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NOT-SO-EQUAL PROTECTION

Reforming the Regulation of Student Internships

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Despite internships' importance to the labor market as a crucial form of vocational training and pre-employment vetting, they are only loosely regulated through vague and outdated employment law. Moreover, these regulations go essentially unenforced. As this paper demonstrates, a lack of clear regulation and enforcement of internship-related laws:

- Leaves many interns unprotected by workplace discrimination and harassment statues such as the Civil Rights Act, Americans with Disability Act, and the Age Discrimination in Employment Act;
- Fosters the growth of unpaid internships, which in turn limits participation to only the students who can afford to forego wages and pay for living expenses, effectively institutionalizing socioeconomic disparities; and
- Permits (and even incentivizes) the replacement of regular workers with unpaid college students and recent graduates.

In light of these outcomes, this paper contends that the current system of regulations governing internships must be reformed, both for the immediate protection of students' rights and also to maintain a strong and vibrant labor market that compensates all workers fairly.

Treatment of internships under current law

The primary law governing workers' rights to fair compensation is the Fair Labor Standards Act of 1938 (FLSA). The FLSA requires employers to provide the federal minimum wage and time-and-a-half overtime wages to most workers, among other regulations. To determine whether an intern qualifies as an "employee" under the FLSA, the Wage and Hour Division (WHD) of the Department of Labor has developed a six-point test for employers to apply. All six points must be met in order to determine that trainees are not fully protected "employees." Though these guidelines do not carry the same weight as law or court rulings, they are rooted in a 1947 Supreme Court ruling regarding exemptions from FLSA for workplace training programs. These six points include (WHD 2004):

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees, but work under close observation;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.

On its face, this test seems to present a clear procedure for determining the legal status of an intern. Given that each point has to be met in order to grant an exemption from FLSA, it would seem that the vast majority of internships would have to be paid. However, this is clearly not the reality that most students face. This mismatch is due to the difficulty of evaluating actual internship programs and mapping their attributes to the six-point test. The six-point test has not been tested directly within the legal system regarding the status of interns.

In fact, students have a strong incentive to keep any reservations they may have about the legality of an internship to themselves. The crucial role of internships in obtaining later employment and the highly competitive market for placement means that no one student has an incentive to report their employer, even in cases of blatant abuses, since another student will readily work for free.

The WHD's guidance to employers, some of which has been provided in official "opinion letters" (responses to queries regarding the legal status of specific internship programs), has not provided perfect clarity. In various letters to employers, the WHD found that it could not determine conclusively whether an unpaid internship program that offered college credit met the six-point test, given the blurred lines between student work and the educational experience of an internship. In these unclear cases, the WHD sought to weigh whether the work performed by the intern would "offset the burden presented to the employer from the necessary training and supervision" and if the experience "provides the students with educational experiences unobtainable in a classroom setting." Should the internship meet either of these criteria, the WHD determined that interns would be unlikely to qualify as a FLSA "employee."

The fifth point of the test in particular may place many firms in violation of WHD guidelines. As previously mentioned, a large share of interns is subsequently hired each year at the firm where they were working. Cases where employment is explicitly or implicitly linked to a prior internship may be a violation of the fifth test.

So though the WHD initially produced an ostensibly straightforward method of evaluating an internship with the six-point test, this methodology does not map well to the reality of internship programs. This flawed method makes enforcement of internships by the federal government all the more challenging. Given the vagueness of the regulations, a lack of vigorous government enforcement, and widespread student ignorance of internship regulations, many employers do not pay their interns or pay stipends that are less than minimum wage.

In addition, the U.S. courts of appeals are divided as to whether an employer must satisfy *all* six tests to avoid an employment relationship with an intern or trainee, or may fail on one or more points if the *totality* of the circumstances nevertheless establishes that the intern is not an employee.

It should be noted that all of these regulations refer to internships in for-profit, private-sector businesses. Internships at non-profit organizations and government agencies fall into a separate category of regulation. Interns at these

organizations can be considered to be donating their time (as volunteers), and are thus not required to be paid even if they are performing qualifying activities as an "employee" under the six-point WHD test. There is also a special exemption for Congressional interns from the FLSA definition of "employee" included in the Congressional Accountability Act of 1995. In spite of the legal distinction between non-profit and for-profit firms, interns at non-profit and governmental organizations are just as likely to find internships where they simply perform administrative or other work that replaces full-time workers. Therefore, we call for non-profit and government organizations to be subject to the same regulatory regime as for-profit firms.

Another critical consequence of ambiguous internship law is that the majority of student workers go unprotected against workplace harassment and discrimination. The central statue that grants employees workplace protection against discrimination and harassment is Title VII of the Civil Rights Act of 1964. Although the legal definition of who is an "employee" protected by Title VII is not specifically outlined in the original legislation, federal courts have consistently found that the question of whether an individual is compensated for his or her work by an employer is the first test for determining employee status. Accordingly, unpaid interns, or even interns paid by an entity other than an employer, do not receive workplace discrimination protection.

This is particularly important given the vulnerable position most student workers are in during internships; they are generally on the lowest rung of a workplace hierarchy and working not for the compensation (if any) but rather for the educational experience and recommendations from supervisors and employers for future opportunities.

The leading precedent for this ruling comes from the case of *O'Connor v. Davis*.[1] Bridget O'Connor was required to complete an internship for her college degree and chose to work at a local psychiatric center. There, O'Connor was subject to repeated sexual harassment by one of her supervisors, Dr. James Davis (for a summary, see Ortner 1997/1998). The district court summarily dismissed O'Connor's complaint because the plaintiff, as an unpaid intern, did not receive compensation from the center, and thus did not qualify as an employee protected under Title VII. The decision was upheld by the U.S. Court of Appeals.[2] Later cases, even as recently as 2008, have upheld the principle that unpaid interns are not employees and thus not eligible for workplace protections under Title VII and other important statutes, such as the age and disability discrimination acts (Bowman and Lipp 2000; LaRocca 2006; Ortner 1997/1998; *The Washington Post* 2008). Previous court decisions have also found that internship sponsors—such as placement agencies or universities—are unlikely to be found liable for harassment that the student experiences during their work.[3]

Problems with current employment law

The current system of regulations for internships and the ambiguity it creates ultimately place both students and full-time workers at a considerable disadvantage. Specifically, the status quo generates three particularly unfair labor market outcomes:

1. The prevalence of unpaid internships. Given the ambiguity of the Labor Department's guidance regarding whether or not interns are eligible for wage protection under the FLSA, as well as a lack of enforcement (which may be due to the complexity of current regulations), many employers do not pay their interns, even if their internship would not legally qualify for an exemption under the six-point test. For example, in reviewing a guidebook of the "top" internships for college students, we found many for-profit businesses that offered unpaid internships with no explicit academic or training component (see, for example, Wise 2009).

In turn, the prevalence of unpaid internships means the choice to take an internship is not only contingent on a student's qualifications, but also his or her economic means, thus institutionalizing socioeconomic disparities beyond college. An unpaid summer internship entails three months of forgone wages and frequently travel, housing, and other

living expenses—often too great a price for students of modest means. Low-income students are either denied the opportunity to participate in these valuable experiences, or must take on significant debt in order to receive the same advantages as their higher income peers. Given the critical importance of internships in securing employment after graduation (particularly in fields that require a high degree of training), low-income students find themselves at a particular disadvantage.

2. The replacement of regular workers with interns. In the absence of clear guidance and enforcement, employers are able to replace regular workers (often, but certainly not exclusively low-wage and entry-level workers) with unpaid college interns and recent graduates. This disadvantages both the workers who are crowded out of employment, as well as college students and recent graduates who are forced into unpaid work that may also be mismatched for their skills. The increasingly competitive labor market for college graduates, combined with the effects of the recession, has intensified the trend of replacing full-time workers with unpaid interns (see Chura 2009; Eaton 2010). Replacement of full-time workers with unpaid interns has also likely been fueled by the rising cost of providing health care and other employee benefits.

Yet given that they often do not have any other recourse but to take these unpaid positions, students still compete in droves for the opportunity to work for free. In some cases, students even *pay* for the right to pursue unpaid internships. (*The Wall Street Journal* 2009).

3. A lack of legal protections for young, vulnerable workers. As previously described, current court rulings grant workplace protections only to employees who are paid by their employer. This leaves unpaid interns—particularly vulnerable young adults—in a legal void without recourse should they experience harassment or other actions that would be otherwise illegal if they were paid employees.

Other issues

The murky legal status of interns leaves open other questions of employer responsibilities, such as workers compensation, unemployment insurance, and Employee Retirement Income Security Act regulation of workplace benefits. However, rather than specifying circumstances where each of these benefits apply, the Department of Labor (DOL) should simplify the process of determining whether or not an intern is covered by the FLSA, and thus eligible for coverage under these various programs.

Proposed reforms

The current six-point test used by the WHD is flawed, as this paper and others have highlighted (see, for example, Gregory 1998 and Yamada 2002). We propose applying a new, straightforward, quantitative test to two of the most ambiguous but most important elements of the guidelines: points two (is the experience primarily for the benefit of the intern?) and four (does the employer directly benefit from the training or internship?).

This new test would compare the *per-hour cost to the employer of an intern* (through supervision and training) relative to the *per-hour benefit to the employer of an intern* (through an intern's production). If the cost exceeds the benefit, than the student would qualify as an intern and FLSA wage protections would not apply. If the benefit exceeds the cost, then the student is simply replacing work that the employer would have already paid a regular worker to perform, and the student should be compensated as an "employee" under the FLSA. In this test, we use employer cost as a proxy for the benefit to an intern of an internship, and while we acknowledge that this is an indirect metric, we feel that the benefit derived by an intern would be too difficult to measure.

EXAMPLES OF HOW THE NEW TEST WOULD WORK

Example 1: A publisher accepts an unpaid intern to help read manuscripts and make a first cut for potential publication. Training consists of four hours of explanation of the type of book desired, what kinds of notes to take while reading, and how to file a form with key information. The rest of the intern's time is spent reading and doing the associated work.

To perform the test, the employer would first calculate the cost of the training, both in hours lost for the interns and for the trainer. Suppose the total per hour cost of not having either the intern or the trainer work is about $100 per hour. The total cost of training would be $400. Next, the employer would calculate the benefit of having an unpaid intern. If the work performed by the intern would ordinarily be done by a worker earning $20 in wages and other benefits, and the intern works 40 hours per week for 10 weeks, the total benefit to the employer is $8,000. Since the benefit to the employer ($8,000) exceeds the cost ($400), the intern would qualify as an employee and would have to be compensated.

Example 2: A fashion designer accepts an unpaid intern to help with clothing production. Because of the intern's lack of experience, a regular worker must spend half of his time observing the intern's work. If the regular worker's normal compensation is $25 an hour and he normally works 40 hours per week, then the total cost to the employer of having the intern is $3,500. If the intern works 40 hours a week for seven weeks, and the wage of a comparable worker is $10 an hour, then the benefit to the employer is $2,800. In this case, the cost ($3,500) exceeds the benefit ($2,800) so the intern does not legally have to be compensated, assuming that the other four tests were also met.

An exception to this test could be established if an educational institution formally endorses an internship program with an employer. This would permit schools to maintain co-op and practicum arrangements where a school explicitly makes a match with an employer and provides academic credit or other recognition of students' work. In order to qualify for the exemption, a school must show that it is actively monitoring the employer's internship program to maintain certain previously determined standards for education and training. This exemption is consistent with prior WHD rulings, which have found that even in instances where the six-point test would indicate employee status for an intern, if the program is "simply an extension of students' academic programs,"[4] then the student is likely an intern rather than a regular employee.

Updating the current six-point test with the new metric would likely benefit employers by reducing uncertainty surrounding the legal status of their interns. It will make it easier for employers to understand their obligations, as well as for the DOL to enforce these regulations. Furthermore, it may also improve the internship experience for many student workers. In response to the new regulatory regime, employers may decide to improve the training components of their internship programs so that their firm qualifies for an exemption from FLSA.

This proposed change to the treatment of interns under the FLSA could, in theory, be adopted by the WHD as guidelines for their guidance and enforcement. However, the most effective way to end the ambiguity of the present system is for Congress to amend the FLSA to include explicit rules for student workers. Such a change is not unprecedented, as Congress has repeatedly amended the FLSA over the years to update employment law to a changing labor market.

Together with the new system of internship regulations, the WHD and the Department of Labor should more aggressively monitor and enforce labor standards among internship programs. However, this brief acknowledges that the widespread nature of internships makes centralized monitoring by the federal government difficult, especially given limited resources. Therefore, the government should work closely with universities and educational institutions to raise awareness of rights of student workers, collaborating closely with career and internship offices present on individual campuses. The WHD should require employers who host interns to place a poster of student worker rights along with the other required worker protection information in company public spaces, and should also require employers to inform students of their rights to compensation and protection before the students begin their internship. Finally, the Bureau of Labor Statistics and Census Bureau should include questions on their employment surveys to classify interns and their demographic and socioeconomic characteristics. This will allow researchers to begin to rigorously study the distribution of interns and internships and their effects on student education and employment.

While expanding the share of paid internships through greater enforcement would increase the number of students covered by workplace discrimination and harassment statutes, unpaid internships would likely still continue to be offered. Therefore, Congress ought to concurrently amend Title VII of the Civil Rights Act and other relevant legislation (such as the Americans with Disability Act, the Equal Pay Act, and the Age Discrimination Act) to include all student workers.

The participation of universities and employers in informing students of their rights is essential, as all parties involved have an incentive to continue with the status quo. Employers are likely reluctant to pay interns if their competitors do not also follow suit. Moreover, universities with more affluent student bodies may be content with the present system, as it confers their students with an advantage in applying to competitive internships and allows the school to highlight their internship placement record as a selling point to prospective students. Students who can currently afford to undertake unpaid internships, for their part, have a similar incentive to preserve the current system where they are able to use their economic standing as leverage to obtain internship placement.

Although the proposed reforms would certainly shift many unpaid internships to paid positions, unpaid internships could still present a significant barrier for qualified low-income students to secure quality employment after graduation. Therefore, the solution to the socioeconomic barrier that internships present should be addressed through another policy lever. For example, elsewhere we describe a "Federal Intern Study" system that would provide modest subsidies to low-income students to pursue internships at non-profits or government agencies, given that unpaid positions are most prevalent in these industries (Edwards and Hertel-Fernandez, forthcoming). Payments could easily be administered through the existing federal work-study infrastructure present at over 3,000 college campuses. These subsidies could help address the problem of access to valuable public-sector and public-service internships and in so doing, promote public service. Finally, the Federal Intern Study system could also be used to raise awareness of interns' rights and methods of reporting workplace violations to the Department of Labor.

SUMMARY OF PROPOSED REFORMS

For the Department of Labor:

- Adopt a new regulatory test for determining whether or not interns must be compensated by examining the per-hour cost and per-hour benefit to an employer of having an intern. If the per-hour benefit to the employer exceeds the cost, then the intern is an FLSA-covered employee and must be compensated accordingly. Exemptions would be granted for internships that failed this test but are of an explicitly educational nature and involve close coordination between the employer and an institution of higher education.
- Apply the new regulatory test to both non-profit and for-profit firms.
- Engage in more aggressive enforcement of the FLSA about internships.
- Engage in a public awareness campaign on the rights of student workers, working closely with employer with interns and college campuses (particularly career service offices).
- Include questions regarding internships on the Current Population Survey and other demographic and economic surveys administered by the federal government.

For Congress:

- Pass legislation that extends coverage of relevant workplace discrimination and harassment legislation (such as the Equal Pay Act, Civil Rights Act, Age Discrimination Act, and the Americans with Disability Act) to interns by changing the definition of an "employee" to include interns who perform work for an employer.
- Pass legislation that creates a system of financial supports for low-income students who pursue public service internships in government agencies or non-profit organizations.

Conclusion

Internships have become a vital component of the labor market for post-secondary school students. Yet the laws governing the rights of student interns have not kept pace with the rise in the prevalence and importance of the internship. The federal government thus has an essential role to ensure that everyone who engages in substantive work is compensated accordingly, that employers do not have an incentive to replace regular workers with unpaid college students or unpaid interns, and that all workers, student or not, have access to equal protection from harassment and discrimination. The reforms outlined in this proposal would take important steps to reach these goals.

Endnotes

1. See the original complaint and related records here: http://openjurist.org/126/f3d/112/oconnor-v-davis.
2. *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997).
3. See for example *Evans v. The Washington Center for Internships and Academic Seminars*, et al., Civil Action No. 2008-0875, Doc. 32, DC District Court.
4. See Wage and Hour Division Letter FLSA2004-5NA: http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.pdf

Reference

Bowman, Cynthia Grant, and MaryBeth Lipp. 2000. Legal limbo of the student intern: the responsibility of colleges and universities to protect student interns against sexual harassment. *Harvard Women's Law Journal*, 23 (95).

Chura, Hillary. 2009. Hiring is rising in one area: Low-paid interns. *The New York Times.* November 27.

Eaton, Kristi. 2010. The rise of the unpaid internship. *Campus Progress*, January 19.

Edwards, Kathryn Anne, and Alexander Hertel-Fernandez. Forthcoming. "Paving the Way through Paid Internships: A Proposal to Expand Educational and Economic Opportunities for Low-Income College Students." Washington, D.C.: Demos and The Economic Policy Institute.

Gardner, Philip D., Georgia T. Chao, and Jessica Hurst. 2008. "Ready for Prime Time? How Internships and Co-ops Affect Decisions on Full-time Job Offers." MonsterTrak.com.

Gregory, David L. 1998. The problematic employment dynamics of student internships. *Notre Dame Journal of Ethics and Public Policy*, Vol. 12, pp. 227-64.

Hanneman, Larry, and Phil Gardner. 2009. "Under the Economic Turmoil a Skills Gap Simmers." East Lansing, Mich.: Michigan State University.

LaRocca, James J. 2006. Lowery v. Klemm: A failed attempt at providing unpaid interns and volunteers with adequate employment protections. *Public Interest Law Journal*, Vol. 16, pp. 131-44.

NACE. 2008. "Experiential Education Survey." Bethlehem, Penn.: National Association of Colleges and Employers.

Ortner, Craig J. 1997/1998. "Adapting Title VII to modern employment realities: The case for the unpaid intern." *Fordham Law Review*, Vol. 66, pp. 2613-48.

The Wall Street Journal. 2009. Do you want an internship? It'll cost you. *The Wall Street Journal*, January 28.

The Washington Post. 2008. Unpaid and unprotected. *The Washington Post*, December 29.

WHD. 2004. "Wage and Hour Division FLSA2004-5NA: RE: FLSA Status of Student Interns." Washington, D.C.: Department of Labor.

Wise, Carolyn C. 2009. "The Vault Guide to Top Internships." New York, N.Y.: Vault.com.

Yamada, David C. 2002. The employment law rights of student interns. *Connecticut Law Review*, Vol. 3, pp. 215-59.