

DESIGNING LAW SCHOOL EXTERNSHIPS THAT COMPLY WITH THE FLSA

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Recent debates over the best way to educate lawyers have led to an increasing focus on providing “experiential” education in law schools – and with it, a noted growth in law school externship programs. Externships provide a valuable way of giving law students real-life legal practice experience by allowing them to earn academic credit for training in a variety of actual legal settings, from prosecutors’ offices to corporate counsel departments. Because current ABA Standards for the Accreditation of Law Schools do not permit students to be paid for activities for which they earn academic credit, law school externships are unpaid, raising questions under the Fair Labor Standards Act (FLSA), which bars covered employers from offering unpaid positions unless those positions qualify for one of the specific exceptions recognized by the Department of Labor. This Article demonstrates that the interests of the law schools and the Department of Labor are aligned in this area, both seeking to ensure that unpaid externships genuinely provide meaningful education and training for the law student externs who participate. The Article derives a set of “best practices” for designing FLSA-compliant law school externship programs, highlights some pitfalls that may arise, and suggests specific steps to be taken both by law school externship program directors and host organizations who may participate in legal externship programs.

INTRODUCTION

Externship programs have become increasingly popular in law schools across the United States. Such programs put law students in field placements from public defenders’ offices, to public interest groups, to private law firms, in order to provide them with experiential training in the real world as part of the law school’s educational program.¹ A classroom or tutorial component is also included, and the placement is monitored by the law school to ensure that the extern is being trained and getting appropriate assignments. Importantly,

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¹ In particular, this Article considers law school externships that meet the following criteria: (1) the students are not paid; (2) the students earn academic credit; and (3) the externship takes place at a work site not operated by the law school itself.

these are not term-time jobs for law students.² Student externs earn academic credit toward their law degree, but are not paid; indeed, students cannot be paid under current American Bar Association (ABA) standards governing legal education.³ Legal externships are more akin to the type of field training that has typically been provided in other professional fields, such as medicine, for many years.

As the range of law school externship opportunities has expanded – and student demand has arisen for experiences in a wide range of legal settings, including not only public agencies and non-profit groups, but also private companies and firms – schools are increasingly struggling with the issue of whether the Fair Labor Standards Act (the Act or the FLSA) applies to unpaid externships.⁴ The FLSA is a broad national statute that protects workers by requiring that covered employers pay at least minimum wage and observe other requirements, such as overtime rules, with respect to its employees.⁵ A covered entity that fails to properly treat its employees may be subject to private lawsuits, including both individual actions and specially authorized class actions,⁶ as well as to enforcement actions brought by the Department of Labor to enforce the FLSA.⁷

Given the increasing interest in the role of externships in legal education, there is a pressing need to understand and address the legal status of law school externships under the FLSA. While compliance with the FLSA is the direct responsibility of the host organizations, law schools are also concerned to design their externship programs to be proper, appropriate and respectful of legal requirements. This Article analyzes the statute, case law, and administrative statements by

² Note that paid internships and/or paid law clerk positions accepted by law students do not implicate the same concerns addressed in this Article. Such employment should be permissible as long as the employer pays the law student at least minimum wage and complies with other FLSA and legal requirements applicable to employees.

³ AMERICAN BAR ASSOCIATION, REVISED STANDARDS FOR APPROVAL OF LAW SCHOOLS (Aug. 2014) [hereinafter ABA Standards], Interpretation 305-2 (“A law school may not grant credit to a student for participation in a field placement program for which the student receives compensation.”). While the ABA recently considered whether the standards should be amended to allow law students to earn academic credit for paid field placements, in August of 2014, the ABA House of Delegates decided to remand the issue for further consideration, without changing the existing approach. *See* American Bar Association, “Revised Standards and Rules Concurred in by ABA House of Delegates,” available at: http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/2014_hod_standards_concurrence_announcement.authcheckdam.pdf (last visited August 31, 2014).

⁴ Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.*

⁵ FLSA, 29 U.S.C. § 206(b) (minimum wage); § 207(a) (overtime).

⁶ FLSA, 29 U.S.C. § 216(b) (authorizing collective actions to be brought by an aggrieved employee on behalf of himself and other employees who are “similarly situated”).

⁷ FLSA, 29 U.S.C. § 216(c) (authorizing civil enforcement actions by the Secretary of Labor).

the Department of Labor in this area, in order to assess the proper design of an FLSA-compliant legal externship program. The question this Article considers, in particular, is whether a law student externing for academic credit (but without pay) at a company, firm, or organization as part of a formal law school externship program will be treated as an “employee” of that entity for FLSA purposes. If an extern is an “employee,” as the Labor Department defines that term, a host organization that accepts unpaid law student externs may be placing itself at risk of legal exposure.

This Article concludes that law school externship programs – including those that place student externs in the for-profit sector – can pass muster under the FLSA, even if externs are not paid, if the programs are carefully designed and properly administered to meet the requirements of a *bona fide* training program. The requirements for such programs are outlined in a six-part test, grounded in a 1947 Supreme Court decision,⁸ which has long been followed by the Department of Labor in administrative interpretations under the FLSA. While more specific details are discussed below, the fundamental touchstone of a permissible externship program is an educational experience in the workplace that is designed and supervised so that externs will “receive training for their own educational benefit.”⁹ By contrast, a work program that simply uses unpaid externs to substitute for regular employees will not be excluded from FLSA requirements. The law student externs must be “trainees,” not ordinary workers.

The goals of law schools and the Department of Labor are in sync. Law schools are concerned to ensure that externships be genuine learning opportunities for our students. Law schools also care about ensuring that the high quality standards enforced within the law school extend to all of the school’s educational programs, including those that take place off-site with the law school’s host organizations. A meaningful externship experience is also expressly required in order for a law school to comply with ABA standards for law schools.¹⁰

The Department of Labor’s goals with respect to the training program exclusion are similar. In defining the parameters of legitimate on-the-job training programs for which workers need not be paid, the Department of Labor is seeking to ensure that the training that takes place on employer premises is a genuine educational experience, and

⁸ See generally *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947); U.S. DEPARTMENT 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.pdf> [hereinafter Fact Sheet #71].

⁹ *Id.* at 1 (laying out six-part test for “trainee” exception to FLSA).

¹⁰ See ABA Standards, *supra* note 3, Standard 303(a)(3) (Curriculum) and Standard 305 (Field Placements and Other Study Outside the Classroom).

not a veiled attempt to exploit free student labor. Because the primary purpose of the FLSA is to make sure that workers are not exploited, either by underpaying or overworking them, the Department views the exclusion for training programs as a narrow exception to the general rule that workers should be paid for their efforts.

Not surprisingly, therefore, many of the requirements that the ABA imposes on law student externships – such as close supervision and opportunities for reflection – are echoed in the Department of Labor factors used to determine whether an educational externship will qualify for FLSA exclusion. This means, in the law school context, an externship program that is carefully designed to meet ABA standards is likely to satisfy many of the Labor Department concerns as well. Where additional program factors may be advisable to comply with the FLSA, the Article notes that below.

Concerns about potential FLSA issues are most often raised in connection with law student externs who provide their services at for-profit sites, such as in-house corporate offices or private law firms. But because the FLSA expressly applies to government offices,¹¹ and because the minimum wage and overtime requirements of the law may potentially apply to both private and non-profit firms and companies,¹² this Article suggests that the best practice is to ensure that all law school externships meet the conditions of a valid training program, whatever the setting. At the same time, the FLSA analysis is somewhat different with respect to externing at for-profit entities than at non-profit organizations or government agencies.

This Article is divided into five parts. Part I notes the general types of legal externship programs being offered and puts such externship offerings in the context of current discussions in the ABA about experiential courses in legal education more generally. Part II lays out the basic FLSA framework applicable to employment relationships, and considers the relevant exclusions under which unpaid externships may be a permissible exception to the Act's wage and hours requirements. Part III addresses the FLSA as applied in the context of law school externs placed in for-profit placements, including companies and law firms. Part IV addresses the FLSA as applied in the context of law school externs in the non-profit sector, including charitable organizations and government agencies. Finally, Part V provides some "best practices" in designing FLSA-compliant law school externship

¹¹ FLSA, 29 U.S.C. § 29(d) and (e) (FLSA applies to "public agencies" including federal, state and local governmental bodies).

¹² See *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296-97 (1985) (noting that the statute "contains no express or implied exception for commercial activities conducted by religious or other nonprofit organizations").

programs.

I. LAW SCHOOL EXTERNSHIPS AND NATIONAL DEBATES ABOUT EXPERIENTIAL EDUCATION

Consistent with national trends toward increasing “experiential” offerings in legal education, in recent years, law schools have been strengthening and expanding their externship program offerings. A number of law schools have extensive and growing externship programs, as has been well documented by other authors.¹³ Significantly, the ABA just amended the ABA Standards for Law Schools to require each student at every ABA-accredited law school to take six credits of “experiential courses” as part of the J.D. degree program.¹⁴ Because this experiential educational requirement can be satisfied by student participation in externships, as well as in clinics and simulation courses, the change is likely to further fuel the growth in law school externship programs.¹⁵

In a well-designed externship program, the law school carefully selects the organizations to which it is willing to send student externs. During each externship, law schools work to ensure that the extern’s work is meaningful legal work of a type that will broaden the student’s skill set; that the extern is guided and supervised by experienced lawyers on-site; that the host organization shares the law school’s goal to make the externship a valuable learning experience for the extern; that the students are provided with a law school supervisor; and that there is an accompanying academic component to encourage the student externs to recognize and internalize the lessons they are learning through the real-life legal experience.

Law schools offer a variety of externship opportunities, which can be grouped into several basic categories:

- 1) *Judicial externships*, which place students in externship positions in federal, state, or other specialized judges’ chambers.
- 2) *Governmental externships*, which place students in externship positions in government offices, such as prosecutors or public

¹³ See, e.g., Sudeb Basu & J.P. Ogilvy, *Externship Demographics Across Two Decades With Lessons for Future Surveys*, 19 CLIN. L. REV. 1, 5 (2012) (reporting on two decades of data concerning law school externship programs and finding that as of 2012, “[a]ll 190 schools surveyed now offer externships with academic credit that a student can earn toward the J.D. degree” and that the variety of externship courses offered at law schools has also progressed). See also James H. Backman & Cory S. Clements, *Significant but Unheralded Growth of Large Externship Programs*, 28 BYU J. PUB. L. 145, 186 (2013) (noting the “steep increases in both in-house clinic students and externship students over the past eight years”).

¹⁴ See ABA Standards, *supra* note 3, Standard 303(a)(3).

¹⁵ *Id.* (“An experiential course must be a simulation course, a law clinic, or a field placement.”).

- defender offices and government agencies;
- 3) *Public interest externships*, which place students in externships in non-profit organizations, such as legal aid offices and special issue non-profit groups.
 - 4) *Corporate counsel externships*, which place students in externships in the office of the general counsel to a corporation;
 - 5) *Law firm externships*, which place students in externships in private for-profit law firms, whether to work on many types of cases, on *pro bono* matters only, or on a specific type of legal work.

In addition to the externship programs above, many law schools are now offering Semester in Practice programs, which allow qualifying students to be placed full-time in externship placements for an entire law school semester, earning credit toward their J.D. degree.

Another related, but distinct, type of placement offered by law schools is designed to require or allow students to engage in *pro bono* service in collaboration with lawyers in the field.¹⁶ Students do not receive academic credit or pay for such projects, but for schools that have a *pro bono* graduation requirement, students are allowed to count the time spent toward satisfaction of that requirement. Externship and *pro bono* programs are generally well-subscribed and can be important to the law school's mission to provide a complete and effective education for its students.

The growing student interest in externships reflects a similar national trend toward experiential education at law schools more broadly. In recent years, the American Bar Association has been looking closely at improvements that may be needed in the American system of legal education. Most recently, in 2012, the ABA formed a Task Force on the Future of Legal Education. One of the Task Force's express conclusions was that there is a pressing need in legal education for "more attention to skills training, experiential learning, and the development of practice-related competencies."¹⁷

The ABA has responded to this call by substantially strengthening its professional skills requirement. Prior to August of 2014, the ABA Standard in place simply provided that law schools must "require that each student receive substantial instruction in" a variety of areas, including substantive law, legal analysis, research and problem-solving, legal writing, and "other professional skills generally regarded as necessary for the effective and responsible participation in the legal

¹⁶ This was the focus of a recent ABA inquiry to the Labor Department, discussed *infra* at Part III.A.1.

¹⁷ AMERICAN BAR ASSOCIATION, TASK FORCE ON THE FUTURE OF LEGAL EDUCATION 3 (2014).

profession.”¹⁸ As a result of recent changes, law schools will need to require each student to complete “one or more experiential course(s) totaling at least six credit hours.” The experiential courses can include simulation courses, clinical courses, or field placements that are “primarily experiential in nature” and satisfy certain other requirements.¹⁹

The drive to give law students more hands-on experience, prior to graduation, in a variety of legal settings is likely to continue and grow. One key part of this movement is the use of field placements – that is, law student externships taken for credit – in settings in which students are likely to practice law. Because most graduating law students end up practicing in the for-profit sector, rather than in government agencies or non-profit organizations, there is and will continue to be a demand for hands-on experience during law school in such settings. The potential FLSA issues raised by this trend are addressed further below.

II. THE FLSA, EMPLOYMENT RELATIONSHIPS AND LAW SCHOOL EXTERNSHIP PROGRAMS

The Fair Labor Standards Act is the primary federal law that governs the relationship between employers and employees. Among other things, the Act requires that employers pay covered employees a legally prescribed minimum hourly wage,²⁰ and that employers provide overtime pay for hours worked over a specified threshold each week.²¹ The Act is a statute of broad coverage enacted to prevent the exploitation of workers by employers. The Act’s requirement that employers pay their workers a minimum hourly wage is justified on a number of rationales: to protect the worker on site from being exploited by an employer; to prevent the prevailing wage for other workers from falling to substandard levels; and to prevent employers from getting an unfair advantage over their competitors. Given the statute’s remedial nature, the courts have emphasized that the FLSA is to be given “an expansive interpretation” so that its provisions have the “widest possible impact in the national economy.”²² It is likely that all or virtually all of the positions in which law student externs are

¹⁸ See ABA Standards, *supra* note 3, Standard 302(a)(4).

¹⁹ See ABA Standards, *supra* note 3, Standard 303(a)(3).

²⁰ FLSA, 29 U.S.C. § 206 (Minimum Wage). Minimum wage is currently set, at the federal level, at \$7.25 an hour. FLSA, § 206(a)(1). However, because state employment laws may supplement federal laws, if state law provides for a higher minimum wage, this will apply in lieu of the federal minimum wage to employers subject to that state’s laws. In Rhode Island, for example, the minimum wage is set at \$8.00, which is above the federal threshold.

²¹ FLSA, 29 U.S.C. § 207 (Maximum Hours).

²² *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999).

likely to serve are subject to the coverage of the FLSA. While this is a federal statute enacted under the Commerce Clause, and thus is theoretically not applicable to purely local employers, in fact, the Act applies quite broadly.

A. The Broad Reach Of The Fair Labor Standards Act

The FLSA applies to all employees of covered “enterprises.”²³ The principal statutory definition of a covered “enterprise” is an entity that engages in interstate commerce, is organized for a “common business purpose,” and takes in at least \$500,000 in gross income each year. Most of the companies participating in law school corporate counsel programs would fall in this category as would many law firms. But the FLSA also goes beyond this. The FLSA also expressly applies, under entity coverage, to employees of “public agencies,” a provision that includes most employees at federal, state and local government agencies.²⁴ Thus, externship work sites such as prosecutors or defenders offices, offices of the Attorney General, and other governmental agencies would also be subject to the FLSA.

The Supreme Court has held, as well, that there is no statutory exclusion from enterprise coverage for non-profit organizations, despite the Act’s reference to a “common business purpose.” Non-profit organizations are subject to the FLSA as covered “enterprises” when they engage in activities that are commonly undertaken by for-profit entities. It is possible that non-profit organizations participating in law school externship programs may at times be subject to FLSA coverage on this ground. For example, a non-profit legal defense group that engages in litigation activities of the type also performed by for-profit law firms may potentially be viewed as competing against such private firms in the marketplace for clients, particularly where the cases they take are eligible for fee-shifting.

In any case, quite aside from “enterprise” coverage, the FLSA also covers workers on an alternative basis: so-called “individual” coverage. Even if an entity is not covered, an individual at a work site who uses means of interstate commerce in her position – for example, to send mail or e-mail, converse by phone, and so on – will be subject to the FLSA on an individual basis.²⁵ Under these precedents, even if enterprise coverage is not applicable, given that law students will pre-

²³ FLSA, 29 U.S.C. § 203(r)(1).

²⁴ FLSA, 29 U.S.C. § 203(e)(2).

²⁵ See, e.g., *Archie v. Grand Central Partnership, Inc.*, 997 F. Supp. 504 (S.D.N.Y. 1998) (finding that “local business activities fall within the reach of the FLSA” when workers handle goods or materials that have moved in interstate commerce, such as where sanitation workers use “bags, brooms, shovel, pails, scrapers” and similar supplies).

sumably be using the internet, researching online, making phone calls, sending e-mails, and otherwise using instrumentalities of commerce, it is virtually certain that their externships would qualify them on an “individual” basis for FLSA coverage, regardless of the type of organization where they have been placed.²⁶

Given the broad reach of the FLSA, it should be assumed that all or most of the externship placements at a law school will be subject to the FLSA on one ground or another. The key issue, therefore, is not whether the FLSA applies, but how the Department of Labor would likely view a particular extern’s status under that law. The question here is two-fold: Given the nature of the extern’s responsibilities and the employer’s role, does the law student extern fall within the broad definition of an “employee” who is entitled to minimum wage and hours protections under the FLSA? Or will the law student extern qualify for one of the narrow exclusions or exemptions from FLSA coverage under which a person may provide services to a covered employer without being deemed an “employee” covered by the law?

B. Employees, Exclusions, and Exemptions Under The FLSA

The Fair Labor Standards Act defines “employ” as “to suffer or permit to work.”²⁷ An “employee” is defined as “any individual employed by an employer.”²⁸ An “employer” is defined as “any person acting directly or indirectly in the interest of an employer in relation to an employee.”²⁹ Courts have noted both the “striking breadth” and the circularity of this definition.³⁰ Again, the coverage of the Act is broadly construed.³¹ The Act was consciously drafted to be ambiguous so that the courts would not be confined to pre-existing law defining employment relationships.³²

²⁶ See generally U.S. DEPARTMENT OF LABOR, FACT SHEET #3: PROFESSIONAL OFFICES UNDER THE FAIR LABOR STANDARDS ACT (July 2008) (noting that individual employees are engaged in interstate commerce when they perform actions such as “transacting business via interstate telephone calls or the U.S. Mail” or undertaking a variety of other actions with an interstate component).

²⁷ FLSA, 29 U.S.C. § 203(g).

²⁸ FLSA, 29 U.S.C. § 203(e)(1).

²⁹ FLSA, 29 U.S.C. § 203(d).

³⁰ See, e.g., *Solis v. Laurelbrook Sanitarium and School*, 642 F.2d 518, 522 (6th Cir. 2011) (noting that the FLSA’s definitions in this area are “exceedingly broad and generally unhelpful”); *Glatt v. Fox Searchlight Pictures, Inc.*, 2013 WL 2495140 (S.D.N.Y. June 11, 2013) (noting the “striking breadth” of the FLSA’s definition of “employ”); *O’Neill v. East Florida Eye Institute*, 2012 WL 8969062 (S.D. Fla. Apr. 17, 2012) (noting that the FLSA definition of “employee” is “somewhat circular”).

³¹ See, e.g., *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 271 (5th Cir. 1982) (noting that the term “employee” in the FLSA is used in the broadest sense ever included in one act).

³² See, e.g., *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947) (noting that

In determining the employment relationship under the FLSA, the courts will consider the “totality of the circumstances.” Courts are not bound by the particular labels a party may attach to its relationship with a worker.³³ They will look instead to the “economic reality” of the relationship.³⁴ The economic reality may at times indicate, for example, that someone who has been described as an “intern” or a “trainee” is in fact an employee, given the facts of the work circumstances.³⁵

While the coverage of the Act is intentionally broad, it does not cover all relationships between an employer and a person who provides services to that employer. There are some exceptions and exclusions under which a person will not be deemed an “employee,” even if he or she does the type of work that could create an employment relationship in other circumstances.

Some of the situations in which a person is not deemed an “employee” are described in the statute itself and are known as exemptions. Others have been created by judicial or administration interpretation, and these are known as exceptions. There are three such doctrines that are worth noting here: (1) the statutory exemption for professional employees, under which lawyers are exempted from the FLSA; (2) the statutory exemption for volunteers at public agencies (which the Department has extended by interpretation to cover volunteers at non-profit groups); and (3) the judicially-created exception from coverage under FLSA for “trainees”. Each is addressed in turn below.³⁶

the FLSA’s definitions of “employ” and “employee” are “comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category”).

³³ See, e.g., *Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979). In that case, the court went through a list of prior decisions that rejected the parties’ own label as to the nature of their relationship, and instead considered the facts “in specific detail” to decide whether the FLSA applied. *Id.* at 468.

³⁴ See, e.g., *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 301 (1985).

³⁵ See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 2013 WL 2495140 (S.D.N.Y. June 11, 2013) (finding interns at film production studios to be employees where the routine work they did allowed the employer to reduce its payroll costs); *Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979) (finding that radiology trainees to be employees where the hospital failed to observe the requirements of the training program).

³⁶ There is also a distinction, under the Department of Labor’s interpretations, between employees and independent contractors. An independent contractor is, in essence, a person who is “engaged in a business or his or her own” and who sells services to another as part of that business. See generally U.S. DEPARTMENT OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (May 2014). This exception is not addressed further in this memo, given that law students are clearly not independent business-owners who are providing services to host organizations.

1. *The Exemption For “Professionals”*

There is a statutory exemption from FLSA coverage for employees in a professional capacity.³⁷ The Labor Department has issued regulations to further define those professional employees that are exempt from the wage and overtime requirements of the law. To qualify as a “professional” employee, a person must, among other things, “perform work requiring advanced knowledge,” defined to mean work which is “predominantly intellectual in character” and which requires the “consistent exercise of judgment and discretion.”³⁸

By virtue of this exemption, practicing lawyers are excluded from FLSA coverage as “learned professionals,” as a matter of Department of Labor interpretation.³⁹ On the other hand, the Department has explained that this exemption does not extend to paralegals or legal assistants, who are not required to have the advanced training needed to practice law, and are usually considered to be covered employees.⁴⁰ A law student, unlike a paralegal, intends to become a lawyer and is in the process of pursuing advanced academic studies to that end. At the same time, he or she has neither completed a program of law studies nor obtained a law license, and is not actually practicing law.

It is instructive, in this regard, to look at the Department’s approach to interns in the medical school context. The Department has explained that physicians are “professionals” who are exempt from the FLSA wage and overtime requirements. Medical interns, similarly, will not be found subject to salary requirements during their internship or resident program “where such a training program is entered upon after the earning of the appropriate degree required for the general practice of their profession.”⁴¹ The Department’s emphasis on the employee’s actual possession of an advanced degree suggests that law students (or medical students) would not receive similar

³⁷ See FLSA, 29 U.S.C. § 213(a)(1) (exempting from FLSA coverage those employees who are “employed in a bona fide executive, administrative or professional capacity”). See generally U.S. DEPARTMENT OF LABOR, FACT SHEET #17A: EXEMPTION FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER & OUTSIDE SALES EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (July 2008) (explaining the statutory exemption for administrative, professional, executive, computer, and outside sales representatives); 29 C.F.R. Part 541 (same).

³⁸ 29 C.F.R. § 541.301(a).

³⁹ See 29 C.F.R. § 541.304(a)(1) (applying professional exemption to “any employee who is the holder of a valid license or certificate permitting the practice of law . . . and is actually engaged in the practice thereof”).

⁴⁰ U.S. DEPARTMENT OF LABOR, FIELD OPERATIONS HANDBOOK, § 221i(a) (“Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field.”).

⁴¹ U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION OPINION LETTER (July 27, 1995).

treatment.

It is true that there are some externship programs (for example, in prosecutorial offices) that may qualify for special court permission that enables law students to practice law in limited contexts (for example, before a specific court or in a specific type of case). More broadly, however, a law student is not permitted to actually practice law until graduating from law school and obtaining a law license. Given these circumstances, it is unlikely that the Department of Labor will find the learned professional exemption applicable to law student externs.⁴² At a minimum, there is no existing regulation or interpretation that would allow it to do so. Exemptions to the FLSA are narrowly construed, and the burden is on the employer to demonstrate that an exemption applies.⁴³

2. *The Exemption For Volunteers At Public And Non-Profit Agencies*

By statute, the FLSA provides that the term “employee” under the Act does not include an individual who “volunteers to perform services for a public agency” without being paid wages, as long as the individual is not performing the type of services for which the agency also pays him.⁴⁴ The Department of Labor has defined a “volunteer” for purposes of this provision as a person who provides hours of service “for civic, charitable or humanitarian reasons, without promise, expectation or receipt of compensation.”⁴⁵ For example, the FLSA would not apply to individuals who volunteer to provide personal services to the sick or elderly in hospitals or nursing homes, to help in a school library or cafeteria, or to work with retarded or handicapped children or disadvantaged youth.⁴⁶ The Department notes, as well, that assuming the legal requirements are otherwise met, there are no restrictions under FLSA on the “types of services which private individuals may volunteer to perform for public agencies.”⁴⁷

While the statute is limited by its terms to volunteers for “public agencies,” the Department of Labor has, although somewhat obliquely, extended the same exemption to volunteers for private non-profit agencies, where the individual is motivated to volunteer by the same charitable goals articulated in the statute. While this policy is

⁴² Eric M. Fink, *No Money, Mo' Problems: Why Unpaid Law Firm Externships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 443 (2013) (noting that, unlike attorneys, law students are not categorically exempt from the FLSA under the DOL's regulations”).

⁴³ See, e.g., *Havey v. Homebound Mortgage, Inc.*, 547 F.3d 158, 163 (2nd Cir. 2008).

⁴⁴ FLSA, 29 U.S.C. § 203(e)(4)(A).

⁴⁵ FLSA, 29 C.F.R. § 553.101(a).

⁴⁶ FLSA, 29 C.F.R. § 553.104(b).

⁴⁷ FLSA, 29 C.F.R. § 553.104(a).

not included in the regulations, the Department has in an opinion letters referred to applying the “volunteer” exemption to private individuals who volunteer at non-profit organizations. Importantly, however, the Department has been clear in its position that the volunteer exemption under FLSA is limited to not-for-profit groups, and that “employees may not volunteer services to private sector for-profit employers.”⁴⁸

3. *The Judicial And Administrative Exception For “Trainees”*

Despite the breadth of the statutory definition of an “employee” under the FLSA, the Department of Labor has long recognized that not everyone who provides services at a workplace can be deemed an “employee.” Significantly here, the Department does not view as an “employee” a person who is at a work site as part of a bona fide “trainee” program. The exclusion from the FLSA for “trainees” is not set out in the statute, but rather originates from a 1947 United States Supreme Court case interpreting the Act, *Walling v. Portland Terminal*.⁴⁹ That ruling has since been elaborated upon by the Department of Labor through opinion letters and interpretive rulings.

While the *Walling* case is old, the principles that it established remain vital.⁵⁰ Because the Department of Labor and the federal courts do not always agree on the proper application of the *Walling* ruling, however, it is worth laying out in some greater detail the parameters of the Supreme Court’s ruling in *Walling*, the Department’s interpretation of that ruling, and the varying federal court approaches.

(a) *The Supreme Court’s Ruling in the Walling Case*

In *Walling*, the Department sought to force the railroad to pay minimum wage to certain “trainees.” In particular, the railroad gave a “course in practical training” to prospective yard brakemen. Unless applicants completed the training and were certified as competent, they were not eligible to be hired by the railway. Applicants who were accepted for the training course, which lasted seven or eight days, were “turned over to a yard crew for instruction.” Under this supervision, the trainee would “first learn the routine activities by observation,” and was then “gradually permitted to do actual work under close scrutiny.”

⁴⁸ See <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp> (online explanation of Department of Labor position on “volunteers”).

⁴⁹ See *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). There was a companion case decided the same day against another railroad, ruling on the same basis. *Walling v. Nashville, C. & St. L. Ry.*, 330 U.S. 158 (1947).

⁵⁰ See, e.g., *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290, 299-300 (1985) (applying principles established in *Walling*).

The trainee's activities did not "displace any of the regular employees," who had to do "most of the work themselves, and must stand immediately by to supervise whatever the trainees do." The trainee's work did "not expedite the company business," but instead could and sometimes did "actually impede and retard it." The railroad did not pay the trainees, and the trainees did not expect to be paid for the training period (though trainees who were hired would receive a retroactive allowance for the days spent in training).⁵¹

Although there was "no question that these trainees do work in the kind of activities covered by the Act,"⁵² the Court declined to find that the definition of an "employee" in the Act extended to such "learners."⁵³ Under these circumstances, the Supreme Court held, the trainees were not "employees" subject to the requirements of FLSA. The famous passage from the *Walling* decision (often quoted by the Labor Department) states as follows:

The definition 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.

Otherwise, the Court went on, "all students would be employees of the school or college they attended, and as such entitled to receive minimum wages."⁵⁴

Importantly for our purposes, the Court made an express comparison to the type of training that might be provided in a school setting. "Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad," the Court emphasized, it could not reasonably be suggested that they were "employees" of the school. Nor would this change, the Court noted, if the school's graduates formed a labor pool from which the railroad could draw. The Act was not intended to penalize railroads for "providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees."⁵⁵

Thus, the Court concluded, while the terms "employ" and "employee" are broad, they "cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction."⁵⁶ Emphasizing the unchallenged findings in that case that the railroad received "no immediate

⁵¹ *Walling*, 330 U.S. at 149-150.

⁵² *Id.* at 150.

⁵³ *Id.* at 151-152.

⁵⁴ *Id.* at 152.

⁵⁵ *Id.* at 153.

⁵⁶ *Id.* at 152.

advantage from any work done by the trainees,” the Court held that the trainees were not “employees” within the Act’s meaning.⁵⁷ The *Walling* decision remains the governing precedent for assessing training and internship programs under the FLSA, and the decision is frequently cited not only in modern Supreme Court decisional law, but in many recent lower court decisions.⁵⁸

(b) *The Labor Department’s Six-Part Test under Walling*

Building on the *Walling* decision, beginning as early as 1967, the Department of Labor developed a six-part test to determine when an individual may engage in activities without pay at a covered work place without giving rise to FLSA liability.⁵⁹ The Department has consistently applied this test since that time to assess the requirements applicable under the FLSA to vocational training programs of different types.⁶⁰ The Labor Department’s six-part test, long used in Department opinion letters, has more recently been the subject of a general information statement issued by the Department, known as Fact Sheet #71, which addresses internships in particular.⁶¹

The information statement reflects the recent rise of unpaid internships at for-profit businesses, a trend further fueled by the economic recession that began around 2009.⁶² In some fairly notorious cases, unpaid interns were used at for-profit businesses, such as film studios and magazine publishers, to do menial labor and act as general “gophers.”⁶³ In 2010, the Department of Labor issued Fact Sheet #71, which is specifically designed to provide employers with “general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act for the

⁵⁷ *Id.* at 153.

⁵⁸ *See, e.g.,* Glatt v. Fox Searchlight Pictures Inc., 2013 WL 2495140 (S.D.N.Y. June 11, 2013) (applying FLSA to unpaid interns at motion distribution company); DeMayo v. Palms West Hospital, 918 F. Supp.2d 1287 (S.D. Fla. 2013) (applying FLSA to unpaid student interns at medical facility).

⁵⁹ *See, e.g.,* Reich v. Parker Fire Protection District, 992 F.2d 1023, 1026 (10th Cir. 1993) (“The six criteria in the Secretary’s test were derived almost directly from [*Walling*] and have appeared in Wage and Hour Administrator opinions since at least 1967.”).

⁶⁰ *Id.* *See also* Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518, 524 (6th Cir. 2011) (noting that the Labor Department’s six-part test was publicly disclosed in its Field Operations Handbook issued in 1980).

⁶¹ *See* Fact Sheet #71, *supra* note 8.

⁶² *See, e.g.,* Jessica L. Curiale, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531 (2010) (noting that “unpaid internships are increasing in the United States, and one can surmise that they will become even more common as the economy continues to deteriorate”).

⁶³ Some of these types of unpaid internships later led to federal court decisions under the FLSA. *See, e.g.,* Glatt v. Fox Searchlight Pictures, Inc., 2013 WL 2495140 (S.D.N.Y. June 11, 2013) (unpaid interns at movie productions); Wang v. Hearst Corporation, 2013 WL 1903787 (S.D.N.Y. May 8, 2013) (unpaid interns at magazines).

services that they provide to ‘for-profit’ private sector employers.” While the Fact Sheet does not define “interns,” it is apparent that the types of positions being addressed would also include what law school typically refer to as “externs” or “clinical externs.”⁶⁴ As noted, the Labor Department’s discussion in Fact Sheet is targeted to placements at for-profit institutions.⁶⁵

Fact Sheet #71 makes clear that there are some circumstances in which individuals who participate in internships at for-profit entities “may do so without compensation.” At the same time, the Department cautions that internships in the for-profit sector will “most often be viewed as employment, unless the test” articulated by the Department for trainees is met. The exclusion from the FLSA for such programs is “necessarily quite narrow because the FLSA’s definition of ‘employ’ is very broad.”⁶⁶

According to the Department, all six of the following criteria must be present for such an internship program to be excluded from the FLSA’s requirements (these are reprinted verbatim below):

- 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.

If all of the factors listed above are met, in the Department’s eyes, “an employment relationship does not exist,” and the FLSA’s minimum wage and overtime provisions do not apply to the intern.⁶⁷ To the extent the Department may be considering an enforcement action under the FLSA, or may be asked to give an opinion of the legality of an externship program, it will apply this six-factor test.

⁶⁴ See Fact Sheet #71, *supra* note 8, at 1 (the Fact Sheet addresses “individuals who participate in ‘for-profit’ private sector internships or training programs” to serve their own interests, such as “interns who receive training for their own educational benefit”).

⁶⁵ The brief discussion in a footnote to Fact Sheet #71 about the FLSA status of internships at government agencies and non-profit organizations is discussed *infra* at Part IV.

⁶⁶ Fact Sheet #71, *supra* note 8, at 1.

⁶⁷ *Id.*

(c) *The Federal Courts' Application of the Walling Case*

As noted, however, the federal courts take a variety of approaches to the *Walling* decision. While some Circuits apply the Department of Labor's six-factor test, others do not agree that the Department of Labor's six-part test is a correct application of *Walling* or the FLSA. Thus, the Department's interpretation is given varying degrees of deference when an internship or training program ends up as the subject of a court case under the statute, depending on the particular jurisdiction in which the federal suit has arisen. Some courts reject the Department's approach outright in favor of a different legal test.

As a legal matter, the extent to which courts must defer to the Department's six-part test as a binding interpretation of the FLSA is affected by the fact that this interpretative statement (and the opinion letters that preceded it) were not the result of a formal agency process, such as an agency adjudication or notice-and-comment rulemaking. Rather, they resulted from an informal agency process. The Department itself describes Fact Sheet #71 simply as "general information," not to be considered "in the same light as official statements of position contained in the regulations."⁶⁸ At the same time, as a matter of administrative law, Fact Sheet #71 stands as an interpretative ruling that is entitled to some degree of deference by the courts.

Where an agency is charged with implementing a statutory scheme, and the statute leaves an implicit or explicit gap as to a particular issue, the enforcing agency's resolution of that issue through formal channels such as adjudication or rulemaking must be followed by the courts so long as the agency's interpretation is "reasonable" (so-called "*Chevron* deference").⁶⁹ By contrast, where the agency's interpretation has been issued through less formal channels – as it was here – the courts will consider the agency's reading of the statute, but are not bound by it. In these circumstances, the courts will give the agency so-called "*Skidmore* deference,"⁷⁰ which treats such agency pronouncements as a "body of experience and informed judgment to which courts and litigants may properly resort for guidance," even if

⁶⁸ *Id.* at 2.

⁶⁹ See *Chevron U.S. A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).

⁷⁰ See *Skidmore v. Swift*, 323 U.S. 134 (1944) (discussing degree of judicial deference to be given to the Labor Department's legal interpretation as expressed in an FLSA opinion letter); see also, *Barfield v. New York City Health and Hospitals Corp.*, 537 F.3d 132, 149 (2d Cir. 2008) (noting that Department of Labor opinion letters and similar pronouncements "do not command *Chevron* deference" but represent a "body of experience and informed judgment to which courts and litigants may properly resort for guidance").

“not controlling on the courts.”⁷¹

While this is less deferential to the agency’s interpretation than the type of judicial deference due to agency regulations under *Chevron*, such agency pronouncements are also entitled to a “measure of respect” from the courts.⁷²

With respect to the Labor Department’s fairly rigid six-part test for valid “trainee” programs that are excluded from FLSA coverage, the courts have given this interpretation of the FLSA varying degrees of deference. Some courts have given the Department’s interpretation full deference, while others have treated it as providing some guidance, and yet others have given the Department’s approach virtually no weight.⁷³ There are three basic approaches taken by the courts. First, some courts simply apply the Department of Labor’s test as articulated in Fact Sheet #71 (and the Department’s earlier opinion letters). The Fifth Circuit, for example, gives “considerable deference” to the Labor Department’s six-part test and applies that test to determine FLSA challenges brought in connection with training programs.⁷⁴

Second, and at the other extreme, some courts reject outright the Department’s six-factor test. The Fourth Circuit, for example, rejects the Department’s interpretation as inconsistent with the *Walling* decision, and applies its own judicially-developed test to decide such challenges.⁷⁵ That court uses a much simpler test to assess the validity of

⁷¹ In *Skidmore*, the Supreme Court held that (323 U.S. at 140):

We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling on the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

⁷² See, e.g., *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (noting that an enforcing agency’s policy statements laid out in its internal policy manual are entitled to a “measure of respect” from the courts, even under the less deferential *Skidmore* standard).

⁷³ See generally, *Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1026 (10th Cir. 1993) (describing different patterns of court approaches to the deference, if any, due to Fact Sheet #71); *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 525-26 (6th Cir. 2011) (same).

⁷⁴ See, e.g., *Atkins v. General Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983) (applying Labor Department’s six-part test to decide challenge by trainees at motor production plant asserting that they performed productive work and thus were “employees” entitled to pay); *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 273 (5th Cir. 1982) (applying Labor Department’s six-part test to support court’s conclusion that flight attendant trainees and reservation sales agent trainees were not “employees”).

⁷⁵ *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 n.2 (4th Cir. 1989) (noting that “[w]e do not rely on the formal six-part test issued by” the Labor Department’s Wage and Hour Division). In that case, which concerned an unpaid week-long orientation for vending ma-

an employment-related training program: It asks only “whether the employee or the employer is the primary beneficiary of the trainee’s labor.”⁷⁶ The same “primary beneficiary” approach has been expressly adopted by the Sixth Circuit in place of the Department’s six-part test,⁷⁷ and implicitly adopted by the Eighth Circuit.⁷⁸

The primary beneficiary test is a much more flexible, less formulaic approach that balances the benefits to the host and the extern, rather than applying a list of specific criteria. The main point of difference between this approach and the Labor Department’s six-factor test comes down to the question of what benefit the employer may permissibly derive from the extern’s workplace participation. While the Labor Department test requires that the employer derive “no immediate advantage” from the extern’s services (whatever that may mean), the courts using the “primary beneficiary” approach recognize that an employer may derive some benefit from an extern’s unpaid efforts, and requires instead that the primary beneficiary of the relationship be the unpaid extern, rather than the employer.⁷⁹

Finally, some other federal courts apply a middle-of-the-road, blended approach. The Tenth Circuit, for example, uses the factors identified in the Department of Labor’s six-part test as relevant factors in assessing the “totality of the circumstances” as to whether a person designated as an unpaid trainee is actually an employee under the FLSA. However, that court does not require that all six factors be present to find a training program valid, as would the Department.⁸⁰

In short, there is little agreement among the courts on whether the Labor Department’s six-part test is the correct approach in decid-

chine workers, the question of the proper degree of deference to the Department’s interpretation of the statute was a central issue. *Id.* at 1209. The district court had applied the Labor Department’s six-part test to find that the training program was valid. Over a dissent, the Fourth Circuit panel reversed this ruling, finding that the district court had not used the “proper legal inquiry.” *Id.*

⁷⁶ *Id.* at 1209.

⁷⁷ *Solis v. Laurelbrook Sanitarium and School, Inc.*, 642 F.3d 518, 524-29 (6th Cir. 2011).

⁷⁸ *See Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (rejecting challenge under the FLSA brought by students in reform school who were required to perform chores on the ground that the chores “were primarily for the students’ . . . benefit”). In the *Blair* case, the court did not discuss the appropriate test to apply, and there is no express rejection of the Department’s six-part test.

⁷⁹ *See, e.g., Solis*, 642 F.3d at 525 (criticizing the “overly rigid” six-part test articulated by the Department of Labor and concluding that the “ultimate inquiry in a learning or training situation is whether the employee is the primary beneficiary of the work performed”).

⁸⁰ *See Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1026-27 (10th Cir. 1993) (applying the Labor Department’s six-factor test to a training program challenge, but rejecting the Secretary of Labor’s position that that six factors should be rigidly applied as an “all or nothing” test).

ing an FLSA challenge to a workplace training program. Whether or not the courts will agree with the Department's approach in a given case, however, it is clear that the Department of Labor itself has for many years consistently applied the six-factor test to law school externship programs and continues to do so (as evidenced by its very recent exchange with the ABA). Because the Department has the power to bring enforcement actions under the FLSA, and because many jurisdictions either apply the Department's approach or give it some deference, this Article will use the six-part test articulated by the enforcement agency in assessing the appropriate design of law school externship programs. Law schools in jurisdictions that have taken a different, or more liberal, approach may feel comfortable following that case law instead of the Department's relatively rigid and formalistic test.

III. APPLICATION OF THE FLSA TO LAW SCHOOL EXTERNSHIPS AT FOR-PROFIT COMPANIES

In recent years, as noted, many law schools have initiated or expanded programs offering their students the opportunity to serve as externs at private companies or law firms.⁸¹ While the clinical education movement is rooted in the public interest arena – recognizing the value of having law students exposed to working for clients who may have pressing legal needs but no income to hire a lawyer – the recent trend to expand externships to private practice settings is grounded in a slightly different motivation. This trend reflects the recognition that there are both educational benefits from and student demand for exposure during law school to law practice experiences not only in public interest settings, but also in a wide range of other environments, including corporate offices and law firms, where the majority of lawyers will end up practicing after graduation.⁸²

Where law school externships are set in private, for-profit companies or firms – such as where students extern with in-house counsel offices or for-profit law firms – the law student will almost certainly be considered an “employee” unless one of the FLSA exemptions or ex-

⁸¹ See, e.g., Bernadette T. Feeley, *Guiding Law Students Through For-Profit Field Placements*, 19 CLIN. L. REV. 57, 60 (2012) (noting that “many law school externship programs have added for-profit placements to their externship program offerings”); Bernadette T. Feeley, *Examining the Use of For-Profit Placements in Law School Externship Programs*, 14 CLIN. L. REV. 37, 37 (2007) (to same effect).

⁸² See, e.g., Carl J. Circo, *An Educational Partnership Model for Establishing, Structuring, and Implementing a Successful Corporate Counsel Externship*, 17 CLIN. L. REV. 99 (2010) (suggesting that corporate counsel externships programs in law schools can help teach core competencies essential for commercial and business lawyers and rarely taught in an experiential setting).

clusions discussed above comes into play. Since such programs are expressly designed to give law students hands-on experience with the type of legal work that is otherwise provided for pay by lawyers and law clerks, the services law students provide as externs would presumably otherwise qualify them as employees.

Looking to the FLSA exemptions, as discussed above, a law student extern will not be considered a “professional.” Nor would a law student externing at a for-profit company or firm qualify for the exemption that applies to some “volunteers” at government agencies and non-profit organizations. The key exclusion, in the for-profit setting, is the recognized exclusion for “trainees” carved out from FLSA coverage by judicial and agency interpretation. Law school externships that contemplate for-profit placements should thus be carefully designed to meet the Labor Department’s requirements for *bona fide* training programs, which if properly designed are not subject to FLSA wage and hours standards.

To understand the FLSA requirements as they apply to law school externship programs in for-profit settings, this section will look first at two opinion letters issued by the Department of Labor in the context of law school programs in for-profit law firms and corporate settings. Then, it will review how each of the six factors the Department uses to judge *bona fide* training programs and internships are likely to apply more generally in the context of unpaid legal externships in commercial settings beyond the law firm *pro bono* setting addressed in the ABA correspondence. Note, again, that this part of the Article is limited to considering an unpaid externship in which a law student works in a for-profit business. Applicability of the FLSA to non-profit settings will be considered in Part IV.

A. Department of Labor Opinion Letters Addressing Legal Trainees in For-Profit Settings

Recently, discussions among law school externship coordinators were sparked by an exchange of correspondence between the Department of Labor and the American Bar Association (ABA).⁸³ The letters addressed certain law school programs – specifically, those that allow students to volunteer at private law firms in work is limited to the firm’s non-fee-generating *pro bono* matters. This letter has raised

⁸³ See Letter from Laurel G. Bellows, President, American Bar Association, to Patricia Smith, Solicitor, U.S. Department of Labor (May 28, 2013) [hereinafter ABA Letter to DOL], http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_reFLSA_091213.pdf; Letter from M. Patricia Smith, Solicitor of Labor, U.S. Department of Labor, to Laurel G. Bellows, Immediate Past President, American Bar Association (September 12, 2013) [hereinafter DOL Letter to ABA], http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013may28_probonointerns_1.authcheckdam.pdf.

some alarm about the broader significance of the Department's statements. However, years before the Department's recent exchange with the ABA, it expressly addressed – and approved – a training program that contemplated placing law students as unpaid “law clerks” working at in-house counsel offices in a “corporate setting.”⁸⁴ While this opinion letter was issued many years earlier than the recent exchange, the Department applied its six-factor test to the facts posited by the inquirer.⁸⁵ This section will examine both of these letters, and what they tell us about how the Department of Labor may view externship programs in for-profit settings.

1. *The ABA-DOL Exchange About Pro Bono Volunteers at For-Profit Firms*

In 2013, the Department of Labor responded to an inquiry from the ABA concerning the applicability of the FLSA to law school programs under which students provide legal services without pay at private law firms, working exclusively on *pro bono* matters. While the Department approved such placements as permissible exceptions to FLSA wage and hour requirements, the question, for many readers, was what the Department might be suggesting more generally about law school externship programs in the private sector – and whether all legal externship programs must be limited to *pro bono* matters.

In looking at both the ABA's inquiry and the Department's response, it does not appear that the Department intended to limit the law school externships that would qualify for the FLSA exclusion, nor that it was imposing any requirement that all such programs permit law students to work only on *pro bono* matters (whether at law firms or companies). Rather, the Department was answering the specific question posed by the ABA. The Department has not, to the author's knowledge, expressed the view – in writing, at least – that law school externship placements at private law firms are unlawful unless the law student is limited to work on *pro bono* cases.⁸⁶

Because this letter is easy to misread, it is useful to consider the ABA letter that led to the Department's response before turning to an explanation of the position that the Department of Labor took in answer to the ABA's question about legal externships.

⁸⁴ See U.S. Department of Labor, Wage and Hour Division, Opinion Letter (January 28, 1988) (opinion letter concerning application of FLSA to a “proposed law clerk extern program” in a “corporate setting”) [hereinafter DOL Letter on Corporate Law Externs], 1988 WL 1534561 (DOL WAGE-HOUR).

⁸⁵ *Id.*

⁸⁶ It is not entirely clear what discussions the Department had with the ABA in private meetings on the issues, but it would be surprising if the Department came up with such a position on its own initiative, for the reasons discussed below.

The exchange was initiated in May of 2013, when then-ABA President Laurel Bellows wrote to the Department of Labor. Her letter suggests that the ABA was motivated to write the letter because it had observed that some private law firms were reluctant, because of FLSA concerns, to allow law students to work on *pro bono* matters as unpaid interns at the firms, relationships that many law schools have been pursuing as one option to satisfy law school *pro bono* requirements.⁸⁷ Following up on some initial discussions between the staff of both organizations, the ABA President asked, in particular, for an informal letter providing law firms and law schools with assurance that the Department would “not take legal enforcement action” against private law firms and companies who use unpaid interns to assist with *pro bono* matters. In particular, the ABA posited a program in which (a) the interns are law students,⁸⁸ (b) the law school serves as an intermediary in arranging the placement, (c) the intern works only on *pro bono* matters in which the firm (or company) will not derive any “direct financial benefit” for the intern’s work, (d) the internship provides an “educational experience related to the practice of law” (whether or not the student earns academic credit), and (e) the intern hosts provide written assurance that these conditions will be met.⁸⁹ Because the ABA’s immediate focus was on satisfaction of a law school *pro bono* obligation – governed by Standard 301(b) – and not on law school externship programs, the letter was, naturally focused on an uncredited *pro bono* program rather than an externship program carrying academic credit.⁹⁰

The Solicitor of Labor, M. Patricia Smith, responded to the ABA in September, 2013. She indicated, first, that as a general matter, a properly designed law school private sector internship program may at times be excluded from FLSA coverage: “There are some circumstances under which individuals who participate in ‘for-profit’ private sector internships or training programs may do so without compensation.” In making this determination, she explained, the question is whether the program meets the six factors outlined in the test applied

⁸⁷ See ABA Letter to DOL, *supra* note 83, at 1 (noting that ABA Accreditation Standard 301(b) requires law schools to offer “substantial opportunities for student participation in *pro bono* activities,” and that beyond *pro bono* opportunities in the non-profit and government sectors, “law schools would also like to place their students with for-profit law firms (including corporate legal offices) to work on *pro bono* matters”).

⁸⁸ While the ABA’s letter also mentioned including in such programs recent law graduates who had not yet passed the bar, the ABA indicated in its own inquiry that the ABA’s Employment and Labor Section did not support allowing law graduates to serve as unpaid interns. See ABA Letter to DOL, *supra* note 83, at 2.

⁸⁹ ABA Letter to DOL, *supra* note 83, at 1.

⁹⁰ See *id.* (noting that “FLSA uncertainty inhibits law firms from offering students the opportunity to work on *pro bono* matters in a real-life practice setting”).

by the Department to internship and training programs (as laid out in Fact Sheet #71). If all of these factors are met, “an employment relationship does not exist under the FLSA.”⁹¹

Solicitor Smith went on to provide even more targeted guidance with respect to the particular private sector program suggested in the ABA’s letter. After repeating the conditions posited by the ABA – including the limitation that the intern will work only on non-fee-generating *pro bono* matters at the private law firm – Solicitor Smith analyzed the application of the Department’s six-factor test to these facts. Her letter concludes that “an unpaid internship with a for-profit law firm structured in such a manner as to provide the student with professional experience in furtherance of their education, involving exclusively non-fee generating *pro bono* matters[,] would not be considered employment subject to the FLSA.”⁹²

Read in isolation, the statement that unpaid internships “involving exclusively non-fee generating *pro bono* matters” would not violate the FLSA might suggest to some readers that working only on *pro bono* matters is a necessary condition for such programs to comply with the Act. In fact, however, reading both the ABA’s letter in conjunction with the Department’s response, it is apparent that the Department did not come up with this language itself as a condition the Department wished to impose on permissible law school externships. Rather, the *pro bono* limitation was a fact posited by the ABA in its original request. The Department was simply using the facts that had been provided by the ABA to answer the precise question that had been posed.

More broadly, the Department’s response indicates that the Department will apply the same six-factor test to law school externship programs that it applies more generally to other internship and training programs.⁹³ Private placements of law students in unpaid externships at for-profit companies and law firms should thus be permissible to the extent the externship placement satisfies all six factors.⁹⁴ Moreover, this conclusion is consistent with the past opinion letters issued by the Department, which have applied the six-factor test to other law school internships in the private sector, which do not involve limita-

⁹¹ DOL Letter to ABA, *supra* note 83, at 1.

⁹² *Id.* at 2. The Department noted, in agreement with the ABA’s Labor Employment Law Section, that allowing law graduates to serve as unpaid interns at a private law firm poses very different issues under the FLSA, and would require a different analysis. *Id.* at 3.

⁹³ See DOL Letter to ABA, *supra* note 83, at 1 (“The FLSA does . . . permit individuals to participate in unpaid internships or training programs conducted by for-profit entities if certain criteria are met.”).

⁹⁴ *Id.*

tions to pro bono work.

2. *DOL's Prior Opinion Letter on Unpaid Corporate Law Office Externships*

In a lesser-known exchange, in 1988, the Department of Labor considered the applicability of the FLSA to a proposed training program that would place law students as unpaid “law clerks” working at in-house counsel offices in corporate settings.⁹⁵ The inquirer described the proposed program as “clinical in nature,” comparable to the training “received by medical students who participate in hospital extern programs.” The idea was for law students to “gain practical experience in a corporate setting addressing real business problems and interacting with ‘clients.’” The advantage to the students, who had no expectation of being paid from the program, and were not eligible to be hired until at least three months after the program ended, was that it would increase their “marketability as paid law clerks or in-house counsel.”⁹⁶ The corporate externship program as described by the inquirer qualified, in the Department’s view, as a legitimate education or training program “designed to provide students with professional experience in the furtherance of their education and training and . . . academically oriented for their benefit.” Under these circumstances, the Department of Labor concluded that the program would qualify as a permissible training program excluded from FLSA coverage if used for currently enrolled students, but not for “after graduation” internships, which would be employment relationships that must be paid.⁹⁷ Significantly, in terms of the possible benefits to the host company, the Department emphasized, the “corporate law office has substantial supervisory responsibilities which offsets any advantage it might otherwise be perceived to receive.”⁹⁸ Hence, rather than holding the corporation to a stringent standard that they receive “no advantage” from the work of the intern, the Department appeared to examine the broader question of whether a net advantage accrued to the corporation.

The Department of Labor’s opinions in the 1988 and 2013 opinion letters are directly relevant precedents that can help law schools understand and predict how the Department of Labor would be likely to view other types of externships at private for-profit companies and firms. These considerations are discussed further below, in the explanation of how each of the six factors might apply in the context of law

⁹⁵ DOL Letter on Corporate Externships, *supra* note 84.

⁹⁶ *Id.* at 1.

⁹⁷ *Id.*

⁹⁸ *Id.*

school externship programs in the private sector more generally.

B. Applying The DOL's Six Factors To Other Legal Externs At For-Profit Entities

Going beyond the relatively narrow program posited by the ABA to legal externships in commercial settings more generally, the combination of Fact Sheet #71 and the Department of Labor opinion letters suggests that the Department would be likely to apply the six factors as follows:

1. Factor One: Similarity to Training in an Educational Environment

In this factor, the Department of Labor considers whether the externship, although it includes the “actual operation of the facilities” of the employer, is “similar to training which would be given in an educational environment.”⁹⁹ This factor is directly related to the *Walling* Court’s emphasis that where an employer provides trainees with the same kind of instruction that would be given at a training school, but “at a place and in a manner which would most greatly benefit the trainees,” this does not create an employment relationship.¹⁰⁰

The Department of Labor has emphasized several things with regard to Factor One. In general, “the more an internship is structured around a classroom or academic experience as opposed to the employer’s actual operations, the more likely the internship will be viewed as an extension of the individual’s educational experience.”¹⁰¹ Recall here, by way of background, that there are two different types of training programs that may potentially be at issue: free-standing employment training programs offered by an employer (as in *Walling* itself); and training programs undertaken at a field site but sponsored by an educational institution as part of a course of study, as with law school externship programs.¹⁰²

Even in the case of free-standing work training programs – such as where an airline offers a six-week training program at the airline for would-be flight attendants – the courts have approved such programs as exceptions to FLSA’s wage and overtime requirements, at

⁹⁹ See Fact Sheet #71, *supra* note 8, at 1.

¹⁰⁰ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947).

¹⁰¹ Fact Sheet #71, *supra* note 8, at 2.

¹⁰² See, e.g., Fink, *supra* note 42 (while arguing that unpaid legal internships should not be permitted, the author limits his argument to internships arranged with law firms directly, recognizing that “students participating in for-credit law school externship programs are likely to be excluded from FLSA coverage under the DOL test”).

times over the Department of Labor's objection.¹⁰³ Moreover, the Department's pronouncements suggest that the agency itself views training programs that are part of an accompanying degree or study program at a college or university as more likely to comply with the FLSA than trainee programs sponsored by a private sector company. Key facts mentioned by the Department as marks of a legitimate educational training program include whether "a college or university exercises oversight over the internship program and provides educational credit."¹⁰⁴ It is also significant if the externship "provides the individual with skills that can be used in multiple employment settings," as opposed to skills particular to one employer's business operations.¹⁰⁵

2. *Factor Two: Experience Is For Extern's Benefit*

In this factor, the Department of Labor considers whether the externship experience "is for the benefit of the [extern]."¹⁰⁶ As with a number of the factors, Factor Two is closely related to another issue, considered in Factor Four, which looks to whether the relationship provides any "immediate advantage" to the employer. In Fact Sheet #71, for example, the Department of Labor does not discuss these factors separately, but instead combines them in a section entitled, in relevant part, "The Primary Beneficiary of the Activity."¹⁰⁷ The important thing being expressed in both inquiries is whether the extern relationship is motivated and designed to benefit the extern rather than the employer.

The courts have been clear, in this regard, that the contemplated "benefit" to the law student should go beyond the benefit that is involved in any ordinary job placement, such as the resume value of the position. Instead, the law student should benefit by virtue of the special instructional value of a carefully structured externship.¹⁰⁸ The ex-

¹⁰³ See, e.g., *Donovan v. American Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982) (finding that training programs offered by American Airlines under which flight attendant and sales agent trainees were not paid were permissible under FLSA; rejecting Department of Labor position); *Ulrich v. Alaska Airlines, Inc.*, 2009 WL 364056 (W.D. Wash. 2009) (finding that training programs offered by Alaska Airlines under which flight attendant trainees were not paid were permissible under FLSA); *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993) (finding that firefighter training program under which trainees were not paid was permissible under FLSA; rejecting Department of Labor position).

¹⁰⁴ Fact Sheet #71, *supra* note 8, at 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 1.

¹⁰⁷ *Id.* at 2.

¹⁰⁸ See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 2013 WL 2495140 (S.D.N.Y. June 11, 2013) (where the benefits from the unpaid internships, such as resume listings and job references, were "incidental to working in the office like any other employee and were not the result of internships intentionally structured to benefit them," this does not support an

ternship should be “engineered to be more educational than a paid position.”¹⁰⁹ In any job, an extern will learn something about the workplace, of course, but the point made by the courts is that a paid extern who is merely assigned to make coffee and deliver mail as needed will not learn any more than a paid assistant in the same job. It is only when the worksite designs the externship so as to teach the intern, rather than cater to the immediate needs of the employer, that FLSA compliance is excused.

3. *Factor Three: Close Supervision And Avoiding Employee Displacement*

In this factor, the Department of Labor considers two distinct, but related considerations that support the application of the FLSA “trainee” exclusion: that the extern is “closely supervised” by the existing staff; and that the extern “does not displace regular employees.”¹¹⁰ Again, this Factor tends to overlap with other parts of the Department’s test, since the close degree of supervision by existing staff required as an extern host, and the amount of time required for supervision, will also mean that the employer is at times “actually . . . impeded” by hosting the extern, as relevant to Factor Four.¹¹¹

In terms of the supervision that is contemplated, in the seminal *Walling* case, the trainees were allowed to participate in “hands-on” work as railroad brakemen, but there was a regular employee standing by to take over at any time.¹¹² Interestingly, the Labor Department has found a similar degree of supervision inherent for trainees in a legal setting, noting that “legal representation and licensing requirements necessitate that unlicensed law students receive close and constant supervision from the firm’s licensed attorneys.”¹¹³ In other words, because any work performed by a law student cannot be used as the basis for a court filing or other work product of the firm without a licensed lawyer having endorsed and approved it, there will perforce be a high degree of supervision of student externs in a legal externship setting.¹¹⁴

exclusion from the wage requirements of FLSA).

¹⁰⁹ *Id.*

¹¹⁰ Fact Sheet #71, *supra* note 8, at 1.

¹¹¹ *Id.* at 1.

¹¹² *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149-50 (1947) (the trainee is “gradually permitted to do actual work under close scrutiny” and regular employees “must stand immediately by to supervise whatever the trainees do”).

¹¹³ DOL Letter to ABA, *supra* note 83, at 2.

¹¹⁴ Of course, a law school should ensure that supervision of student externs on-site is not only theoretically required (as a by-product of attorney licensing requirements) but is actually provided. See DOL Letter to ABA, *supra* note 83, at 2 (where an extern “receives minimal supervision and guidance from the firm’s licensed attorneys,” the extern would be

As for the “displacement” issue, the Department’s concern is expressed this way: “If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods,” the interns should be paid at least minimum wage and entitled to overtime protections. Likewise, if an employer “would have hired additional employees or required existing staff to work additional hours had the interns not performed the work,” again, the interns will be viewed as employees under FLSA.¹¹⁵ The concept here, obviously, is that an employer can’t use a training program as an attempt to save money by using unpaid student interns in place of hiring employees, thereby circumventing federal wage and hour laws.

In a legal setting, similarly, the Department has emphasized that if a law student extern “displaces regular employees (including support staff)” the extern will be treated as an employee.¹¹⁶ Again, the issue of displacing regular employees is closely connected with other factors, including the emphasis on the educational value of the externship, and the lack of “immediate advantage” to the employer. If a legal extern is being given copying or filing assignments or routine and repetitive work such as a massive document review project – that is, work that would ordinarily be assigned to a secretary or paralegal – this is likely to be a red flag to the Labor Department. The same is true if externs are being used to perform the work of regular staff members who are out sick or on vacation, or are retained by a company or law firm instead of hiring contract lawyers on a particularly demanding case or stage of litigation.

Again, this issue is connected not only to the Department’s concerns about protecting employees (including those who would have been hired for pay, but for the unpaid intern) but also to the law school’s concerns about educational value. The work given to a student extern should be driven by careful thought about what will best teach the extern about some aspect of what lawyers do in practice, using actual work projects done in the business operation. Project assignments should not be driven by the company’s staffing needs. The difference can be subtle, so it is important that law school supervisors and site supervisors be attuned to the point at which assignments cross a line from educational to routine—and the point at which the extern is being used to perform the company’s work in place of a regular employee.

considered an employee subject to FLSA). The degree of supervision provided by host lawyers should be readily evident to the law school through its oversight role.

¹¹⁵ Fact Sheet #71, *supra*, note 8, at 2.

¹¹⁶ DOL Letter to ABA, *supra* note 83, at 2.

4. Factor Four: No “Immediate Advantage” To Employer

In this factor, the Department of Labor considers whether the employer who provides the training “derives no immediate advantage from the activities of the intern” and on occasion “its operations may actually be impeded.”¹¹⁷ This factor is perhaps the most challenging to understand and implement, particularly in a professional setting. There is considerable tension in a professional setting between the need to make the externship an educational experience – which, by its nature, contemplates assigning the extern actual legal work that is substantive in nature, and therefore potentially useful to the host organization – and the need to avoid an “immediate advantage” to the host through the extern’s work. The question, therefore, is what this factor means for law school externships.

At one end, it is clear that an externship experience largely devoted to “shadowing” a practicing lawyer through the course of his or her day should pass muster as a legitimate “trainee” program that does not provide an “immediate advantage” to the employer, and is thus excluded from FLSA coverage.¹¹⁸ A law student who is simply accompanying and watching a lawyer as that lawyer goes about his or her normal law-related tasks is, by definition, not doing productive work for the employer. The problem, of course, is that such an externship is of relatively limited use to the extern. It is only by actually doing some of the tasks the practicing lawyer does that the extern will fully learn from the field placement experience.

This is by far the most challenging issue in designing FLSA-compliant externship programs. It clearly appears, from the Department’s letter to the ABA, that the Department understands and tolerates the fact that a legal extern will not simply be observing lawyers by attending hearings or meetings with them as they go about their jobs. Instead, the Department contemplates, as part of a valid training program for law students, that they will actually be “participating in” substantive legal work, such as “drafting or reviewing documents.”¹¹⁹ Courts deciding such challenges often observe that host organization may derive *some* benefit from the unpaid labor. It is clear that simply creating goodwill (as with a law firm that sponsors a pro bono externship program), or investing in a future labor pool (as with job training programs sponsored by an employer), do not count as the type of “im-

¹¹⁷ Fact Sheet #71, *supra* note 8, at 1.

¹¹⁸ *See id.* (noting that the FLSA is likely to recognize a *bona fide* educational program for an internship in which the employer “is providing shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work”).

¹¹⁹ DOL Letter to ABA, *supra* note 83, at 2.

mediate” advantages that will disqualify the training program from the wage and overtime exception under the FLSA.¹²⁰ The question remains as to what an “immediate advantage” means.

As these letters suggest, it would be hard to design a meaningful externship program in which the law students do not potentially provide *some* benefit to the host organization in doing the assigned work. More importantly, however, precisely because legal work is demanding and complex, the supervision and training required in overseeing a legal extern will often involve a substantial commitment by the organization’s staff. This is reinforced by the fact that, in the area of legal work, any work product produced by an extern must presumably be carefully reviewed, assessed, and adopted by a licensed attorney before any reliance will be placed on that work product or the work product shared with others – a factor highlighted by the Department itself in responding to the ABA.¹²¹

In the Department’s earlier opinion letter addressing corporate law office externships, the agency expressly highlighted the fact that “the corporate law office has substantial supervisory responsibilities which offsets any advantage it might otherwise be perceived to receive” from the extern’s activities.¹²² The important thing, the Department’s letters suggest, is that the net advantage from the relationship should benefit the intern, not the host organization. This focus on net advantage is consistent, in this regard, with the approach taken by the courts that emphasize whether the “primary benefit” accrues to the trainee or the employer.¹²³ One key element in applying this Factor, thus, is ensuring that the supervision provided by the host organization is indeed robust, educational, and intensive.¹²⁴

¹²⁰ See, e.g., DOL Letter to ABA, *supra* note 83, at 2 (noting that “intangible, long-term benefits such as general reputational benefits associated with pro bono activities” are not considered the type of “immediate advantage” to a law firm that could weigh in favor of applying FLSA wage requirements); *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1028 (10th Cir. 1993) (noting that “although we agree that the defendant derived an ultimate advantage by creating a pool of prospective employees trained in its operations, this is the intended result of any employer-sponsored training program,” and thus cannot be the type of “immediate advantage” that would require application of the FLSA).

¹²¹ See DOL Letter to ABA, *supra* note 83, at 2 (noting that “legal representation and licensing requirements necessitate that unlicensed law students receive close and constant supervision from the firm’s licensed attorneys”).

¹²² DOL Letter on Corporate Law Office Externs, *supra* note 84, at 1.

¹²³ See, e.g., *Reich v. Parker Fire Protection District*, 992 F.2d 1023, 1028 (10th Cir. 1993) (noting, with respect to the “benefit of the trainees” and the “immediate advantage” to the employer, that “a number of courts have considered these factors together, weighing the relative benefits to each party, and we are persuaded that conducting the inquiry in this fashion is both permissible and helpful.”).

¹²⁴ See, e.g., *Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465 (M.D. Tenn. 1979) (finding FLSA applicable where hospital training program for radiology technicians was designed to require substantial supervision, but the hospital “exploited the training program,

At a minimum, Factor Four suggests that special FLSA considerations come into play with law school externships that place students at private law firms. One important issue, in this setting, is the question of the pressures posed by law firm billable hour requirements (and of billing by the hour more generally). There are two perceived risks for externship programs in private law firms in particular: First, because lawyers in private practice derive their income predominately based on the number of hours billed, this can create pressures to give supervisory responsibilities short shrift.¹²⁵ Second, and relatedly, law firm managers may wish to bill clients for the time spent by the unpaid externs on legal work, seeing an externship program as a potential profit center. The Department of Labor specifically emphasized, in the context of the externship program posited by the ABA, that were the firm to have the law student work “on fee generating matters”, that is a factor that could create exposure under the FLSA, as could the firm’s provision of “minimal supervision and guidance from the firm’s licensed attorneys.”¹²⁶

Aside from the clear problem raised for FLSA compliance if law firms bill clients for work performed by unpaid externs, the question remains whether it is either necessary or advisable as a legal matter to limit any student law firm placements to work on *pro bono* matters. Leaving aside any policy concerns or law school public service goals (which are not the focus of this Article), there is no reason to conclude from the case law or the Department of Labor statements, that limiting work to *pro bono* matters in law firm field placements is required by the FLSA. The question under the Department’s test is not what particular assignments the externs are given, but whether their presence provides an “immediate advantage” to the law firm.

As a logical matter, if an extern were assigned to draft a memo, even one that might potentially be useful to a client, the firm could avoid any “immediate advantage” from the externship by declining to bill the client for the extern’s memo. Indeed, the law firm would likely lose income in such a case, both because a supervising attorney would have spent unbilled time supervising the extern’s work, and because the law firm would lose the opportunity to make the money that could have been billed had a regular associate written the memo. While it is true that a client who receives a law student extern’s work

turning it to its own advantage” by having trainees work unsupervised and billing for their time).

¹²⁵ See generally Fink, *supra* note 42, at 448 n.80 (2013) (arguing that in private firms, many lawyers “will decline to expend potentially billable time on non-billable training, supervision and assessment of interns”).

¹²⁶ DOL Letter to ABA, *supra* note 83, at 2.

product without paying for it derives an advantage, the focus of the FLSA inquiry is on the employer not the client. If the law firm provides free work product to its clients, the benefit to the firm is, at most, intangible and long-term, in the form of good will and client loyalty, and is not likely to be considered an “immediate” benefit by the courts or the Department.

Some further insight into what the Labor Department understands as an impermissible “immediate advantage” is provided by parsing its correspondence with the ABA about law student externs who perform *pro bono* services within a law firm. The Labor Department emphasized in its letter to the ABA not only that the services of law student externs should not be used on “fee generating” *pro bono* matters, but also that the work of externs should not be used to free up firm lawyers so that *they* can bill time instead of working on *pro bono* matters that don’t pay fees. Such a practice provides a different type of “immediate advantage” to the firm by allowing the firm to earn more money by assigning externs to work on matters can’t be billed, thereby freeing up other attorneys to do billing work. This elaboration suggests that, in each situation, the Department will look to the financial reality, and consider whether the law firm in fact derives an immediate bottom line financial benefit from hosting the extern. If so, the arrangement is likely to be suspect under the FLSA. In short, the key here would seem to be that the intern’s work be “non-fee generating,” a condition that can be enforced in other means than limiting the student to *pro bono* matters.¹²⁷

5. *Factor Five: Extern Is Not Entitled To A Job*

In this factor, the Department of Labor looks to whether the extern is “entitled to a job at the conclusion” of the externship.¹²⁸ The Department has elaborated this factor by emphasizing that the externship should be “of a fixed duration, established prior to the outset” of the placement.¹²⁹ This factor should be easily satisfied. Both the Department of Labor and the courts have accepted a variety of evidence to show that Factor Five was met.¹³⁰

At the same time, note that there is no prohibition in the FLSA against an employer later offering a position to a law student extern after the externship. Indeed, in the *Walling* case, as in the airline training program cases, the entire program was intended to provide a trained “labor pool” upon which the employer could later draw. The

¹²⁷ *Id.* at 2.

¹²⁸ Fact Sheet #71, *supra* note 8, at 1.

¹²⁹ *Id.* at 2.

¹³⁰ See DOL Letter to ABA, *supra* note 83, at 2.

key is simply that the extern understands that he or she will “not necessarily” receive a job out of the externship.

The idea here is that the extern should be protected against exploitation by dispelling any misunderstanding, on the extern’s part, that providing unpaid services will lead to a paying job with the company. The extern should undertake the position based on the educational value of the training, and the long-term benefits of having had the experience, such as the resume value and the transferability of the skills gained to other job settings.

6. *Factor Six: Extern Is Not Entitled To Wages*

In this factor, the Department of Labor considers whether the employer and the extern understand “that the [extern] is not entitled to wages” for the time spent in the externship.¹³¹ Again, this Factor is straightforward. To protect against exploitation of student externs, the Department requires clarity at the outset to all concerned that the extern is undertaking an unpaid position. This legal requirement would be satisfied by having the externs sign a written externship contract with the host organization acknowledging that they do not expect pay for their externship.¹³² The important thing is ensuring that there is no confusion about the fact that the externship is an unpaid position.

In conclusion, it should be possible to design a legal externship program in which law students serve as externs, without pay, in for-profit settings without running afoul of the FLSA’s minimum wage requirements. The key is designing a program that satisfies the Department of Labor’s six-part test for a bona fide training program – and then administering that program consistent with the requirements that have been established. Such a program could validly include field placements both in corporate counsel offices and private law firms, particularly if the special protections suggested by the Department for law firm settings are included as part of the program conditions. Indeed, the Department has already approved two such programs – in the Department’s recent opinion letter approving a law school externship program that places law students in law firms, without pay, assigned exclusively to *pro bono* matters, and in the Department’s earlier opinion letter approving a law school-connected externship program that placed law students, without pay, in corporate counsel

¹³¹ Fact Sheet #71, *supra* note 8, at 1.

¹³² See, e.g., *Ulrich v. Alaska Airlines Inc.*, 2009 WL 364056 (W.D. Wash. 2009) (where the trainee signed a training contract which “specified that no wages would be paid during training,” this satisfied the requirement that both employer and trainee understand that the training is unpaid).

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IV. APPLICATION OF FLSA TO LAW SCHOOL EXTERNSHIPS IN NON-PROFIT SETTINGS

While the data suggests that law school externships in for-profit settings, as discussed above, have been growing, many more law school externships are in non-profit or governmental settings.¹³³ Many law schools offer legal externships in the non-profit sector. These may include field placements in government agency settings, such as the offices of prosecutors and public defenders, or at government agencies. Law schools also typically offer field placements in non-profit organizations, such as legal services organizations or non-profit legal groups working on particular causes. The question is whether the Department of Labor could potentially consider such externships subject to the FLSA where the law students are unpaid, as they must be, to earn law school credit.

While Fact Sheet #71 is directed at the issue of unpaid internships at for-profit enterprises, the Department of Labor also addresses, briefly, the question of internships in the non-profit sector, concluding that unpaid internships for state and local government agencies and non-profit charitable groups are “generally permissible.” The Department reasoned that there are special statutory exemptions for certain “volunteers,” specifically for individuals who volunteer to perform services for a state or local government agency or a private non-profit food bank.¹³⁴ The Labor Department’s Wage and Hour Division also recognizes, by interpretation, an exception from the FLSA for “individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civil or humanitarian purposes to non-profit organizations.”¹³⁵ In other words, the Department has in effect extended the statutory exemption for “volunteers” at public agencies to cover volunteers at non-profit private groups as well.

Based on these principles, the Department concludes, “[u]npaid

¹³³ See, e.g., Basu & Ogilvy, *supra* note 13, at 19 (noting that according to recent data, eighty percent of externship courses limit placements to specific types of settings, most commonly to not-for-profit settings, while twenty percent of externship courses have no limitations on externship settings).

¹³⁴ See 29 U.S.C. § 203(e)(4)(A) and (e)(5). See generally 29 C.F.R. Part 553, Subpart B (implementing the FLSA’s statutory exception for “volunteers” at State and local governmental agencies).

¹³⁵ Fact Sheet #71, *supra* note 8, at 1-2 n.*. While Fact Sheet #71 was published in 2010, that guidance has not yet been forthcoming. See, e.g., Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Government Agencies*, 97 IOWA L. REV. 1363 (2012) (noting the open issue and suggesting additional factors the Department of Labor should consider for unpaid internship programs in the non-profit sector).

internships in the public sector and for non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible.” Finally, the discussion notes that the Wage and Hour Division “is reviewing the need for additional guidance on internships in the public and non-profit sectors.”¹³⁶

The “volunteer” exemption noted in the Department’s discussion in Fact Sheet #71 is explained as follows by the Department on its website:

Individuals who volunteer or donate their services, usually on a part-time basis, for public service, religious or humanitarian objectives, not as employees and without contemplation of pay, are not considered employees of the religious, charitable or similar non-profit organizations that receive their service.

For example, members of civic organizations may help out in a sheltered workshop; men’s or women’s organizations may send members or students into hospitals or nursing homes to provide certain personal services for the sick or elderly; parents may assist in a school library or cafeteria as a public duty to maintain effective services for their children or they may volunteer to drive a school bus to carry a football team or school band on a trip. Similarly, an individual may volunteer to perform such tasks as driving vehicles or folding bandages for the Red Cross, working with disabled children or disadvantaged youth, helping in youth programs as camp counselors, scoutmasters, den mothers, providing child care assistance for needy working mothers, soliciting contributions or participating in benefit programs for such organizations and volunteering other services needed to carry out their charitable, educational, or religious programs.¹³⁷

The question is how much comfort a law school should derive, in placing students at externships in public agencies and non-profit groups, from the existence of the “volunteer” exemption above.

As noted above, a law school’s externship programs may include many placements in which the law student is, in fact, voluntarily working for a public agency or a non-profit organization without any expectation of pay. These would seem, from Fact Sheet #71, to be the types of externships that the Department of Labor has found “generally permissible” under the “volunteer” exception.¹³⁸ At the same time, it is not entirely clear that the types of externship programs con-

¹³⁶ Fact Sheet #71, *supra* note 8, at 2 n.*.

¹³⁷ See <http://www.dol.gov/elaws/esa/flsa/docs/volunteers.asp>.

¹³⁸ While the statutory exemption is limited to state and local public agencies, presumably the Department of Labor would also extend the same “volunteer” principle to externships at federal government agencies, given that it has already applied this beyond the literal language of the statute to encompass non-profit organizations.

templated by a law school are a true “volunteer” program under the statutory exemption, for two reasons.

First, unlike the typical volunteers addressed in the Department’s opinion letters, a law student will typically be serving as an extern not for purely charitable motives, but in order to get professional training. Often, he or she is actually receiving credit for the service as part of his or her law school education, or otherwise fulfilling educational requirements in order to graduate. This is not completely analogous to someone who is purely “volunteering” out of the good of their heart to benefit the public, or to help disadvantaged groups. In fact, these externs look a lot more like “trainees” than like the Department’s examples of “volunteers.” It may be that the policy behind this statutory provision is served by allowing law students to voluntarily provide legal assistance to charitable groups, who unlike for-profit businesses serve the public good, and are generally not well-heeled. But still, law student externs gaining intensive professional training at a prosecutor’s office would seem, logically, to occupy a different employment niche than volunteer candy-strippers spending a few hours a week at a local nursing home.

Second, even if the law student externs can be treated as volunteers, this does not necessarily end the analysis. There is no unassailable exemption from the FLSA for persons who “volunteer” to work for public agencies or, by extension, non-profit groups. Rather, the Department of Labor is sensitive to the fact that someone denominated a “volunteer” may in reality be used by the employer instead in the role of a regular employee who is not being paid. The courts have been clear that the FLSA status of an individual is not determined by the job title the parties have chosen – a principle that should apply to “volunteers” as much as to “interns” or “trainees.”¹³⁹ Instead, the “economic reality” of the situation governs.¹⁴⁰ Even here, where Congress has spoken, the Department will likely be sensitive to the same general concerns at play in its “trainee” decisions about the risks of displacing paid workers, and preventing abuse of unpaid workers, that would follow by over-extending the statutory “volunteer” exemption.

Where a person in the supposed role of a “volunteer” is in fact infringing on the core functions of the FLSA – whether by displacing regular paid employees, or being exploited by the employer – the Department does not consider the exemption applicable. In *Tony and*

¹³⁹ See, e.g., *Marshall v. Baptist Hospital, Inc.*, 473 F. Supp. 465, 467 (M.D. Tenn. 1979) (noting that the application of the FLSA is “not fixed by labels the parties may attach to their relationship”).

¹⁴⁰ *Id.*

Susan Alamo Foundation v. Secretary of Labor,¹⁴¹ the Labor Department brought an enforcement action against a non-profit religious foundation that used unpaid volunteers to staff some of the operations run by the Foundation. In that case, the Supreme Court and the Department of Labor disregarded both the ostensibly “charitable” nature of the Foundation’s operations and the protestations of the volunteers themselves, and held that they were, in fact, “employees” subject to the wage and overtime requirements of the FLSA.

The program run by the Foundation used individuals who had been rehabilitated, such as former drug addicts, derelicts, or criminals, to staff operations such as service stations, grocery stores, farms, and construction companies, which provided the income to support the religious activities of the Foundation.¹⁴² Known as “associates” rather than employees, these individuals were provided with food, shelter, and clothing, but no cash wages. The associates themselves took the firm position that they “considered themselves volunteers who were working only for religious and evangelical reasons.”¹⁴³

The Supreme Court held, first, that there is no categorical exclusion from FLSA coverage for “religious or nonprofit organizations.”¹⁴⁴ When non-profit organizations are engaged in activities that “serve the general public in competition with ordinary commercial enterprises,” they may be subject to the FLSA.¹⁴⁵ Second, the Court held that despite the self-identification of the associates as “volunteers,” they were in fact employees working in expectation of in-kind compensation, and their willingness to work without wages enabled the Foundation to gain an advantage over its competitors.¹⁴⁶

Significantly, while the *Alamo* case was decided before Congress added the “volunteer” exemption to the FLSA, the Court addressed the issue of distinguishing between the employees used by the Foundation and true “volunteers.” There is no reason to fear that covering the Foundation’s business operations under the FLSA, held the Court, will “lead to coverage of volunteers who drive the elderly to church, serve church suppers, or help remodel a church home for the needy.” The Court distinguished the associates in the *Alamo* case from situations of “[o]rdinary volunteerism,” which is “not threatened by this interpretation of the statute.”¹⁴⁷

A similar outcome was reached in *Archie v. Grand Central Part-*

¹⁴¹ 471 U.S. 290 (1985).

¹⁴² *Id.* at 292.

¹⁴³ *Id.* at 293.

¹⁴⁴ *Id.* at 298-97.

¹⁴⁵ *Id.* at 299.

¹⁴⁶ *Id.* at 300-301.

¹⁴⁷ *Id.* at 302-303.

nership, Inc.,¹⁴⁸ written by then-District Judge Sonya Sotomayor, which addressed the Department of Labor's enforcement action against a public agency partnership that placed homeless people in positions where they could gain work experience, at sub-minimum wages (averaging \$1 to \$1.50 per hour).¹⁴⁹ The purpose of the "Pathway to Employment" program, which was run by a non-profit corporation, was to aid the homeless in "developing vocational skills for the purpose of future employment."¹⁵⁰

The court held that notwithstanding the praiseworthy purpose of the program, and the fact that the homeless clients "benefitted enormously from the work opportunities provided," the program violated the FLSA. By paying wages to the participants that were far below the minimum wage, the non-profit corporation gained an unfair advantage in bidding for contracts to provide services (such as recycling and security) in competition with commercial businesses. At the same time, the program was structured like a regular work environment, and not a training program.¹⁵¹ Unlike in *Alamo*, the non-profit in the *Archie* case did not argue that the homeless were working as "volunteers," but the broader point is the same: neither the Department of Labor nor the courts will give a "pass" to programs run by non-profits, even for very worthy goals.

Concerns will be raised, even in externships in the non-profit sector, if several factors are present: the activity in which the host is engaged competes with commercial enterprises; the relationship created between the host and the extern looks like a regular employment relationship; and the program is not designed to fall within one of the special categories exempted from FLSA requirements (such as volunteers or trainees). In a law school externship program, for example, a student extern doing legal work at a non-profit law firm or legal defense fund on a fee-shifting case might well look, to the Labor Department, much like an extern at a for-profit law firm doing legal work on a fee-generating case. While this issue is unlikely to arise when a law student is externing with a prosecutor's office, student externs at legal services clinics and public interest groups may well be working on the types of matters which are also handled, for fees, by private lawyers. If so, the Department may well apply the same analysis outlined in above, rather than treating the externs as "volunteers."

There is no question that the Department of Labor, given its statements on the issue, sees unpaid externships at public agencies and

¹⁴⁸ 997 F. Supp. 504 (S.D.N.Y. 1998).

¹⁴⁹ *Id.* at 513.

¹⁵⁰ *Id.* at 509.

¹⁵¹ *Id.* at 533.

non-profit organizations as an easier case for purposes of exclusions from the FLSA, at least in the abstract, than unpaid externships in for-profit businesses. At the same time, there are important reasons to carefully structure all law school externship programs, wherever the law students may be placed. To begin with, for any externships offered for academic credit by a law school, the school must ensure compliance with the ABA Standards, which will require designing and administering the externship as a valuable and considered educational training program. This will already implicate many of the same concerns shared by the Department of Labor in Fact Sheet #71 under the FLSA.

As important, the principles in this area are far from clear. The Department has never, for example, embodied in any regulation or clear statement of policy its approach to externships at non-profit organizations, as opposed to state and local public agencies. Nor is it clear when an extern's activities as a permissible "volunteer" will cross the line and implicate the kind of concerns that led to the FLSA enforcement actions in *Alamo Foundation* and *Grand Central Partnership*. While it is possible that the Department may provide further guidance in this area, there is no information available as to when that might occur.

All of these factors suggest that the best course is simply to design all law school externships with the goal in mind – shared by the ABA and the Department of Labor – to make it a valuable training opportunity for the law student, rather than a chance for employers to obtain free student labor.

V. SOME "BEST PRACTICES" IN DESIGNING LAW SCHOOL EXTERNSHIPS

This Article has concluded, based on a close analysis of the governing statute, cases and agency interpretations, that unpaid law school externships at off-campus work sites will be viewed by the Department of Labor as permissible to the extent such placements meet the general six-part test developed by the Department to describe the parameters of "trainee" programs that are an exception to the wage and overtime requirements of the FLSA. As laid out at length above, under the Department's six-part test, it is important to design a law school externship so that it is clearly an educational training program, rather than merely providing work experience. This suggests that there are some "best practices" that are advisable in designing FLSA-compliant programs. Although not an exhaustive list, these best practices might include some of the following features.

Educating Host Organizations: It is important to ensure that the

host organizations understand and agree, from the outset, that the function and purpose of the externship program is to provide externs with an educational benefit, and that the externship program is not, for example, a job placement program to supply law students who can serve as temporary workers to meet the organization's needs. In its letter to the ABA, the Department expresses the benefit from the legal externship at issue in that letter as providing a law student with "professional practice in the furtherance of his or her education."¹⁵² The emphasis in these discussions between the law school and the extern hosts needs to be on the experience for the extern and on the educational benefits the extern will derive from the placement. Host organizations that express concern or hesitation about this focus, or have a more business-driven conception of the extern's role and assignments, should not be included in the externship program. Instead, they should be re-directed to the law school's Career Services staff with the recommendation that they consider hiring some of the law school's students as term-time law clerks, which would be more suited to their needs.

Written Materials and Agreements: It is critical to have clear, written materials, which may even be framed as agreements or memoranda of understanding, setting out the expectations of each of the participating parties, including the law school, the host organization, and the student. Both in discussions and in written materials, it is important that externs not be referred to as "employees" or "workers." While carefully drafted language in the accompanying documents will not save a program that is administered poorly, using the right terms will reinforce the true nature of the relationship to all involved and help to document these discussions for any later review.¹⁵³

The written materials should include documentation to ensure compliance with Factors Five and Six of the Department's test. Specifically, the intern and host organization should expressly agree in writing before the externship commences that: (a) the extern is not entitled to a job at the conclusion of the externship; and (b) the extern will not be entitled to wages for the time spent in the externship.¹⁵⁴ Again, the function of this writing is not only to document FLSA compliance to reinforce to all involved that the externship is a training program, and not a job. Some additional factors that should be ad-

¹⁵² DOL Letter to ABA, *supra* note 83, at 2.

¹⁵³ See, e.g., *Archie v. Grand Central Partnership, Inc.*, 997 F. Supp. 504 (S.D.N.Y. 1998) (in a case rejecting application of the "trainee" exception to FLSA, the court noted that contemporaneous documents used the term "workers" to describe the persons at issue, and that the only documents that described in other terms post-dated the company's knowledge of threatened litigation).

¹⁵⁴ See Fact Sheet#71, *supra* note 8, at 1.

dressed in the written materials are discussed further below.

Law School Oversight: It is important to ensure that the law school exercises continuing oversight of the externship experience and placements. Because the field placement is not a job, but a carefully designed educational program to provide students with direct exposure to the work lawyers actually do, the law school and host organization should work closely in shaping the experience for each intern, to ensure that both law school goals and FLSA standards are met. Each law school should, of course, structure its legal externships from the outset so that they are FLSA-compliant, but more than this, a law school also needs to administer its externship programs to ensure that the parameters are actually met in practice. An externship program that is in compliance with the FLSA's training exception only on paper is not likely to be given a pass if examined by the Labor Department or the courts.

Academic Credit: It is helpful, though not essential, that the externship be taken for law school credit. Fact Sheet #71 uses academic credit as one of the facts that suggests the externship is an extension of the educational experience, rather than a job. Thus, if an externship is given for academic credit – and/or in conjunction with courses given for academic credit – that fact is helpful in showing the educational purpose of the hands-on experience, and in reinforcing that the externship is an extension of and integral to the student's law school education.¹⁵⁵ By giving credit for the externship, the law school both recognizes the educational value of the externship and frees the student to devote himself or herself to the externship intensively during the law school term, while still earning credit toward graduation. Giving credit for the field placement also reinforces the law school's recognition that the experience is an integral part of the training required to become a competent and ethical practicing lawyer.

Indeed, as noted above, the ABA has just adopted an amendment to the ABA Standards for Approval of Law Schools that requires law students to take six credits in experiential courses during law school in order to graduate. These experiential credits include, though they are not limited to, field placements through externships.¹⁵⁶ This revised Standard reinforces that externships are indeed an educational experience required as part of the student's legal

¹⁵⁵ At the same time, an externship that is well-designed should be able to meet the requirements for exclusion from FLSA even if it is not taken for academic credit. The Department of Labor, in its exchange with the ABA, indicated that law students who interned at private law firms working on *pro bono* matters only, under the conditions posed by the ABA, would be excluded from FLSA coverage "whether or not any academic credit is provided." DOL Letter to ABA, *supra* note 83, at 2.

¹⁵⁶ ABA Standards, *supra* note 3, Standard 303(a)(3).

training.

Similarity to Law School Clinic Experience: Externships that involve field placements should, to the extent possible, mimic the experience that a student would have in a law school legal clinic to show that the externship is indeed, to quote Factor One, “similar to training which would be given in an educational environment.” In analyzing FLSA coverage of an externship program, the Department of Labor’s 1988 letter expressly compared a legal externship to the experience a student would receive in a “law school clinical programs.”¹⁵⁷

Law school clinics are governed by the ABA Standards, which specify certain requirements for a law student’s experience in a school-run law clinic. In an in-school clinic, the law school must afford opportunities for students to represent or advise “actual clients,” must provide “direct supervision” of the student’s performance by faculty, and must allow opportunities for student “performance,” for faculty “feedback,” and for student “self-evaluation,” as well as including an instructional component.¹⁵⁸

The more an externship program is designed to parallel a law school clinic experience at the same school, the easier it will be to show that the field placement is comparable to the training that the student would receive at the law school itself. Looking to the ABA Standards, some key components, in this regard, are (a) ensuring that students receive direct supervision and meaningful feedback in connection with the student’s performance, as they would if they were engaging in client representation within a law school clinic; and (b) designing the program so that students are called upon to reflect upon their practice experiences and to engage in self-evaluation of their legal skills and areas for improvement.¹⁵⁹ Satisfying these elements will help establish compliance both with the ABA and with the FLSA exclusion for training programs.

Assignments during the Externship: Monitoring and regulating the types of assignments given to the law student as an extern is also an essential component of ensuring FLSA compliance. To ensure that problems with the FLSA will not arise, law student externs should be given substantive legal work, and not assigned to menial labor or non-legal tasks, so that the externship will, indeed, provide meaningful training. In approving the ABA *pro bono* programs at private law firms, the Department of Labor provided some guidance in this regard

¹⁵⁷ DOL Letter to ABA, *supra* note 8, at 2.

¹⁵⁸ *Id.*

¹⁵⁹ See also ABA Standards, *supra* note 3, Standard 305(e)(7) (requiring that a field placement program, such as an externship, provide for “opportunities for student reflection on their field placement experience”).

by describing both the types of assignments that will be treated as part of the law student's legal education and those that will not qualify the student extern for exclusion from the FLSA. Both comments are helpful here.

The Department has described favorably a legal internship program that engages law students in substantive legal work, as follows:

Where law firm internships involve law students participating in or observing substantive legal work, such as drafting or reviewing documents or attending client meetings or hearings, the experience should be consistent with the educational experience the intern would receive in a law school clinical program.¹⁶⁰

On the other hand, the Department has emphasized that an extern assigned to perform "routine non-substantive work that could be performed by a paralegal" would instead be considered an employee subject to FLSA. The same guidance is echoed in Fact Sheet #71, which emphasizes that in a proper training program, an intern will be assigned to perform "routine work of the business on a regular and recurring basis."¹⁶¹

These sources suggest that it is important to make sure that the legal extern is being assigned to do substantive work that is legal in nature, and is not being assigned either to non-legal work or to menial tasks of the type that would otherwise be performed by a paralegal or a legal secretary. It is also important that the work be varied, to give the extern skills in a number of areas.¹⁶²

Duration of the Externship: On a related point, as a natural matter, law school externships will typically track the length of a law school semester. This is another factor that could be important in showing that the externship is part of a coordinated educational experience. Prior Labor Department guidance suggests that it is important that the externship be of an appropriate, and limited, duration in time – and that the specific duration of the externship be determined with the educational goals of the field placement in mind.¹⁶³ In the law

¹⁶⁰ DOL Letter to ABA, *supra* note 83, at 2.

¹⁶¹ Fact Sheet #71, *supra* note 8, at 2.

¹⁶² *Cf.* U.S. DEPARTMENT OF LABOR, WAGE AND HOUR DIVISION, OPINION LETTER (Oct. 7, 1975) (noting that a high school externship program designed to allow students to engage in activities in connection with career education should be permissible if "students continue rotating in the career exploration cycle, without settling on one occupation or working an excessive length of time at one establishment in one occupation," but that it presents a "closer question" where a student "spends substantial time in one employer's establishment in one job").

¹⁶³ Indeed, it appears that at one time at least, the Department of Labor had a presumptive limit of thirteen weeks for the appropriate length of school-related internships. *See id.* (noting, in the context of a student internship program, that "generally, we will consider an employment relationship to exist where a student has been with an employer 13 weeks").

school context, this suggests that law schools should be hesitant to allow students to do more than one semester in the same field placement, unless it is clear that new skills will be taught and additional training provided in the second semester.

Avoiding Displacement of Regular Workers: In each case, the law school and the host organization should also be sensitive to the risk that a law student extern will be used improperly to meet the host's regular hiring needs or to perform work that would ordinarily be done by paid employees. Such practices will likely take the program outside of the narrow FLSA exception for training programs, and may result in treatment of the law students as "employees" for legal purposes.

The easiest cases in which to apply this principle are those in which, for example, a law firm that ordinarily hires summer associates and term-time law clerks decides instead to use unpaid law student externs. This would be a clear case of the student extern displacing regular paid employees, and the Department of Labor would likely require payment for the extern's services under FLSA. The same would be true if a law firm were able to reduce its regular staff by adding an externship program. Similarly, a law firm that agrees to take on externs because it has an unusually large client matter that is beyond the capacity of its existing staff should raise red flags. In such cases, the circumstances should suggest that the host may be taking on the law student extern for the firm's own immediate financial benefit, rather than for the purpose of assisting with the student's education and mentorship.

Similarly, in discussions about participation in the externship program, a law firm or company should not view participation in the externship program as an opportunity to save costs by reducing the budget attributable to support staff or contract lawyers. A sensitive understanding on the part of the host organization as to what the externship program is – and is not – is essential, as is careful monitoring or project assignments by both the law school and the host supervisor. To reinforce this message, it may be advisable for the written agreement to call upon a host organizations to acknowledge expressly that it understands that unpaid student externs cannot be used as a stand-in for compensated workers, and that an externship program will not be a budgetary cost-savings measure and will necessarily result in some supervisory burdens to the organization.¹⁶⁴

This position is from a 1975 opinion letter, and it is not clear whether that guideline is still in force. It does, however, fairly closely track the general length of externship taken over a law school semester.

¹⁶⁴ See *Glatt v. Fox Searchlight Pictures, Inc.*, 2013 WL 2495140 (S.D.N.Y. 2013) (rely-

On-Site Supervision of Externs: Another component of an educational program is, of course, supervision and instruction from an experienced mentor—here, a lawyer at the host organization. The Department of Labor has expressly emphasized that supervision by licensed attorneys “provides an educational benefit to the law student.”¹⁶⁵

Billable Hour Issues: Certain special issues related to billing need to be dealt with up front in creating any externship program that contemplates placement in private, for-profit law firms. Private law firms commonly bill their clients based on the hours spent by lawyers and other staff members on the client’s matters. This presents two issues, as discussed above. The first is that allowing a firm to bill a client for time spent by an unpaid extern would be the type of “immediate advantage” to the firm that would take the externship outside of the training exception recognized by the Department (and require the firm to compensate the law student as it would a regular employee). The second is that billing pressures within private law firms make it particularly important to ensure that lawyers within the firm are providing adequate training and oversight to the law student externs.

Thus, when placing students in externships in private law firms, a law school should be particularly careful to ensure that the law firm understands the nature of the program and its responsibilities, and should be selective in which private for-profit law firms it accepts for participation in an externship program. The law firms should agree to keep records documenting the time spent supervising externs. Obviously, there should also be a flat prohibition on charging clients for the legal work performed by unpaid law student externs, as well as a ban on billing clients for the time spent by lawyers in supervising the student externs.¹⁶⁶

CONCLUSION

This Article has set out to accomplish a necessary, if technical, next step in the evolution of law school experiential education: determining whether, and how, law school externships that provide critical training for law students can be squared with important federal laws designed to protect those students when they are instead working as

ing on evidence that if the interns “had not performed these tasks for free, a paid employee would have been needed”).

¹⁶⁵ DOL Letter to ABA, *supra* note 83, at 2.

¹⁶⁶ There are, undoubtedly, many other “best practices” that could be included in this list. I do not mean to disregard the fine program brochures and guidance developed by many law schools in connection with their externship programs, many of which incorporate “best practices” in this area.

employees in the same types of legal settings. In the course of doing so, I have demonstrated that the interests of the law school and the law student mesh with the concerns of the Labor Department in enforcing the FLSA. Both are concerned to make sure that unpaid legal externships provide meaningful training and educational experiences for law students and are not misused by legal employers to take advantage of unpaid student labor. In so doing, this Article not only clarifies the right way to think about law school externships but also responds to a common, if unjustified, critique of law school externship programs: if students are working, why aren't they getting paid – and why are they paying the law school for the work experience?¹⁶⁷ The answer is, of course, that they are *not* working. Instead, law student externs are receiving valuable, supervised training in the field that is overseen and administered by the law school.

There is a serious issue with the cost of law school tuition, but focusing this critique on externships is misplaced. Properly understood, externships are not simply job placements obtained through an office at the law school, but valuable training programs that require extensive oversight and management by the law school and are accompanied by a carefully designed academic component. If a similar approach were taken to breaking down the “worth” of different curricular offerings at law schools, one might as aptly critique large lecture courses on the ground that students aren't getting their “money's worth.” In fact, however, all of the varied components of a law school's program – including doctrinal classes and experiential field placements – are important in giving students a complete, varied, and effective education in the law. The good news, in this regard, is that the research laid out in this Article suggests that the law school externships can be a legally permissible part of this process under the FLSA, even in for-profit settings such as corporations and law firms, and that FLSA obstacles can be overcome when law school externship programs are designed carefully and administered diligently.

¹⁶⁷ See, e.g., Mark Chandler, *Letting 3Ls Earn Both School Credit and Pay for Externships Could Make a Dent in Debt Crisis*, ABA J., Oct.16, 2013 (proposing to revise ABA Standards so that law students do not have to pay tuition during field placements, and tuition can be paid instead by host companies), available at http://www.abajournal.com/legalrebels/article/mark_chandler_3L_externship_law_students_debt/.

