worker's compensation is essentially a type of no-fault program that provides benefits to workers injured on the job or who have acquired work related illnesses. Coverage is provided through an insurance policy, in some states by a state plan, or under certain circumstances an employer may be self-insured. Employees generally receive approximately two-thirds of their normal wages and full payment of medical bills.⁷⁶ Benefits to workers may be limited or unavailable depending upon worker classification.

Starting at the end of the nineteenth century, the Industrial Revolution resulted in a large number of workers being injured in factories, mills, and mines.⁷⁷ However, employees were rarely successful in negligence actions against their employers due to the employers' defenses of contributory negligence, assumption of risk, and the fellow-servant rule.⁷⁸ Dangerous working conditions with little protection or assistance for employees led to the passage of worker's compensation statutes. Williams and Barth, in their book *Workmen's Compensation*, estimated that only 13% of injured employees recovered damages at common law prior to workers' compensation laws, despite the fact that about 70% of the injuries were the result of poor working conditions and the employers' own negligence.⁷⁹ Under a worker's compensation statute, the employee gives up his or her common law right to sue in exchange for limited but certain benefits. The employee's fault is not a defense.⁸⁰ However, the current law relating to unpaid interns could again leave injured workers without recourse due to the fact that only "employees" are protected.

State worker's compensation statutes often include a definition of an employee. For example, Georgia law states,

(2) "Employee" means every person in the service of another under any contract of hire or apprenticeship, written or implied, except a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer; and, except as otherwise provided in this chapter, minors are included even though working in violation of any child labor law or other similar statute; . . . A person shall be an independent contractor and not an employee if such person has a

⁷⁶ David C. Yamada, *The Emp't Law Rights of Student Interns*, 35 CONN. L. REV. 215, 251 (2002).

⁷⁷ *Pleasant v. Johnson*, 312 N.C. 710, 711, 325 S.E.2d 244, 246 (1985).

⁷⁸ *Id.*

⁷⁹ C. Arthur Williams, Jr. & Peter S. Barth, *Compendium On Workmens' Comp.* 11 (1973).

⁸⁰ *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E.2d 244, 247 (1985).

written contract as an independent contractor and if such person buys a product and resells it, receiving no other compensation, or provides an agricultural service or such person otherwise qualifies as an independent contractor...⁸¹

Early Georgia cases established that the worker's compensation law is applicable only where there is a master and servant relationship, and only an employee whose relationship with the employer is that of a servant to a master is entitled to compensation under that law.⁸² The final test assesses whose work the servant was doing and under whose control the servant was doing it.⁸³ A 1994 case determined that an individual in training for two-and-a-half weeks as a substitute bus driver was not an employee because she was not guaranteed employment and received no compensation during the training.⁸⁴

Similarly, Pennsylvania Workers' Compensation statutes define an employee as follows:

The term "EMPLOYEE," as used in this act is declared to be synonymous with servant, and includes: All natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale in the worker's own home, or on other premises, not under the control or management of the employer.⁸⁵

"Employee" is defined under the Pennsylvania Workers' Compensation Act to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration.⁸⁶

Some proposed revisions to the Restatement of Employment Law attempt to distinguish between internships created for purpose of training, and those replacing paid workers.⁸⁷ Comment d uses the term "intern" without defining it, but does state, "Students who render uncompensated services to satisfy bona fide education or training requirements...generally are not treated as

⁸¹ O.C.G.A. § 34-9-1 (2010). The definition contains special rules for fire fighter, law enforcement personnel, and other municipal employees.

⁸² *Chandler v. Harris*, 47 Ga. App. 535, 171 S.E. 174 (1933); *Bentley v. Jones*, 48 Ga. App. 587, 173 S.E. 737 (1934); *Alexander v. Bremen*, 53 Ga. App. 676, 187 S.E. 141 (1936).

⁸³ *U.S. Fid. & Guar. Co. v. Hamlin*, 98 Ga. App. 167, 105 S.E.2d 481 (1958).

⁸⁴ *North v. Floyd Cnty. Bd. of Educ.*, 212 Ga. App. 593, 442 S.E.2d 809 (1994).

⁸⁵ 77 P.S. § 22 (2010). The section also includes special rules for executive officers of corporations.

⁸⁶ *B&T Trucking v. Workers' Comp.* Appeal Bd. (Paull), 815 A.2d 1167, 2003 Pa. Commw. LEXIS 36 (Pa. Commw. Ct. 2003).

⁸⁷ Nolan, *supra* note 20, at 56

employees.”⁸⁸ Paid interns are likely to be eligible for workers compensation for work related injuries, but they would consequently be precluded from using common law tort claims.⁸⁹

Courts decisions are inconsistent as to whether workers compensation laws cover unpaid interns. Some decisions turn on whether the individual was paid wages. Other courts consider the nature of the work performed by the individual. California courts have stated that unpaid students, “who work, ‘shoulder to shoulder with paid workers ...in an established business or institution’ and render ‘ services that are of economic benefit to the third party,’ ” are entitled to workers compensation protection.⁹⁰ In a Delaware case, Maureen Burgess was an unpaid technician intern in a hospital’s histology department when she was injured. Burgess explained that the only thing a histologist did that she could not do involved frozen specimens because a certificate was required for that. Delaware’s Industrial Accident Board found that Burgess was an employee when she was injured and that she was entitled to workers compensation.⁹¹

Courts disagree on the result when the schools also cover the students under their Worker’s Compensation policy. In *Olsson v. Nyack Hospital*,⁹² the Supreme Court of New York held that an intern was an employee of the hospital despite the lack of compensation because the required training and experience that the intern received was a thing of value equivalent to wages. This was true even though an agreement between the hospital and the college stated that the students participating in the intern program shall not be deemed employees, and the school, Boston University, covered the intern under their policy. The court dismissed the injured intern’s lawsuit against the hospital because the intern was covered under the college’s workers compensation plan. However, the Colorado Court of Appeals found that the state worker’s compensation statute provided that interns were employees of the employer unless the internship was unpaid. In that case the intern is covered under the university’s policy.⁹³ Angela and her fellow student interns may not even be aware of an official policy, if the college or university even has one.

⁸⁸ RESTATEMENT (THIRD) OF EMPLOYMENT LAW, §1.02 cmt. d; discussed in Nolan, *supra* note 13, at 56.

⁸⁹ Yamada, *supra* note 76, at 251.

⁹⁰ Nolan, *supra* note 20, at 56, quoting, Land v. Workers’ Comp. App. Bd, 125 Cal. Rptr. 2d 432, 435-436 (Cal. Ct. App. 2002).

⁹¹ Burgess v. Christiana Care Health Systems, 2000 Del. Super. LEXIS 116 (2000). The appellate court did not address whether Burgess was an employee but what the amount of compensation should have been.

⁹² *Olson v. Nyack Hosp.*, 193 A.D. 2d 1006 (N.Y. App. Div. 1993).

⁹³ *Kinder v. The Indus. Claims Appeal Office of the State of Colo.*, 976 P.2d 295 (1998).

B. NEGLIGENCE AND OTHER TORTS

Worker classification can also be a determinant in methods of remediation sought. “Of course, 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 worker’s compensation statute.”⁹⁴ Unpaid interns who are not eligible for protection under worker’s compensation or discrimination statutes should be able to bring actions under state tort law.⁹⁵ This could prove to be more costly for employers. Possible causes-of-action could include negligence, assault and battery, common law harassment, and defamation, all of which are sometimes based on theories of negligent hiring or negligent supervision of other employees. For example, an Illinois court found that an employer could be held liable to an intern who was allegedly assaulted by her supervisor on the employer’s premises based on a theory of negligent supervision.⁹⁶ Also, a claim for battery has survived dismissal when one plaintiff alleged unauthorized touching by her supervisor during an unpaid internship.⁹⁷

V. WAGE AND HOUR

On June 25, 1938 Congress enacted the Fair Labor Standards Act (FLSA).⁹⁸

The FLSA is a Depression-era statute designed to protect the lowest paid classes of workers and to provide a social safety net that guarantees all workers a certain minimum level of earnings.⁹⁹ This is probably the most significant law facing employers using student interns. The statute requires in some situations that the intern be paid. Section 3(g) of the Act, which provides a definition of “employ” as including “to suffer or permit to work” and §3(e), which defines “employee” as “any individual employed by an employer,” are not helpful in identifying who is an employee. However, the Department of Labor has taken the position that if the intern is hired to complete tasks beneficial to the employer, especially if they prevent the intern from achieving the educational value of the internship, the intern must be paid at least minimum wage.

⁹⁴ David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME L.J. ETHICS & PUB. POL’Y 227, 245 (1998).

⁹⁵ Yamada, *supra* note 76, at 253.

⁹⁶ *Platson v. NSM, America, Inc.*, 748 N.E.2d 1278 (Ill. App. Ct. 2001)

⁹⁷ *Evans v. The Wash. Ctr. for Internships and Acad. Seminars*, 587 F.Supp. 2d 148. (2008).

⁹⁸ Fair Labor Standards Act of 1938, ch. 676, 2-19, 52 Stat. 1060 (codified as amended at 29 U.S.C. 201-219).

⁹⁹ Edward D. Cavanaugh, *Journalists as Professionals: Rethinking the Professional Exemption Under the Fair Labor Standards Act*, 16 LOY. L.A. ENT. L.J. 277 (1995)

In April 2010, the U.S. Department of Labor issued Fact Sheet #71¹⁰⁰ which discusses internship programs under the Fair Labor Standards Act. Interns who qualify as employees rather than as trainees¹⁰¹ typically must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek. Complaints had previously existed about confusion in understanding the DOL policy on the internship problem. However, Fact Sheet #71 is identical to the previous DOL policy.¹⁰² The fact sheet contains six criteria to determine if an employment relationship exists. They include:

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 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.¹⁰³

The Fact Sheet explains that an employment relationship does not exist if all of the factors are met. The DOL implies that any college-sponsored internship should be an educational experience, validated by earned credit hours. The intern will hopefully be learning skills that can be used in multiple employment settings. However, the fact that the intern may be receiving some benefits in the form of a new skill or improved work habits may not be enough if the employer is also benefiting from the intern's work. The FLSA probably would not apply if the intern is engaged in job shadowing, under the close and constant supervision of regular employees, and the intern performs no work or a minimal amount of work.

¹⁰⁰ Dep't. of Labor, Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act (April 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.

¹⁰¹ The Department of Labor does not define the term "trainee" other than by using the same six criteria as for interns but replaces the words "interns" and "internship" with "trainee and students" and "training," respectively. Also, "educational environment" is replaced with "which would be given in a vocational school." See *elaws - Fair Labor Standards Act Advisor* at <http://www.dol.gov/elaws/esa/flsa/scope/er15.asp>.

¹⁰² Natalie Bacon, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71."* 6 *ENTREPREN. BUS. L.J.* 67 (2011). Bacon believes the guidelines were reissued to indicate an increase in enforcement.

¹⁰³ *Supra* note 100.

Conversely, the FLSA is triggered if the business is dependent upon the work of the intern. If the employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns are covered by the Act, and additional issues are raised. If the intern is placed with an employer for a trial period where he or she expects to be permanently hired, the intern will probably be considered an employee. It should be noted that the FLSA factors only apply to “for-profit” private sector internship programs, implying a safe-harbor for not-for-profit volunteer relationships.¹⁰⁴ Angela was clearly working in the “for-profit” private sector.

These same criteria were included in an opinion letter the Department of Labor issued in 2006.¹⁰⁵ The fact that the same criteria were reissued in 2010 does not indicate a change in the law, but probably signals a resolution by the agency to more aggressively enforce the law.¹⁰⁶ Although the opinions of the Department of Labor do not carry the same weight as a law, they were developed based on the 1947 U. S. Supreme Court decision of *Walling v. Portland Terminal Co.*¹⁰⁷ In that case a railroad gave prospective yard brakemen a training program lasting seven or eight days. Each trainee first learned routine activities, and was gradually permitted to do actual work while being closely scrutinized. The work did not displace any regular workers. In fact, the workers needed to supervise the trainees. The trainees’ work did not expedite the railroad’s work. In fact, sometimes it did just the opposite. Trainees who satisfactorily completed the program were eligible for employment when needed. The Supreme Court held that the trainees were not employees because the railroad received no “immediate advantage” from any of the work done by the trainees. The court recognized that employers who hire beginners, learners, or handicapped persons, and expressly or impliedly agree to pay them compensation must do so. The language in the Act was not created to cover all persons as employees might work for their own advantage on the premises of another. A person whose work serves only his own interest does not become an employee of another who gives him aid and instruction. Had the trainees taken courses in a public or private vocational school, it would not imply that they were employees of the school.

There are no federal court decisions dealing with the FLSA and student interns. Existing court decisions deal with trainees but should still serve as guidance

¹⁰⁴ The FLSA makes a special exception under certain circumstances for individuals who volunteer to perform services for a state or local government agency and for individuals who volunteer for humanitarian purposes for private non-profit food banks. WHD also recognizes an exception for individuals who volunteer their time freely and without anticipation of compensation for religious, charitable, civic, or humanitarian purposes to non-profit organizations. See <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.

¹⁰⁵ Wage and Hour Division, Opinion Letter FLSA2006-4, Civic and charitable volunteer activities and compensable work time under the FLSA, available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_01_27_04_FLSA.pdf.

¹⁰⁶ *Supra* note 102.

¹⁰⁷ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

for employers using interns. In *Reich v. Parker Fire Protection District*,¹⁰⁸ the Tenth Circuit Court of Appeals analyzed a situation in which a fire department required potential firemen to undergo training with no pay. Even though the trainees expected to be hired as firemen, the Court said that it was necessary to look at the totality of the circumstances. This meant considering that the training was comparable to a vocational program, the trainees benefitted and the fire department received only a dominium benefit, the trainees did not replace current employees, and the trainees did not expect to be paid. This differs from the language that *all* the criteria must be met to establish an employment relationship. The Court held that the trainees were not employees, and that the fire department had not violated the FLSA by failing to pay wages.

A 2004 federal district court decision found that workers were employees and not trainees.¹⁰⁹ The Court relied on the reasoning of the *Reich* decision and applied the totality of the circumstances and the economic realities analyses.¹¹⁰ The case involved workers from India who were brought to the United States to work in the defendant's plant. The defendant claimed that they were employed by an Indian Company and would be trained at the employer's facility; thus they were exempt from minimum wage and overtime requirements. However, the Court found that they were employees because they expected to obtain long-term jobs with the employer, they already possessed a high level of skill, the defendant did not teach them any new skills, they displaced American workers, and the employer derived immediate advantage and financial gain from their work, thus using both the economic realities test and the six-factor test developed by the Department of Labor.¹¹¹

VI. BREACH OF CONTRACT

In a recent case, a graduate student who was a plaintiff had enrolled in Washburn University's Master of Arts in Psychology with an Emphasis in Clinical Skills Program (MAPECS) and was required to participate in a practicum.¹¹² The University had entered into an agreement with Kansas Women's Prison to provide the practicum. The medical facility at the prison was operated by Correct Care Solutions, LLC (CCS). The plaintiff signed an internship agreement for Correct Care Solutions. The District Court noted that in this practicum, the plaintiff received, no salary or wages; no bonuses; no paid or unpaid sick leave; no vacation time; no bereavement leave; no health insurance coverage; no disability pay; no retirement/401k/IRA pay, benefits or contributions; no allowances or reimbursements for meals, transportation, lodging, or work uniforms; no licensing

¹⁰⁸ *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (1993).

¹⁰⁹ *Chellen v. John Pickle Co., Inc.*, 344 F. Supp. 2d 1278 (N. D.Ct. OK. 2004)

¹¹⁰ Discussed under Section II. A. 3.

¹¹¹ *Supra* note 109, at 41.

¹¹² *Talley v. Washburn University, et al.*, 2012 U.S. Dist. LEXIS 69407 (D.C.D.Kan. 2012)

fee payments or reimbursements; no tuition reimbursement, either full or partial; and no medical care. Plaintiff maintains that he did, however, receive a benefit from CCS in the form of experience, training, and supervision.¹¹³ The plaintiff alleged that CCS improperly terminated him before his practicum, and he brought an action for, among other things, a breach of contract. He claimed that the termination caused him to be dismissed from the Graduate Program and resulted in his being unable to obtain his degree or license. CCS argued that the internship agreement was unenforceable due to a lack of consideration or mutuality of obligation. The U.S. District Court reviewed Kansas contract law and concluded that a promise to pay wages is not the only type of consideration that would create a valid contract. The defendant's motion for a summary judgment was denied as to this issue.

VII. LIABILITY FOR INTERNS

Those who hire student interns may not only face liability to those students, but also to third parties for the work performed by the interns. Traditionally there have been three classifications that describe the relationship when one party hires another to do work for them: principal/agent, master/servant, and independent contractor.¹¹⁴ Once the agency relationship is established, the principal is liable for the agent's acts that are within the agent's actual and apparent authority.¹¹⁵

The traditional agency law test is again used as a starting point in determining if a worker is an employee or independent contractor for purposes of determining liability to third parties. The Restatement (Second) of Agency test is:

- (1) 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.
- (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
 - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;

¹¹³ *Id.* at 6.

¹¹⁴ Deanne M. Mosley and William C. Walter, *The Significance of the Classification of Employment Relationships in Determining Exposure to Liability*, 67 MISS. L.J. 613, 614 (1998).

¹¹⁵ *Id.* at n.11.

- (e) whether the employer or the [worker] supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant;
- (j) whether the principal is or is not in business.¹¹⁶

Generally, an employer or principal is vicariously liable for the torts of its employees or agents under the doctrine of *respondeat superior* but not for the negligence of an independent contractor over whom it retained no right to control the mode and manner of doing the contracted-for work.¹¹⁷

Rather than return to the circular reasoning as to whether the agent was ever actually “hired,” it should be noted that courts have used a fictional agency relationship to impose vicarious liability for the agent in the absence of actual agency. However, Deanna N. Conn has noted four exceptions to the non-liability for the acts of independent contractors.¹¹⁸ Two are particularly apt, and the first discussed pertains to retained control. If the employer exercises significant control, which it should over a student intern, courts have stated that the relationship is more like that of an employee in which vicarious liability is imposed.¹¹⁹ The other is apparent agency, also called agency by estoppel. This theory requires some act on the part of the principal that would lead a third party to believe that the person is an agent of the principal.¹²⁰ It is not clear what conduct must occur on the part of the intern and employer, but allowing interns to meet clients and perform work for clients should qualify in our opinion.

VIII. DISCUSSION

James Kozlowski, in his article dealing with unpaid student interns and the Fair Labor Standards Act, suggests that any determination under the FLSA will be fact specific, and it would be “inappropriate to offer general conclusions” as to how the six criteria in the Fact Sheet might relate to the “myriad of situations involving unpaid interns.”¹²¹ However, it is our opinion that many student internships could easily be found to violate the FLSA. Many employers see students as an avenue for finding free work, and the amount of time they spend

¹¹⁶ RESTATEMENT (SECOND) OF AGENCY 220 (1958).

¹¹⁷ *Clark v. Southview*, 68 Ohio St. 3d 435, 438, 628 N.E.2d 46, 49 (1994)

¹¹⁸ Deanna N. Conn, *When Contract Should Preempt Tort Remedies: Limits on Vicarious Liability for Acts of Independent Contractors*, 15 FORDHAM J. CORP. & FIN. L. 179 (2009).

¹¹⁹ *Id.* at 195-196, citing 44 Tex. Jur. 3d Independent Contractors §7 (2009).

¹²⁰ *Id.* at 196-197.

¹²¹ James C. Kozlowski, *Unpaid Student Interns Under the Fair Labor Standards Act*, PARKS AND RECREATION 27, 32 (May 2010).

focusing on the student's education is limited. The Economic Policy Institute found that many for-profit businesses offered unpaid internships with no explicit academic training component.¹²² Many students report that they served in internships that involved non-educational, menial work.¹²³ A prime example would be interns at Disney World. While the experience is touted as being educational and a career opportunity, many of the 8,000 annual interns spend their time "flipping burgers, cleaning toilets and hotel rooms, parking cars, and stocking gift shops."¹²⁴

An employer that seriously devotes time to the education and training of the intern will do so at significant cost. The Economic Policy Institute¹²⁵ recommends comparing the per-hour cost of having the intern to the benefit to the employer. If the cost is greater, the student is an intern. If the benefit is greater, the student is an employee.¹²⁶

Where the work of the intern benefits the employer, another concern is that the intern is replacing regular workers, and some of these may be low-income workers. Also, students from lower-income backgrounds may not be able to afford spending a semester or summer working for free, and this puts them at a competitive disadvantage when looking for a job after graduation in comparison to those who can afford to serve an unpaid internship.¹²⁷

In this article's opening example, the manufacturing firm will undoubtedly run afoul of the Wage and Hour laws. The employer is essentially using the intern, Angela, as free labor, and in the process is likely treating Angela contrary to the goals of the university. The employer is clearly benefitting in the short run while the intern is doing work not aligned to academic study that should be done by a paid employee. Displacement of workers in a depressed economy is a side effect that should not be overlooked. In the long run, the viability and value of such internship programs to all parties becomes questionable.

IX. SOLUTIONS

Most commentators recommend government action and a change to the laws. This could be difficult since some laws are from the states, such as workers compensation and negligence, and some are federal, such as Title VII and the FLSA.

¹²² *EPI Policy Memorandum #160*, *supra* note 11, at 3.

¹²³ Greenhouse, *supra* note 10. The article gives several examples of this.

¹²⁴ Hodge, *supra* note 13, at 16-17, discussing Ross Perlin, *Intern Nation: How to earn Nothing and Learn Little in the Brave New Economy*, Verso, Brooklyn NY (2011).

¹²⁵ The Economic Policy Institute (EPI), a non-profit, non-partisan think tank, was created in 1986 to broaden discussions about economic policy to include the needs of low- and middle-income workers.

¹²⁶ *EPI Policy Memorandum #160*, *supra* note 11, at 3.

¹²⁷ Occupy Wall Street has identified unpaid internships as one of its projects. See Greenhouse, *supra* note 8.

The tests and definitions vary. It would be impossible to institute one comprehensive change to cover all situations. Still interns need protection from discrimination and harassment. The only area in which action appears to be occurring is with the Wage and Hour laws. The Economic Policy Institute recommends adopting its test, comparing the cost to the benefit, and enforcing the FLSA more aggressively when it comes to internships.¹²⁸ There is little incentive for students to report abuses because they need the internships. Consequently, there is little incentive for employers to pay interns, or to protect them or provide an educational experience. However, until the laws change, there are things employers and schools can do.

Employers concerned about liability to the intern could request that the intern sign a release form, although it would probably not be effective in all situations. Considering the students' subordinate positions, some states might find this agreement to be unconscionable and refuse to enforce it. The employer might also require the school to sign an indemnity clause, which would result in the school assuming liability for anything that happens to the student intern. It would seem that the schools would be reluctant to do this, although they may have some liability regardless.

Laurie Pike, in an article she wrote for *Entrepreneur* magazine, suggests that employers consider what interns are learning from the internship, so that it does not just look as though they are replacing paid employees. She has also compiled a list of suggestions for hiring an intern:

1. Get clear start and end dates (perhaps corresponding with colleges' semesters).
2. Post the position on Internship websites.
3. Schedule the work days.
4. Limit the hours.
5. Make expectations clear.
6. Do not make promises about a future job.
7. Appoint a supervisor.
8. Be consistent. Do not have some paid and some unpaid interns.
9. Challenge interns.
10. Encourage networking.
11. Offer perks.
12. Give interns an exit interview.
13. Write a recommendation.¹²⁹

Of course, employers could pay the interns for the work that they do. This would answer many of these issues. It would reduce the possibility of students being

¹²⁸ *Id.* at 8.

¹²⁹ Pike, *supra* note 5, at 84.

exploited, and it would allow more lower-income students to benefit from participation, assuming the entities were willing to “pay.” Wages subject to FICA, federal, and applicable state withholding would also benefit the employer by providing protection from lawsuits that could be brought against them on the basis of worker misclassification as volunteers or independent contractors. Interns deserve some protection against harassment during the duration of the internship, but it is likely they will not be eligible for any protection without a salary. A struggling economy should not be enough to justify free labor and worker exploitation. Nevertheless, some might ask if this is the best time for the administration to enforce the DOL policy when unemployment is still high.¹³⁰ However, despite the announcement in 2009 that 250 new wage and hour investigators were going to be hired,¹³¹ the Department of Labor could not possibly crack down on all violations. The fact that some high profile cases have hit the news does not change this.

Some unpaid internships are awarded to individuals who are not in school. Employers concerned about the Department of Labor finding that the internship is not an educational experience may want to use college students seeking college credit for their internships. In order to receive credit, the college or university usually insists upon a number of requirements. The student and employer must sign an agreement that spells out the learning objectives. The employer must assign a supervisor who evaluates the students’ work, and the school assigns a faculty member to assign a final grade. Students are usually required to keep a journal and submit a final paper.¹³² However, many schools should be more proactive, and have knowledge about the workplaces to which they send their students. Site visits would also be a good idea. Students should have several key campus individuals to contact immediately if they have any concerns. The institution should award appropriate course credit for the internship experience. The overall “learning” benefits of any internship should be evaluated with scrutiny, and the absence of even a nominal monetary compensation package might make internship offers suspect. Schools should also assist interns in evaluating documents they are asked to sign by the employing entity that involve any release, indemnity, and waiver.

Some may question why interns are willing to submit to an “Angela-like” situation. In today’s economy, with slow hiring, the answer is simple. Interns are looking for experience and an opportunity to get a foot in the door.¹³³ However, need on the part of interns should not encourage employers to become complacent. Not only has the Department of Labor promised to enforce the Wage and Hour laws as applied to unpaid workers, but interns are also beginning to file suit. In 2011 two

¹³⁰ Braun, *supra* note 4 at 307.

¹³¹ DOL Hired 250 New Wage and Hour Investigators, HUMAN RESOURCE NEWS, (November 20, 2009), available <http://blogs.hrhero.com/hrnews/2009/11/20/dol-hires-250-new-wage-and-hour-investigators/>

¹³² Sanford Dennis, *supra* note 42.

¹³³ Ross Eisenbery, a vice president at the Economy Policy Institute notes that unlike a few years ago, we are seeing college graduates take unpaid internships. See Steven Greenhouse, *Jobs Few, Grads Flock to Unpaid Internships*, The New York Times, (May 5, 2012).

men filed suit against Fox Searchlight Pictures for work they had done on the film, “Black Swan,” as unpaid interns. The men claimed they performed menial work that provided them with no educational experience.¹³⁴ More recently, Xuedan Wang, an unpaid intern at Harper’s Bazaar, filed suit against the magazine’s parent company, Hearst Corporation. Wang worked fulltime, and sometimes even worked 55 hours a week.¹³⁵ Wang was in charge of other interns and maintained records for the corporation’s expense reports.¹³⁶ The lawsuit alleges that this nationwide practice “curtails opportunities for employment, fosters class divisions between those who can afford to work for no wage and those who cannot, and indirectly contributes to rising unemployment.”¹³⁷ In a pretrial ruling Judge Baer has allowed the class and collective actions (including unpaid and underpaid interns) to proceed at this time.¹³⁸

Student workers need not suffer Angela’s fate. Moreover, firms should consider the potential long-run liability in the areas of employment law covered by this paper. Firms seeking short-run cost savings in the labor pool through unpaid student internships may find themselves with results that benefit neither workers nor management. Outcomes that are counter to educational experiences of legitimate internship engagements must be avoided.

¹³⁴ Steven Greenhouse, *Interns, Unpaid by a Studio, File Suit*, N.Y. TIMES, Sept. 28, 2011, available at <http://www.nytimes.com/2011/09/29/business/interns-file-suit-against-black-swan-producer.html?scp=1&sq=Interns%2C+unpaid+by+studio+file+suit&st=nyt>.

¹³⁵ Jonathan Allen, *Unpaid Intern Sues Harper’s Bazaar for Minimum Wage*, REUTERS, Feb. 2, 2012, available at <http://www.reuters.com/article/2012/02/02/us-intern-unpaid-lawsuit-idUSTRE81100P20120202>.

¹³⁶ Stephanie Rabiner, *Hearst Corp. Sued by Unpaid Intern at Harpers Bazaar*, IN HOUSE, Feb. 7, 2012, available at http://blogs.findlaw.com/in_house/2012/02/hearst-corp-sued-by-unpaid-intern.html.

¹³⁷ Julie Beck, *Former Unpaid Intern Sues Hearst Corp., Seeks Class Action*, INSIDE COUNSEL, Feb. 2, 2012, available at <http://www.insidecounsel.com/2012/02/02/former-unpaid-intern-sues-hearst-corp-seeks-class>.

¹³⁸ *Wang v. the Hearst Corporation*, 2012 U.S. Dist. LEXIS 97043 (2012). The Judge also stated that Wang argument that requiring intern to purchase academic credits was an unlawful deduction is, “unique if not farfetched;” *Id.* at 3.