TOPIC:

INTERNSHIP AND EXTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT

INTRODUCTION:

In April 2010, the Department of Labor ("DOL") published a “Fact Sheet” on “Internship Programs Under the Fair Labor Standards Act.” [1] Despite the reaction among employers, some of whom suspended or modified their student internship programs in response to this publication [2], the DOL Fact Sheet does not change the substantive law governing the status of interns under the FLSA. Instead, it merely restates the DOL’s longstanding policy of applying the criteria used to determine the status of trainees under the FLSA to interns. That said, these criteria have often been misunderstood and applied inconsistently. At the very least, the Fact Sheet should be taken as a sign that DOL plans to renew focus on the propriety of internship programs, especially to ensure that employers are not using unpaid internships to displace employment opportunities.

Further complicating matters is that the test applied by DOL to determine when an intern qualifies as an employee under the FLSA has never been fully and universally endorsed by the courts and has not been subjected to the rulemaking process. This Note will discuss the treatment that internships have received by DOL and the courts and attempt to elucidate the common characteristics of acceptable internship programs that do not create an employment relationship—thus avoiding the application of minimum wage and overtime laws, which would extinguish many such programs.

DISCUSSION:

The FLSA, which sets a minimum wage for those employed within the meaning of the Act, aptly defines an employee as “any individual employed by an employer.” [3] The FLSA goes on to define “employ” as “to suffer to work” and “employer” as “any person acting directly or indirectly in the interest of an employer in relation to an employee.” [4] When an employer “suffers” or “permits” another to work, an employment relationship exists under the FLSA, regardless of the parties’ intentions [5].

Six-Part Test

Recognizing the implications of an overbroad application of the FLSA definitions, the Supreme Court held in Walling v. Portland Terminal Co. that the Act does not apply to those who work on the premises of another for their own advantage [6]. Walling involved a group of trainee railroad workers whose completion of a training course was a condition to their actual employment at the railroad. The Court identified six characteristics of the trainees’ work that removed it from the scope of
“employment” under the FLSA. These characteristics were later adopted by the DOL as the six-factor test used for determining trainee status [7]. The criteria are as follows:

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 [8].

Department of Labor’s Interpretation

Although the six-factor test has never been fixed in regulation, the DOL has consistently taken the position that “if all of the factors listed above are met,” no employment relationship exists under the FLSA and minimum wage and overtime provisions will not apply to the intern [9].

Despite its strict application of the six-part test in practice, the Wage and Hour Division (“Division”) of the DOL has recognized that “[i]n the typical externship or internship program, where the work activities are simply an extension of the student’s academic program, these factors often are met and an employer-employee relationship does not exist.” [10] Still, as demonstrated by the Division’s opinion letters, the outcome in each particular case will depend on the facts surrounding the internship.

In one such opinion letter, a university had asked the Division whether students in its externship program qualified as employees under the FLSA, where the externship program involved students spending one week “shadowing” an employee at a sponsoring employer [11]. The students received neither compensation nor credit for their participation. Any “work” performed by the students consisted of small office tasks or assistance with projects. In general, however, the students did not perform work for their employers, who invested considerable effort in devising meaningful experiences for them. Under these circumstances, the Division stated that it did not think that an employment relationship existed between the sponsor and the externs. The Division found that all six criteria were satisfied, noting, among other things, that the fact that the extern merely “shadowed” an employee meant that no regular workers risked being displaced and that the operations of the sponsor might actually be impeded by the constant accompaniment of a student [12].

In another opinion, the Division addressed whether student marketing interns working between seven and eight hours a week as field representatives qualified as employees [13]. The interns collected data, distributed flyers, conducted surveys, and generally assumed the role of regular staff members for the company at which they worked. In its letter, the Division suggested these interns were probably employees, although it declined to say definitively one way or the other. While the interns received academic credit and obtained an educational experience that was unavailable to them in the classroom—thus satisfying the first two of the six criteria—it was unclear whether the sponsor derived immediate benefit from the interns, who provided the employer with survey results
and other statistical data. The Division went on to say that, while the other criteria were met, the uncertainty over whether the sponsor derived benefit from the intern raised questions as to their coverage under the FLSA.

**Court Application of the Six-Part Test**

Courts have not squarely addressed the issue of unpaid interns under FLSA. However, several courts have addressed analogous relationships, such as trainees. In fact, as noted above, the DOL derived its six-part test from the Supreme Court’s decision in *Walling v. Portland Terminal Co.* [14]

Although many courts have since recognized the legitimacy of the six part test, some have noted that nothing in *Walling* supports the “all or nothing” approach favored by DOL. [15] These courts (most notably the Tenth Circuit) prefer a “totality of the circumstances” analysis that considers the six factors, but does not consider any as determinative. Other courts have ignored the six-part test altogether, preferring instead to simply focus on whether the employer or the intern/trainee was the “primary beneficiary” of the arrangement [16].

Recently the Sixth Circuit pulled no punches, labeling the six-part test “a poor method for determining employee status in a training or educational setting.” [17] After examining the history of the FLSA and precedent from several other circuits (which it uniformly characterized as rejecting the six-part test) the court threw its weight firmly behind a “primary beneficiary” analysis [18]. Nevertheless, the court seemed to use some of the six factors as benchmarks leading to its ultimate conclusion that the vocational students at issue were the primary beneficiaries of their school’s program.

It is therefore important to understand the judicial treatment of employment status under FLSA and how it can be leveraged against potential enforcement actions by DOL and lawsuits by interns seeking FLSA protections. However, since even courts that reject the DOL test use the six factors as analytic tools, it remains prudent to follow DOL guidance where it is reasonable and practical to do so (not to mention the fact that it might take litigation to earn a reprieve from strict application of the six-part test).

**Meeting the Six Criteria**

The first factor requires that the internship program be an extension of the academic experience. The Division takes a broad view of what activities are similar to those which would be given in an educational environment. What is necessary is that the intern’s work constitutes “the practical application of material taught in the classroom.” [19] Given the variety of classes available to students, many internships involve work that allows interns to apply what they are learning, or could learn, in class. Nevertheless, this requirement makes some employers uneasy and can require a higher level of involvement by institutions as they act as gatekeepers of the “academic environment.”

If an internship program is included or required as part of a bona fide academic program, it is much more likely to provide training similar to the educational environment—indeed, it will be part of the academic experience. For this reason, many potential internship sponsors prefer interns that receive academic credit. Especially in the large for-profit sector, it is not uncommon for sponsors to require that interns receive academic credit. This can place pressure on faculty and internship coordinators to award credit for the most coveted internship programs.

However, the granting of academic credit alone will not bestow an FLSA exemption on what is otherwise an employment relationship subject to the FLSA [20]. It is therefore important for colleges and universities to look carefully at the structure and content of an internship program to ensure that
it provides an academic experience worthy of any credit that the institution may confer. It may even be necessary for the institution to reinforce the academic component of the internship by requiring interns to complete supplemental assignments, such as journals and reflective papers. This added layer of participation by the institution will also help to stave off criticism that it is charging tuition unjustly [21].

The second factor requires that the internship benefits the intern. This requirement mixes easily with the first and is similarly easy to satisfy. Absent undue coercion, it is axiomatic that unpaid interns are unlikely to enroll in an internship program at all unless they stand to benefit. Here again, awarding academic credit to the intern for the internship may be almost determinative. However, awarding credit is by no means necessary; an internship will objectively benefit the intern where the work he or she performs teaches and applies skills that have application beyond the would-be employer’s operation.

The third and fourth factors are the most problematic. Whether an intern displaces regular employees will largely depend on the level of responsibility assigned to the intern, the number of interns, and the number of hours each intern works. Generally, the fewer hours worked, the less likely it is that interns displace regular employees. In the case of the field marketing students discussed above, the Division stated that it was unlikely that the interns displaced regular employees because they only worked a maximum of ten hours each week. The Division seemed to equate “regular employees” with full-time employees and reasoned that part-time interns could not substitute for full-time employees. Similarly, full-time but temporary (e.g. summer) interns are unlikely to displace “regular” employees. By contrast, one can certainly imagine a scenario where part-time interns scheduled in consecutive shifts could be used as a substitute for full-time employees, which could bring them within the ambit of the FLSA’s protections.

Other important considerations when evaluating the third factor are the amount of supervision the interns require and the relative staffing levels when the interns are present or away. It stands to reason that if an employer must consistently assign employees to supervise interns, the interns are incapable of displacing those employees. Likewise, if staffing levels are constant regardless of the presence of interns, it is unlikely that those interns are impacting employment opportunities.

The fourth factor states that an employer must derive no immediate advantage from the activities of the intern. This does not mean that an intern cannot, on occasion, get coffee for his or her employer or perform other tasks, so long as these tasks are isolated instances or de minimis [22]. This criterion also does not prohibit use of the intern’s work product unless the product is both substantial and ready for use by the employer without adaptation or assistance (e.g., the data collected by the student marketers in the letter opinion discussed above). In fact, courts have recognized that the “law presumes that [the employer] will derive ‘some’ benefit from offering training.” [23] An example of a work product that requires work on the part of the employer to be usable would be a newspaper article, which typically requires significant revision by an editor—“impeding” his or her “operations”—before it can be published. Reasoning from this example, the more an intern’s work involves such collaboration between an employer and the intern, the more it can be said that the employer “derives no immediate benefit.” Similarly if the employer or its staff must continuously supervise the intern, the benefits it will reap are not “immediate.” [24]

The fifth and sixth factors should not be hard to satisfy. These require that the intern not necessarily be entitled to a job after completion of the internship and that the employer and intern understand that the intern is not entitled to wages. Such expectations can be dispelled by a written agreement, counseling by an internship coordinator, or similar unambiguous communication between the employer or institution and the intern. It should be noted that nothing in the fifth factor forecloses an employer from hiring a former intern, only that such future employment not be an expectation.

Recognizing that the actual operation of the internship program will be evaluated to determine whether the six-factor test is satisfied, sponsors of internship programs should nevertheless prepare
at the outset a written description of the program and consider having all participants sign a written agreement that confirms that the six-factor test is satisfied, including that no wages will be paid and that the participant has no guarantee of future employment.

**Significant Exceptions**

The FLSA excludes from the term “employee” anyone who volunteers for a public agency which is a political subdivision of a state or the federal government. This would include many public colleges and universities as well as the many public entities that serve as internship sites. Such institutions may make use of the services of volunteers without creating an employment relationship, so long as the individual receives no compensation or is paid only expenses, reasonable benefits or a nominal fee for the services provided and such services are not the same type of services which the individual is employed to perform for the public entity. Another exception also applies to people who, on a part-time basis, donate their services for public service, religious or humanitarian objectives. Neither of these exceptions apply to the “for profit” sector, even if the volunteer activity is meant to benefit worthy causes.

The FLSA also allows students to apply for a student-learner certificate. This certificate allows college students to work under a “bona fide vocational training program” for less than the minimum wage—though not less than 75% of the FLSA minimum. A bona fide vocational training program is defined as:

A program authorized and approved by a state board of vocational education or other recognized educational body that provides for part-time employment training which may be scheduled for a part of the work day or workweek, for alternating weeks or for other limited periods during the year, supplemented by and integrated with a definitely organized plan of instruction designed to teach technical knowledge and related industrial information given as a regular part of the student-learner’s course by an accredited school, college, or university.

To obtain a student-learner certificate, a student must show that, among other things, the profession for which the program will provide training “requires a sufficient degree of skill to necessitate a substantial learning period.” The student must also show that his or her employment would not have the effect of displacing workers employed in the establishment.

A bona fide vocational training certificate would be appropriate, for instance, where an education student teaches in a private school. In such a situation, unless the intern merely assists or “shadows” a teacher, he or she would probably qualify as an employee under the FLSA because he or she would likely be displacing other teachers and because the school would be deriving an immediate advantage from the student’s teaching.

**CONCLUSION:**

The Department of Labor has shown a renewed interest in policing internship programs to ensure that they are not being abused. Although its legal footing is less than sure, the six-part test (and its useful exceptions) adopted by the Division provide a fairly navigable path for colleges and universities as well as their private-sector partners to devise compliant internship programs. State law should also be consulted as some jurisdictions may impose greater obligations on employers than federal law.
FOOTNOTES:


FN4. 29 U.S.C. § 203(d), (g).

FN5. This NACUA Note is limited to the issue of interns under the FLSA. Beyond the scope of this Note is the larger issue of student worker coverage under the FLSA generally. Many colleges and universities employ large numbers of students in a wide variety of roles. Historically, at least some classes of students employed by an educational institution have been viewed as excluded from the definition of “employee” under the FLSA. See, e.g., Marshall v. Regis Educ. Corp., 666 F. 2d 1324 (10th Cir.1981) (college resident-hall assistants not employees under the FLSA); cf. Blair v. Wills, 420 F. 3d 823 (8th Cir. 2005) and Woods v. Wills, 400 F. Supp. 2d 1145 (E.D. Mo. 2005). But in recent years, efforts have begun to challenge this interpretation. See Summa v. Hofstra University, 715 F.Supp.2d 378 (E.D.N.Y. 2010); North v. Board of Trustees of Illinois State University, 2008 WL 905969 (C.D. IL 2008) and 676 F. Supp.2d 690 (C.D.II 2009) (denying motion to dismiss and allowing notice to possible class members).


FN7. See Wage and Hour Division, U.S. Department of Labor, FIELD OPERATIONS HANDBOOK, at Chapter 10 (1993) (setting forth the six-part Supreme Court test as DOL policy); Atkins v. General Motors Corp., 701 F.2d 1124, 1127-28 (5th Cir. 1983); Marshall v. Baptist Hosp., Inc., 473 F.Supp. 465, 478 (M.D. Tenn. 1979), rev’d on other grounds, 668 F.2d 234 (6th Cir. 1981); but see Reich v. Parker Fire Protection District, 992 F.2d 1023, 1027 (10th Cir. 1993) (“We are satisfied that the six criteria are relevant but not conclusive to the determination of whether these firefighter trainees were employees under the FLSA”).

FN8. Fact Sheet, supra note 1.


FN11. See id.

FN12. Id.


FN14. 330 U.S. at 152.

FN15. Reich, 992 F.2d at 1026; see also Harris v. Vector Marketing Corp., 716


FN18. See Id. at 11 (“the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship”).


FN22. Atkins, 701 F.2d at 1129 (finding that during a six-to-eight week training period, two isolated instances where trainees cleaned up construction debris and unloaded a piece of machinery constituted de minimis compensable work, and did not transform the trainees into employees).


FN24. See id. at 5-6.

FN25. In this regard, colleges should also check applicable accreditation standards, which may actually preclude compensation if credit is awarded. See, e.g., 2010-2011 ABA Standards and Rules of Procedure for Approval of Law Schools, Interpretation 305-3 of Standard 305. Complying with applicable accreditation standards can also bolster the requirement that the internship program be an extension of the academic experience.


FN30. 29 C.F.R. § 520.300.

FN31. Id. at § 520.503(d).

FN32. Id. at (f).

FN33. For example, in California, the Division of Labor Standards Enforcement (“DLSE”) has taken the position in several opinion letters that employers should follow several additional requirements that go beyond the six-factor test. See, e.g., DLSE Opinion Letter 1993.10.21 (applying an 11-point test.) Although these guidelines may not be compulsory, courts often accord them deference.

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RESOURCES:


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