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Fact Sheet #71: Shortchanging the Unpaid Academic Intern

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FACT SHEET #71: SHORTCHANGING THE UNPAID
ACADEMIC INTERN

*Patricia L. Reid**

Abstract

On the eve of the Fair Labor Standards Act's seventy-fifth anniversary, unpaid academic internships threaten to outpace government regulation and undermine opportunities for gainful employment. Although coveted by students eager to fill a line on their résumé, unpaid academic internships are a subspecies of unpaid internships that might soon face extinction. While the advent of unpaid internship litigation decreases the likelihood that employers will plead ignorance of the law when they defend against disgruntled unpaid interns, recent litigation does little to clear up a half-century of contradictory case law. The only certainty that surrounds the legal status of unpaid academic internships is that Fact Sheet #71, the current regulatory mechanism, shortchanges the unpaid academic intern. Fact Sheet #71's six-prong test neither affords meaningful protection nor fosters beneficial learning opportunities.

Congress must exchange Fact Sheet #71's old currency for a new currency, a currency that invests in America's future and fosters meaningful internship opportunities for students. The key to effective regulation is distinguishing between educationally beneficial and educationally deficient unpaid internships. This distinction will simultaneously safeguard students from unfair employment relationships and allow students to prosper in educationally beneficial opportunities. To successfully revise the current regulations, Congress must first understand why the six-prong test fails to promote uniform interpretation and application. Second, Congress must delegate its regulatory power to the Department of Education, the most qualified agency to measure the educational value of unpaid academic internships. And third, Congress must codify a new test, one that provides a predictable legal framework on which students and employers can rely. Only then, when Congress exchanges its old regulations for new, will Congress stop shortchanging students and invest in their future.

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INTRODUCTION

In an era in which over one-third of college students complete an internship before graduation,¹ internships are “key in today’s economy”² and “the gateway into the white-collar work force.”³ Career experts proclaim that “the academic experience alone is just not

1. Menachem Wecker, *10 National Universities That Produce the Most Interns*, US NEWS & WORLD REP. (Nov. 20, 2012), <http://www.usnews.com/education/best-colleges/the-short-list-college/articles/2012/11/20/10-national-universities-that-produce-the-most-interns> (noting that, among ranked colleges that report internship data, 36.9% of students had an internship). Some colleges’ internship participation rates are much higher. For example, eighty-six percent of Clarkson University graduates interned, a statistic that earned the school the right to claim that it had “the largest percentage of interns among the class of 2011.” *Id.*

2. Beth Braccio Hering, *Why Are Internships So Important?*, MSN CAREERS (Mar. 1, 2010, 12:36 PM), <http://msn.careerbuilder.com/Article/MSN-2202-College-Internships-First-Jobs-Why-Are-Internships-So-Important> (internal quotation marks omitted).

3. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), <http://www.nytimes.com/2010/04/03/business/03intern.html> (internal quotation marks omitted).

enough.”⁴ These experts urge students to “get as many internships as [they] possibly can” because “[g]etting a degree doesn’t mean [they will] get a job.”⁵ Companies like Dream Careers, Inc. (f/k/a University of Dreams) detect this mounting pressure and convince ambitious students and gullible parents to pay as much as \$10,000 for an unpaid “guaranteed internship placement” with a desirable name like DreamWorks, Dolce & Gabana, or Merrill Lynch.⁶ Whether bought or earned, unpaid internships are everywhere,⁷ even in the White House.⁸

Of the 1.5 million internships in the United States, nearly half are unpaid.⁹ What about internships is so desirable that around 750,000 people work for free each year?¹⁰ Perhaps the opportunity to acquire a new profession’s skills entices students.¹¹ Maybe they seek “real life

4. Kate Merrill, *Employers Taking Advantage of Unpaid Interns*, CBS BOS. (June 28, 2012, 11:59 PM), <http://boston.cbslocal.com/2012/06/28/survey-questions-benefits-of-unpaid-internships> (internal quotation marks omitted).

5. Alan Farnham, *Job Prospects for New Grads Best Since Recession*, ABC NEWS (May 15, 2012), <http://abcnews.go.com/Business/jobs-outlook-college-graduates/story?id=16345862> (internal quotation marks omitted).

6. See generally DREAM CAREERS, <http://www.summerinternships.com> (last visited June 17, 2014). For a list of prospective employers, see *Employer List*, DREAM CAREERS, <http://www.summerinternships.com/employerList> (last visited June 17, 2014). Regarding Dream Careers’ tuition, see Kristen Sze, *Students Pay Big Bucks for Internships*, ABC 7 NEWS (Feb. 6, 2009), <http://abclocal.go.com/kgo/story?section=news/education&id=6644672> (“[F]ees range from \$5,000 to \$10,000 . . .”).

7. While still a staple of industries such as film and journalism, unpaid internships now permeate nearly every field, including fashion, publishing, marketing, public relations, art, law, and medicine. Tracie Powell, *How to Tell When Unpaid Internships Are Opportunities, When They’re Abuse*, POYNTER (May 10, 2012, 10:51 AM), <http://www.poynter.org/how-tos/career-development/173377/how-to-tell-when-unpaid-internships-are-opportunities-when-theyre-an-abuse> (last updated May 10, 2012, 2:58 PM).

8. *Internship Timeline and FAQs*, WHITE HOUSE, <http://www.whitehouse.gov/about/internships/FAQs> (last visited June 17, 2014). In early 2010, the Committee on Oversight and Government Reform investigated the White House’s unpaid internship program. Letter from Darrell Issa, Ranking Member, Comm. on Oversight & Gov’t Reform, to Barack Obama, President, U.S. (Apr. 12, 2010), available at <http://online.wsj.com/public/resources/documents/IssaLettertoPOTUS-Interns.pdf>. Despite groups’ attempts to affect change, the White House internships remain unpaid due to an exception to minimum wage laws for unpaid internships with government agencies. Julia Fisher, *Revealed: The Insiders Whose Kids Got White House Internships*, NEW REPUBLIC (Sept. 24, 2013), <http://www.newrepublic.com/node/114844>.

9. Paul Davidson, *Fewer Unpaid Internships to Be Offered*, USA TODAY (Mar. 7, 2012, 7:59 PM), <http://usatoday30.usatoday.com/money/workplace/story/2012-03-07/summer-internships-paid-unpaid/53404886/1>. There are no official records of the total number of unpaid internships. See Natalie Bacon, Note, *Unpaid Internships: The History, Policy, and Future Implications of “Fact Sheet #71,”* 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 69 (2011).

10. Davidson, *supra* note 9.

11. KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, DEMOS, PAVING THE WAY THROUGH PAID INTERNSHIPS: A PROPOSAL TO EXPAND EDUCATIONAL AND ECONOMIC OPPORTUNITIES FOR LOW-INCOME COLLEGE STUDENTS 3 (2010), available at http://www.demos.org/sites/default/files/publications/PavingWay_PaidInternships_Demos.pdf.

experience” outside the classroom.¹² Or maybe students view internships as a foot in the door to future employment.¹³ Either way, the fact that 84% of college students plan to intern before they graduate¹⁴ illustrates the mass appeal of internships.

While many commentators praise the unpaid academic internship system, others find fault with its very core. Some, for example, condemn the system for its indirect exclusion of students of modest means¹⁵ and its disproportionate exclusion of minorities.¹⁶ Others lament the loss of tax revenues that support Social Security, unemployment, and workers’ compensation premiums.¹⁷ Critics blame wage depression on an oversupply of free interns.¹⁸ They often blame universities and colleges for “farm[ing] out” free labor in exchange for easy tuition dollars.¹⁹ But what most alarms critics is the tendency of unpaid internships to depress interns’ expectations and to create overidentification with employers.²⁰ Scholars therefore worry that unpaid internships ultimately damage the career prospects of young interns.²¹

12. *Why You Need an Internship*, HISP. SCHOLARSHIP FUND (internal quotation marks omitted), <http://web.archive.org/web/20101215065716/http://hsf.net/cCenter-inner.aspx?id=2564> (archived copy) (last visited June 17, 2014).

13. EDWARDS & HERTEL-FERNANDEZ, *supra* note 11, at 3.

14. Anya Kamenetz, *Take This Internship and Shove It*, N.Y. TIMES (May 30, 2006), <http://www.nytimes.com/2006/05/30/opinion/30kamenetz.html>.

15. EDWARDS & HERTEL-FERNANDEZ, *supra* note 11, at 3. In a recent exposé, the White House’s internship program was yet again under fire, this time for its focus on the privileged and for its failure to “represent a cross section of the nation.” Fisher, *supra* note 8; *see also* Ginia Bellafante, *Seeking Chic, Brilliant Intern to Thread Needles (No Pay)*, N.Y. TIMES (Sept. 15, 2012), <http://www.nytimes.com/2012/09/16/nyregion/seeking-chic-edgy-brilliant-intern-to-thread-needles-free.html> (noting that unpaid internships “deprive[] an entire class of people from whole categories of entry-level work”).

16. Ross Eisenbrey, *Unpaid Internships Hurt Mobility*, ECON. POL’Y INST. BLOG (Jan. 5, 2012, 3:42 PM), <http://www.epi.org/blog/unpaid-internships-economic-mobility>.

17. Ross Eisenbrey, *Unpaid Internships: A Scourge on the Labor Market*, ECON. POL’Y INST. BLOG (Feb. 7, 2012, 2:54 PM), <http://www.epi.org/blog/unpaid-internships-scourge-labor-market>.

18. *See* Kamenetz, *supra* note 14.

19. Eisenbrey, *supra* note 17; Lydia Emmanouilidou, *Internship Courses Raise Controversy*, JUSTICE (Jan. 28, 2014), <http://www.thejustice.org/news/internship-courses-raise-controversy-1.3133566#.UuhE12Qo4y4> (last updated Jan. 28, 2014). Colleges and universities exploit unpaid interns in other manners, too. Some, for example, fill paid positions on their campuses with unpaid interns. In particular, undergraduate athletic and business departments are the subject of recent criticism and lawsuits. Casey McDermott, *You Know Who Else Uses Unpaid Interns? Colleges and Universities*, PAC. STANDARD (Dec. 30, 2013, 2:00 PM), <http://www.psmag.com/navigation/business-economics/know-else-uses-unpaid-interns-colleges-universities-72118>.

20. Kamenetz, *supra* note 14.

21. In 2013, a National Association of Colleges and Employers survey found that students who accept unpaid internships are at a later disadvantage when they negotiate for their first salary. The study found that students who work as unpaid interns make on average over \$16,000

As the number of internships rises,²² the unemployment rate among young workers sits at an unprecedented high.²³ In 2010, for example, the total number of unemployed workers included a disproportionate percentage of young workers between the ages of sixteen and twenty-four.²⁴ Though this age group comprised only 13% of the labor force, they comprised 26% of the unemployed.²⁵ Unemployment among young workers reached 19.6% in 2010—the highest unemployment level for the age group since 1947, when the Bureau of Labor Statistics first recorded unemployment rates.²⁶ A period of unemployment early in life “can have lasting negative effects on future earnings, productivity, and employment opportunities.”²⁷ Some commentators worry that, after the economy recovers, employers will permanently rely on unpaid interns to cut costs.²⁸ Commentators worry that unpaid internships, like prolonged spells of unemployment, will damage the future job prospects of today’s young workers.²⁹

Similar risks caught Congress’s attention several decades ago when, in 1938, Congress tasked the Department of Labor (DOL) Wage and Hour Division (WHD) to ensure employer compliance with the Fair Labor Standards Act (FLSA)³⁰ and to protect the interests of young

less in their first year than students who worked as paid interns. Students with previous unpaid internship experience make over \$1,300 less than students with no prior internship experience. *Class of 2013: Paid Interns Outpace Unpaid Peers in Job Offers, Salaries*, NAT’L ASS’N CS. & EMPLOYERS (May 29, 2013), <http://www.nacweb.org/s05292013/paid-unpaid-interns-job-offer.aspx>.

22. Bacon, *supra* note 9, at 69.

23. Alexander Eichler, *Employment Rate for Young Adults Lowest in 60 Years*, *Study Says*, HUFFINGTON POST (Feb. 9, 2012, 12:01 AM), http://www.huffingtonpost.com/2012/02/09/employment-rate-young-adults_n_126424.

24. U.S. CONG. JOINT ECON. COMM., UNDERSTANDING THE ECONOMY: UNEMPLOYMENT AMONG YOUNG WORKERS 1 (2010), *available at* http://www.jec.senate.gov/public/?a=Files.Serve&File_id=adaef80b-d1f3-479c-97e7-727f4c0d9ce6.

25. *Id.*

26. *Id.*

27. *Id.*

28. *E.g.*, *Unpaid Internships: Not Just the Economy*, SKILLEDUP, <http://www.skilledup.com/unpaid-internships-not-just-the-economy> (last visited June 17, 2014). Scholars who compare current unemployment rates with post-recession unemployment rates—not all recorded rates—are less worried about the economy that young workers face. Farnham, *supra* note 5. Others are less worried because they believe that unpaid internships will never replace entry-level jobs because “[the] two roles aren’t cut from the same cloth,” “[t]he pay and benefits aren’t equal,” “[i]nterns have no legal protection,” and “[i]nternships don’t guarantee full-time employment.” Heather R. Huhman, *4 Reasons Internships Aren’t the New Entry-Level Jobs*, PARADE (Jan. 28, 2014, 12:00 PM), <http://parade.condenast.com/253997/heatherhuhman/4-reasons-internships-arent-the-new-entry-level-jobs>.

29. U.S. CONG. JOINT ECON. COMM., *supra* note 24, at 1.

30. *See generally* 29 U.S.C. §§ 201–219 (1940). Congress enacted the Fair Labor Standards Act in 1938. The Act established a variety of standards for minimum wage, overtime pay, business recordkeeping, and youth employment. *See id.* The Act collides with unpaid

workers.³¹ After the U.S. Supreme Court decided the seminal unpaid-worker case, *Walling v. Portland Terminal, Co.*,³² WHD developed the Court's analysis into a six-prong test to accomplish these goals.³³ From that point forward, WHD used the six-prong test to determine a worker's entitlement to a minimum wage.³⁴

Subsequent courts continued to quarrel over the proper test to apply to unpaid worker lawsuits. As a result, the six-prong test's interpretation and application in judicial settings was far from uniform. WHD's memorialization of a simplified form of the six-prong test in Fact Sheet #71 did little to clarify the law, and now, after simmering for over sixty years, the courts' disagreements form the basis of a wave of unpaid-internship litigation.

This wave of challenges to the legality of unpaid internships requires courts to reinterpret *Portland Terminal*, Fact Sheet #71, and other precedent. If courts unquestioningly accept Fact Sheet #71 and its six prongs, then their holdings could signal the "beginning of the end"³⁵ for unpaid academic internships as employers cut internship programs in response to the increased legal risk.³⁶

Even though college graduates and middle-age workers now join the ranks of unpaid interns, this Note focuses only on unpaid academic internships. As such, it proposes a sustainable legal solution crafted specifically for students who seek academic credit as compensation for their work with private employers. Part I of this Note provides essential

internships because interns covered under the Act are entitled to a minimum wage, currently \$7.25 per hour. *Compliance Assistance – Wages and the Fair Labor Standards Act (FLSA)*, U.S. DEP'T OF LABOR [hereinafter *Compliance Assistance*], <http://www.dol.gov/whd/flsa/index.htm> (last visited June 17, 2014). See *infra* Sections I.B–C for more discussion of the six factors WHD uses to determine whether the FLSA applies to an intern and thus entitles the intern to receive a minimum wage.

31. WHD created Fact Sheet #71 as a nonbinding source "for general information . . . not to be considered in the same light as official statements of position contained in regulations." WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter FACT SHEET #71], <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

32. 330 U.S. 148 (1947). *Portland Terminal* held that railroad company trainees were not employees, so the Fair Labor Standards Act did not prohibit the railroad company from training them without paying them the applicable minimum wage. *Id.* at 153.

33. See 1 LES A. SCHNEIDER & J. LARRY STINE, WAGE AND HOUR LAW § 3:13 & n.6 (Westlaw updated Mar. 2014).

34. *Id.* § 3:13 ("Wage and Hour has taken the position that a person who meets all six of the following criteria is a trainee: . . .").

35. Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), <http://moneyland.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it>.

36. Davidson, *supra* note 9; see Kit Johnson, *The Wonderful World of Disney Visas*, 63 FLA. L. REV. 915, 943 (2011) (noting that the Walt Disney Company does not sponsor unpaid internships).

background to the unpaid internship debate. It begins with an analysis of the fundamental case that yielded the current employment status test, and then discusses the test's economic context and subsequent application to unpaid internships. Part II details the state of today's economy by tracking current unpaid internship litigation. It also explores three proposals to change current unpaid internship regulation by addressing the unique challenges today's economy presents.

Part III proposes a new form of unpaid academic internship regulation: a modified version of DOL's six-prong test and Congress's delegation of regulatory power over unpaid academic internships to the Department of Education (ED). This solution empowers the agency that is best equipped to evaluate the academic value of unpaid internships and to balance minimum wage concerns. Finally, this Note concludes with a discussion of how Congress's delegation of regulatory power to ED will affect unpaid internships and why such changes are desirable.

I. THE HISTORY OF INTERNSHIP REGULATION

Modern internship regulation began in 1938, when Congress enacted FLSA.³⁷ Congress tasked WHD to protect workers and to ensure employer compliance with FLSA's minimum wage standard.³⁸ Even though the minimum wage standard is perhaps the most important aspect of internship regulation, it was not until 1947 that the Supreme Court heard a case that involved unpaid workers and their potential entitlement to minimum wage.³⁹ The case, *Walling v. Portland Terminal, Co.*, motivated WHD's later attempts to regulate unpaid internships and sparked the confusion that surrounds unpaid internships today.

A. *Walling v. Portland Terminal, Co.: Where the Internship Train First Derailed*

The U.S. Supreme Court's 1947 decision in *Walling v. Portland Terminal, Co.* forms the basis for WHD's Fact Sheet #71.⁴⁰ In *Portland Terminal*, the Supreme Court contemplated whether a railroad company violated FLSA when it refused to compensate prospective yard brakemen with a minimum wage.⁴¹ As part of its employment process, the railroad company required prospective yard brakemen to attend an unpaid practical-training program.⁴² The railroad company never hired workers who failed to complete the program—program completion was

37. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19 (1940).

38. *Id.*; *Compliance Assistance*, *supra* note 30.

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

40. *Compare id.* at 149–50, 152–53, with FACT SHEET #71, *supra* note 31.

41. *Portland Terminal*, 330 U.S. at 150.

42. *Id.* at 149, 150.

essential to earn the railroad company's trust.⁴³

Upon completion of the training program, the railroad company offered some of the prospective yard brakemen jobs.⁴⁴ The railroad company placed some of the others into a pool of available qualified yard brakemen who could work on an as-needed basis.⁴⁵ Only the brakemen whom the railroad company hired would receive a retroactive allowance of \$4 per day of training.⁴⁶

The main issues in *Portland Terminal* were whether all of the prospective yard brakemen "trainees" qualified as "employees" under FLSA and whether all of the prospective yard brakemen deserved minimum wage compensation for their participation in the training program.⁴⁷ To resolve the question, the Court examined several factors that are now collectively known as the *Portland Terminal* test.⁴⁸

First, the Supreme Court found that the prospective brakemen did not displace regular workers.⁴⁹ Instead, they required constant supervision by regular employees who "d[id] most of the work themselves."⁵⁰ Second, FLSA did not govern the relationship because the railroad company did not promise the brakemen a job or remuneration for their participation in the program.⁵¹ Third, the railroad company provided the brakemen with practical training that was similar to the instruction the workers would receive from a vocational school.⁵² The Supreme Court decided not to penalize the railroad company when it provided the same education free of charge.⁵³ Fourth, the training primarily benefited the brakemen.⁵⁴ Similar to students who attend school to receive an education, the brakemen learned the skills of a new trade in the training program.⁵⁵ And fifth, the brakemen's presence afforded the railroad company no immediate advantage.⁵⁶ Instead, the brakemen's presence impeded the railroad company's operation.⁵⁷

43. *Id.* at 149.

44. *Id.* at 150.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 149–50.

49. *Id.*

50. *Id.* at 150.

51. *Id.*

52. *Id.* at 149.

53. *Id.* at 153.

54. *Id.*

55. Justice Black wrote for the Court and argued that FLSA permitted persons to "work for their own advantage on the premises of another." *Id.* at 152. "Otherwise," he argued, "all students would be employees of the school or college they attended, and as such entitled to receive minimum wages." *Id.*

56. *Id.* at 153.

57. *Id.* at 150.

After the Supreme Court considered each of the factors, it concluded that the prospective yard brakemen were trainees and not employees entitled to receive a minimum wage.⁵⁸ With these factors, the Supreme Court christened the law's first voyage into internship regulation.

B. *Precedent Meets the Modern Internship*

Portland Terminal prompted decades of disparate applications of the test. Shortly after the Supreme Court decided *Portland Terminal*, WHD developed six factors to determine whether FLSA requires an employer to pay a minimum wage.⁵⁹ It was not until 2010, however, that WHD developed Fact Sheet #71 and applied these factors to unpaid internship scenarios.⁶⁰ Now, according to WHD's test, for-profit companies may use intern labor without paying a minimum wage if the internship meets six criteria:

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.⁶¹

Even with the help of this iteration of the test, courts do not uniformly apply FLSA to unpaid internship cases. For example, a district court in the Second Circuit, and the Fourth, Fifth, and Tenth Circuit Courts of Appeal each apply a different test, not all of which incorporate WHD's six factors.⁶² Thus, employer "compliance with the law is [still] nearly impossible."⁶³

58. *Id.* at 153.

59. See 1 SCHNEIDER & STINE, *supra* note 33, § 3:13 & n.6.

60. FACT SHEET #71, *supra* note 31.

61. *Id.*

62. Archie v. Grand Cent. P'ship, Inc., 997 F. Supp. 504, 531–35 (S.D.N.Y. 1998); McLaughlin v. Ensley, 877 F.2d 1207, 1209 n.2 (4th Cir. 1989); Hopkins v. Cornerstone Am., 545 F.3d 338, 343 (5th Cir. 2008); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993).

63. Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1546 (2010).

A district court from the Second Circuit adopts the most inclusive approach to unpaid internship cases. It considers the individual elements of WHD's six-factor test as part of a more in-depth analysis.⁶⁴ In *Archie v. Grand Central Partnership, Inc.*, for example, the court held that a company violated FLSA's minimum wage requirements when it "failed to [first] show that under the six-factor test, the [homeless participants in its PTE Training Program] were trainees rather than employees."⁶⁵ The court recognized that though WHD's test is "not determinative of whether a person is an employee under the FLSA, it is a factor to be weighed in the analysis."⁶⁶

The Fourth Circuit, on the other hand, rejects the six-prong test and applies its own "principal benefit" test.⁶⁷ Although the Fourth Circuit and the Second Circuit make many of the same factual inquiries to determine whether a worker deserves a minimum wage, the circuits ultimately split over their interpretation of *Portland Terminal*. In *Isaacson v. Penn Community Services*, the Fourth Circuit interpreted *Portland Terminal* to hold that when the employer "received no 'immediate advantage' from the trainees' services,"—essentially, when "the principal purpose of the seemingly employment relationship was to benefit the person in the employee status"—FLSA does not protect the worker.⁶⁸

The Fifth Circuit uses a less popular "economic realities" test to focus on workers' economic dependence on their employers.⁶⁹ Though the economic realities test involves a few of the same inquiries—such as the degree of supervision a worker receives—the economic realities test is otherwise distinct.⁷⁰ It encompasses five factors that range from "the extent of the relative investments of the worker and the alleged employer" to "the skill and initiative required in performing the job."⁷¹ Courts infrequently apply the economic realities test to unpaid internship cases, however, and more commonly apply it to cases that distinguish between employees and volunteers.⁷² As such, this test exerts limited influence over unpaid academic internship cases.

And finally, the Tenth Circuit uses WHD's six-prong test as part of a totality of the circumstances analysis.⁷³ It rejects an "all or nothing" approach to WHD's test, and instead applies the test as a "relevant but

64. *Archie*, 997 F. Supp. at 531–35.

65. *Id.* at 533, 535.

66. *Id.* at 533.

67. *McLaughlin*, 877 F.2d at 1209 & n.2, 1210.

68. *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971).

69. *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008).

70. *Id.*

71. *Id.*

72. *E.g., Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 293 (1985).

73. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993).

not conclusive . . . determination of whether . . . trainees [are] employees under the FLSA.”⁷⁴ As such, even when a defendant fails to satisfy one prong of WHD’s test, like in *Reich v. Parker Fire Prot. Dist.*, the Tenth Circuit can still find that prospective workers or interns are trainees and not employees.⁷⁵ In the Tenth Circuit, a “single factor cannot carry the entire weight of an inquiry into the totality of the circumstances.”⁷⁶

Not all circuits readily adopt aspects of Fact Sheet #71’s six-prong test, however. In *Solis v. Laurelbrook Sanitarium & School Inc.*, the Sixth Circuit described WHD’s test as a “poor method for determining employee status in a training or educational setting” and ultimately rejected the six-prong analysis for three reasons.⁷⁷ First, the *Solis* court found the test “overly rigid and inconsistent with a totality-of-the-circumstances approach, where no one factor (or the absence of one factor) controls.”⁷⁸ Second, the *Solis* court identified precedent that “found the test’s all-or-nothing approach inconsistent with prior WHD interpretations and opinions endorsing a flexible approach, thereby diminishing any persuasive force the test might be entitled to.”⁷⁹ And third, the *Solis* court found WHD’s test to conflict with *Portland Terminal*.⁸⁰

Though it noted that the Supreme Court considered “various other facets of the relationship” between the trainees and the railroad company, the Sixth Circuit believed the *Portland Terminal* decision rested more upon “whether the trainees received the primary benefit of the work they performed.”⁸¹ Accordingly, the Sixth Circuit developed the primary benefit test as a substitute for WHD’s six-prong test.⁸² Because *Solis* found that the high school students received the primary benefit from their work in the school’s sanitarium, the students were not entitled to receive a minimum wage.⁸³

Although *Solis* involves high school students,⁸⁴ the Sixth Circuit’s

74. *Id.* at 1026–27.

75. *Id.* at 1029.

76. *Id.*

77. *Solis v. Laurelbrook Sanitarium & Sch. Inc.*, 642 F.3d 518, 525 (6th Cir. 2011).

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 526.

82. *Id.* at 521, 526–29.

83. *Id.* at 519, 532. The Sixth Circuit did not reach this conclusion by adopting the defendant high school’s argument that *Portland Terminal* stood for the proposition that vocational students are automatically classified as non-employees. Instead, the Sixth Circuit squarely rejected this argument because its basis was in the dicta of *Portland Terminal*, not the holding. *Id.* at 523–24.

84. *Id.* at 520.

reasoning would likely yield the same result in an unpaid academic internship case that involves undergraduate students. In both scenarios, the courts would consider the same factors, which would include: the amount of on-site supervision the student receives, whether competition for labor exists, whether the student's academic credits transfer to other institutions, and whether the employer promises a future job.⁸⁵ Given the similarities between the facts in *Solis* and the facts many unpaid academic internships present, *Solis* is poised to become a persuasive case in the consolidation and reinvention of unpaid academic internship regulation.

C. *The Advent of Unpaid Internship Litigation*

While *Solis* may persuade courts to adopt the primary benefit test in future unpaid academic internship cases, recent litigation could prove equally influential. Though these cases do not directly concern unpaid academic internships, if courts strictly adhere to Fact Sheet #71, then they could inadvertently extinguish unpaid academic internships: to eliminate the risk of adverse litigation, employers who cannot afford to pay minimum wage will likely discontinue their internship programs, even if their internships are academically beneficial.⁸⁶

The menace of minimum wage litigation frightens potential employers—the money they save by not paying interns does not seem worth the legal risk.⁸⁷ As a result, some interns will realize the benefits of current class action litigation if courts strictly adhere to Fact Sheet #71. Because some employers, like Fox Searchlight Productions, already converted previously unpaid internships into paid positions, students can learn new skills and receive a paycheck, too.⁸⁸

85. *Id.* at 530–31; *see also id.* at 521 (noting that the majority of practical training courses were approved by the state for transfer credit).

86. In October 2013, in the midst of unpaid internship litigation, Condé Nast announced that it intended to end its internship program. Blair Hickman & Casey McDermott, *2013: The Year of the Intern?*, NEW PITTSBURGH COURIER (Jan. 12, 2014), <http://newpittsburghcourieronline.com/2014/01/12/2013-the-year-of-the-intern>. Internship outsourcing is another potential consequence of unpaid internship litigation. If courts declare unpaid internships illegal, some companies vow to respond by “hir[ing] more interns overseas” because their “interns can work remotely from anywhere.” Melissa Schorr, *The Revolt of the Unpaid Intern*, BOS. GLOBE (Jan. 12, 2014), <http://www.bostonglobe.com/magazine/2014/01/12/unpaid-internships-are-they-doomed/vi8MVMlqfeJQHIMY3vlBpJ/story.html>.

87. Davidson, *supra* note 9.

88. In 2010, Fox Searchlight Productions announced plans to amend its internship program to pay all interns \$10 per hour. Joe Satran, *‘Black Swan’ Intern Lawsuit Proceeds, Striking Blow Against Unpaid Labor in Film*, HUFFINGTON POST (Aug. 24, 2012, 4:39 PM), http://www.huffingtonpost.com/2012/08/24/black-swan-intern-lawsuit_n_1828206.html (last updated Aug. 30, 2012, 9:02 PM). The move was undoubtedly intended to stave off future litigation, such as the minimum wage litigation brought by unpaid interns who worked on the *Black Swan* set. *Id.* Trial in that case was originally set for spring 2013, *id.*, though by June

Oftentimes, corporations settle lawsuits outside of court to avoid the specter of unlimited liability.⁸⁹ The Public Broadcasting Service (PBS), for example, recently agreed to settle a minimum wage violation class action lawsuit.⁹⁰ A former unpaid intern initiated the lawsuit when she claimed that her internship with the *Charlie Rose Show* violated New York labor laws.⁹¹ In order to avoid litigation (and potentially unfavorable precedent), PBS agreed to pay the lead plaintiff and 189 similarly situated former interns up to \$250,000 in back wages and \$50,000 in legal fees.⁹² To the lead plaintiff and to many others who watched the case unfold, the settlement marked “a really important moment for this movement against unpaid internships.”⁹³

Not every company, though, is as swift to shift its employment policies or settle class action lawsuits. Other companies prefer to defend against lawsuits and hope for favorable outcomes. Hearst Corporation, the owner of the magazine *Harper's Bazaar*, is one such company. Despite the onslaught of a recent unpaid intern class action, Hearst Corporation set out to “vigorously defend this matter.”⁹⁴ Throughout the litigation, the corporation steadfastly attested to the quality of its unpaid internship program: “The internship programs at each of our magazines are designed to enhance the educational experience of students who are

2013, the judge ruled that the interns were entitled to minimum wage. Steven Greenhouse, *Judge Rules that Movie Studio Should Have Been Paying Interns*, N.Y. TIMES (June 11, 2013), <http://www.nytimes.com/2013/06/12/business/judge-rules-for-interns-who-sued-fox-searchlight.html>. Perhaps what motivates such policy changes is the fact that “[m]inimum wage isn’t big dollars compared to the cost of a lawsuit.” Schorr, *supra* note 86 (internal quotation marks omitted).

89. Steven Greenhouse, *‘Charlie Rose’ Show Agrees to Pay Up to \$250,000 to Settle Interns’ Lawsuit*, N.Y. TIMES (Dec. 20, 2012, 12:34 PM), <http://mediadecoder.blogs.nytimes.com/2012/12/20/charlie-rose-show-agrees-to-pay-up-to-250000-to-settle-interns-lawsuit>. In the largest unpaid internship class action settlement to date, Elite Model Management agreed to pay \$450,000 to approximately 150 of the company’s former unpaid interns. In light of the \$50 million that the lead plaintiff, Daija Davenport, originally sought in unpaid wages, overtime pay, and attorneys’ fees under FLSA, however, \$450,000 is a small price for the corporation to pay. Ashley Mosley, *Why Unpaid Internships Are No Catwalk for the Fashion Industry*, HUFFINGTON POST (Jan. 28, 2014, 11:02 AM), http://www.huffingtonpost.com/ashley-mosley/why-unpaid-internships-are-no-catwalk-for-the-fashion-industry_b_4675855.html; Dhani Mau, *Elite Models to Fork Over \$450,000 to Unpaid Interns in Class Action Settlement*, FASHIONISTA (Jan. 13, 2014, 6:15 PM), <http://fashionista.com/2014/01/elite-models-to-fork-over-450000-to-unpaid-interns-in-class-action-settlement>; Jenna Zhang, *Elite Model Management Settles with Former Unpaid Interns*, CHRONICLE (Durham, NC) (Jan. 22, 2014), <http://www.dukechronicle.com/articles/2014/01/22/elite-model-management-settles-former-unpaid-interns>.

90. Greenhouse, *supra* note 89.

91. *Id.*

92. *Id.*

93. *Id.*

94. Christopher Zara, *Hearst Corp. Seeks Allies in Lawsuit Against Unpaid Interns: Report*, INT’L BUS. TIMES (Dec. 5, 2012, 6:00 PM), <http://www.ibtimes.com/hears-corp-seeks-allies-lawsuit-against-unpaid-interns-report-922413>.

receiving academic credit for their participation, and are otherwise fully in compliance with applicable laws.”⁹⁵ Hearst Corporation’s bold move paid off. The corporation escaped a debilitating settlement and steep attorney’s fees⁹⁶ when the judge refused to grant class action status to Wang and the other interns.⁹⁷ Now, a few summers worth of wages is the most Hearst Corporation stands to lose when it faces Wang and six other interns alone.⁹⁸

Other corporations’ litigation prospects are more expensive. When a federal district court judge applied Fact Sheet #71’s test to the *Black Swan* unpaid intern class action lawsuit,⁹⁹ he determined that Fox Searchlight Production’s interns were employees.¹⁰⁰ Accordingly, the production company violated minimum wage laws when it refused to pay the plaintiff interns.¹⁰¹

The judge’s rejection of the primary benefit test in favor of Fact Sheet #71’s six prongs darkened the prospects of corporations embroiled in unpaid intern litigation.¹⁰² Though the *Black Swan* case presents but one of many conflicting court opinions, it suggests that courts no longer tolerate unpaid internships and instead require strict compliance with Fact Sheet #71’s six prongs.

Given the existent discrepancies amongst the circuits, even when courts resolve pending unpaid internship class actions, it is unlikely that a clear answer will emerge as to which internships require a minimum wage. Because the pending and recently decided cases do not involve unpaid academic internships, a ruling in favor of the plaintiff interns would not automatically ban all unpaid academic internships. Nevertheless, such a ruling would serve as persuasive fodder for future arguments and, in the meantime, would convince many employers to

95. *Id.* While Hearst Corporation’s justification seems convincing, the facts that lead plaintiff Xeudan “Diana” Wang was twenty-seven years old and was not pursuing academic credit for her fifty-five hour workweeks suggest that even if this policy existed, Hearst Corporation did not follow it. *See id.* But see *infra* notes 123–24 and accompanying text (offering reasons why, contrary to Hearst Corporation’s argument, an intern’s receipt of academic credit does not exempt an employer from FLSA’s minimum wage requirements).

96. See Rebecca Greenfield, *Class Action or Not, the Unpaid Intern Lawsuit at Hearst Will Go On*, WIRE (May 9, 2013, 2:15 PM), <http://www.thewire.com/national/2013/05/class-action-or-not-unpaid-intern-lawsuit-will-go/65059>.

97. Wang v. Hearst Corp., 293 F.R.D. 489, 498 (S.D.N.Y. 2013).

98. Greenfield, *supra* note 96.

99. Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013).

100. *Id.* at 534.

101. *Id.*

102. *See id.* at 532 (noting that under the test “the very same internship position might be compensable as to one intern . . . and not compensable as to another”). Corporations’ prospects darken because, arguably under Fact Sheet #71’s six prongs, “[t]he more useless the intern, the better (legally speaking),” and most corporations cannot demonstrate a sufficient degree of uselessness. Schorr, *supra* note 86.

cancel their internship programs. If the plaintiff interns lose their class action lawsuits or if they continue to settle, then the uncertain legal status of unpaid academic internships will likely persist.

II. THE MODERN UNPAID INTERNSHIP: IS IT LEGAL?

Despite major shifts in the economic and employment landscapes after 1947, several outdated aspects of *Portland Terminal* persist in current unpaid internship regulation.¹⁰³ Fact Sheet #71's effort to apply a modernized version of the *Portland Terminal* test is little more than superficial—while the original factors remain almost wholly intact, the most significant update is the substitution of “intern” and “internship” for the *Portland Terminal* terms “trainee” and “training.”¹⁰⁴

Yesterday's stagnant standard is not an effective solution to internship regulation today. The Supreme Court decided *Portland Terminal* in a different era. Nearly a decade past the worst of the Great Depression, in 1947, the year *Portland Terminal* was decided, the unemployment rate rested at a healthy 3.9%.¹⁰⁵ Students of this era received less formal education than their modern counterparts. In the years that immediately preceded *Portland Terminal*, only 6% of men and 4% of women completed four years of college.¹⁰⁶ Moreover, among adults twenty-five years of age and older, the median number of years of education hovered around 8.6.¹⁰⁷

Americans today face a markedly different employment environment. The unemployment rate is at 6.7% as of March 2014¹⁰⁸ after having been above 8% for forty-three months,¹⁰⁹ a period that economists likened to a Great Recession.¹¹⁰ Education attainment rates

103. See *supra* Section I.B for the Sixth Circuit's criticism of WHD's outdated six-prong test.

104. Compare FACT SHEET #71, *supra* note 31, with *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149–50 (1947).

105. *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATS. [hereinafter *Labor Force Statistics*], <http://www.bls.gov/cps/cpsaat01.htm>.

106. NAT'L CTR. FOR EDUC. STATISTICS, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 7 (Thomas D. Snyder ed., 1993).

107. *Id.*

108. News Release, Bureau of Labor Stats., U.S. Dep't of Labor, The Employment Situation—March 2014 (Apr. 4, 2014, 8:30 AM), http://www.bls.gov/news.release/archives/empsit_04042014.pdf.

109. Table of Monthly Unemployment Statistics from the Current Population Survey, BUREAU OF LABOR STATS., <http://data.bls.gov/timeseries/LNS14000000> (last visited June 17, 2014).

110. See, e.g., Robert J. Samuelson, *Rethinking the Great Recession*, WILSON Q., Winter 2011, at 16, 17. While the recession, as economists define it, ended in June 2009, *US Business Cycle Expansions and Contractions*, NAT'L BUREAU OF ECON. RESEARCH, <http://www.nber.org/cycles/cyclesmain.html> (last visited June 17, 2014), popular sentiment is that the recession continued much longer (or is still continuing), John W. Schoen, *Many Feel Like Recession Still*

are also high. In 2010, 89% of 25- to 29-year-olds received at least a high school diploma or equivalent certificate,¹¹¹ and 32% of 25- to 29-year-olds held at least a bachelor's degree.¹¹²

Thus, WHD governs a different employment market than existed in the years after *Portland Terminal*—the current market features a fundamentally different type of worker with an overall higher level of formal education. And although legislators should not abandon *Portland Terminal* in its entirety, if they are to accommodate the current labor landscape, then legislators must adapt the test beyond the substitution of “intern” for “trainee.”¹¹³ Rather than focus solely on the protection of blue-collar workers, labor regulations must strike a balance between protection and opportunity for modern, educated workers.

Scholarly solutions to strike this balance abound. Some of the most recent proposed reforms include eliminating unpaid internships in certain industries,¹¹⁴ exempting certain industries from minimum wage requirements,¹¹⁵ and creating a new “intern-learner” exemption that permits interns to work for subminimum wages.¹¹⁶ And although some of these solutions do not contemplate unpaid academic internships, their theoretical bases can nevertheless guide legislators tasked with unpaid academic internship regulation reform.

A. *An Endangered Species of Internship*

Professors Kristi L. Schoepfer and Mark Dodds suggest perhaps the most drastic form of regulation: the elimination of unpaid academic internships.¹¹⁷ While their symposium article limits its scope to unpaid internships in the sport management industry, the authors' main concern applies to employers in all fields: does an unpaid intern's value outweigh associated legal risks?¹¹⁸ Schoepfer and Dodds do not believe so.¹¹⁹

Hasn't Ended, USA TODAY (Jan. 1, 2014, 8:05 PM), <http://www.usatoday.com/story/money/personalfinance/2014/01/01/cnbc-recovery-slowed-economy/4222929>.

111. NAT'L CTR. FOR EDUC. STATS., U.S. DEP'T OF EDUC., NCES 2011-033, *THE CONDITION OF EDUCATION 2011*, at 74 (2011).

112. *Id.*

113. *See supra* note 104 and accompanying text.

114. Kristi L. Schoepfer & Mark Dodds, *Internships in Sport Management Curriculum: Should Legal Implications of Experiential Learning Result in the Elimination of the Sport Management Internship?*, 21 MARQ. SPORTS L. REV. 183, 196–97 (2010).

115. Jennifer J. Kalyuzhny, Comment, *Cultivating the Next Generation: Why Farming Internships Should Be Legal*, 21 SAN JOAQUIN AGRIC. L. REV. 131, 132–33 (2012).

116. Curiale, *supra* note 63, at 1531.

117. Schoepfer & Dodds, *supra* note 114, at 184.

118. *Id.*

119. *Id.* at 197.

Because sport organizations often solicit interns and benefit from their presence, unpaid academic internships expose sport organizations to labor law liability.¹²⁰ Unpaid sport management internships are risky because little legal precedent addresses the specific subgenre of unpaid academic internships.

WHD warns employers that despite the lack of harmonious legal precedent, “internships in the for-profit private sector will most often be viewed as employment, unless the [six-part] test . . . is met.”¹²¹ Stated more bluntly, Nancy J. Leppink, then-acting director of WHD, said, “[i]f you’re a for-profit employer or you want to pursue an internship with a for-profit employer, there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.”¹²²

Leppink’s cautionary advice shatters an assumption many sport organizations make—if an unpaid intern receives academic credit for the internship, then the intern will qualify as the primary beneficiary of the internship, and the employer is not obligated to pay the intern minimum wage.¹²³ Nor does the receipt of academic credit legitimize menial tasks like paper-pushing or coffee brewing. DOL’s statement deconstructs this misguided notion: “the only acceptable activities for unpaid interns are those that are purely for teaching purposes and do not help with [a host organization’s] day-to-day tasks.”¹²⁴

For this reason, with the advent of less risky alternatives, Schoepfer and Dodds advise sport management programs to eliminate their unpaid academic internship opportunities.¹²⁵ Academic accreditation boards previously required universities to provide internship opportunities for sport management students.¹²⁶ Recently revised standards, however, demonstrate a trend more in line with Schoepfer and Dodds’s advice. In lieu of the prior internship requirement, accreditation boards now permit schools to substitute a capstone experience or a comprehensive exam.¹²⁷

Although Schoepfer and Dodds’s recommendation to evaluate unpaid academic internships on an industry-by-industry basis eliminates legal risks, it more closely resembles scorched-earth policy than compromise. Beneficial unpaid academic internships in the sport

120. *Id.* “Any employer that violates FLSA minimum wage standards may be liable for unpaid wages, compensatory damages, and additional liquidated damages.” *Id.* at 198.

121. *Id.* at 194 (alterations in original) (quoting FACT SHEET #71, *supra* note 31) (internal quotation marks omitted).

122. *Id.* at 198 (alteration in original) (internal quotation marks omitted).

123. *Id.* at 195–96.

124. *Id.* at 196 (alteration in original) (internal quotation marks omitted). Essentially, “[t]he more useless the intern, the better (legally speaking).” Schorr, *supra* note 86.

125. Schoepfer & Dodds, *supra* note 114, at 184, 201.

126. *Id.* at 189.

127. *Id.*

management industry exist, but these opportunities will vanish if employers heed Schoepfer and Dodds's advice.¹²⁸ Certainly, an alternative to complete elimination could balance protection with opportunity and could separate educationally beneficial unpaid internships from educationally deficient unpaid internships.

B. *An Advocate for Agricultural Exemption*

Jennifer Kalyuzhny's Comment presents the foil to Schoepfer and Dodds's argument. Kalyuzhny's view supports an industry-by-industry exemption of unpaid academic internships from the minimum wage requirement, rather than an elimination of all unpaid academic internships within select industries.¹²⁹ More specifically, her proposal exempts from minimum wage requirements all unpaid agricultural internships.¹³⁰

The premise behind Kalyuzhny's proposal is that the main problems FLSA regulates do not plague unpaid internships in industries such as agriculture. For example, Kalyuzhny asserts that unpaid agricultural interns lack the skills and qualifications necessary to replace paid workers, whereas unpaid interns in other industries displace paid workers and drive wages down.¹³¹ Because of this difference, unpaid agricultural interns are less of a threat to paid workers than the typical unpaid intern.

Kalyuzhny also argues that agricultural internships do not typically lead to a permanent job with the same employer.¹³² Most often, agricultural internships are short-term opportunities to learn valuable skills that interns can later apply to their own farms.¹³³ Unpaid agricultural interns are thus less likely than the typical unpaid intern to overly depend on their employer.¹³⁴ Given these distinctions, Kalyuzhny reasons that unpaid agricultural internships are distinctive enough to warrant their exemption from minimum wage laws.¹³⁵

128. See sources cited *supra* note 86 (noting that one firm terminated its internship program and other firms considered outsourcing their internships due to the litigious environment).

129. See Kalyuzhny, *supra* note 115, at 133, 147–49.

130. *Id.* at 151.

131. *Id.* at 152.

132. *Id.* at 152–53 (noting that these interns usually go on to run their own farms).

133. *Id.* at 152.

134. *Id.* at 153.

135. *Id.* at 152–53. Kalyuzhny's proposed industry-wide exemption surpasses all previous state-level initiatives to soften regulation of the agricultural industry. California, for example, developed a program that incorporates 1800 hours of fieldwork and 11 academic courses in order to introduce students interested in agricultural careers to classroom and on-site learning. Washington developed a program that allows farms with annual sales of less than \$250,000 to

Despite the validity of many aspects of her theory, Kalyuzhny's industry-by-industry exemption falls prey to many of the same weaknesses that plague Schoepfer and Dodds's proposal. These common weaknesses stem from the authors' compartmentalized approaches. An industry-by-industry analysis assumes that all unpaid internships within the same industry are similar enough that WHD can make a single determination as to whether a given industry's academic internships are legal. WHD can make such a determination only when it categorizes industries in accordance with a much narrower scope than "sport management" or "agriculture." For example, even though WHD could classify both an internship on a farm and an internship in the John Deere corporate office as "agricultural" internships, the two internships present a very different set of educational and legal concerns.

Only narrow classifications can account for the meaningful differences between various sub-industries.¹³⁶ But as the scope narrows, other problems arise. One of the largest problems is that members of nearly every industry can make the same type of arguments Kalyuzhny makes for the agriculture industry.¹³⁷ As each sub-industry lobbies for a minimum wage exemption, the increasing number of exemptions reduces the effectiveness of any WHD rule.

A better approach focuses not on distinctions between industries but on characteristics within every industry that distinguish educationally beneficial unpaid internships from educationally deficient unpaid internships. Every industry offers both types of internships, but Schoepfer's, Dodds's, and Kalyuzhny's approaches treat all internships within the same industry identically. Because the authors focus on differences between industries, their proposed regulations do not focus on the core purpose of academic internship regulation: the educational benefit that the intern derives.

C. *The "Intern-Learner" as the New "Learner" Exemption*

Jessica L. Curiale's Note steers away from the industry-by-industry approach her scholarly predecessors adopt, and instead carefully considers the mechanics of internship reform.¹³⁸ Curiale proposes that WHD promulgate an "intern-learner" exemption that is similar to the current "learner" exemption.¹³⁹

retain up to three unpaid interns per year. For a description and Kalyuzhny's criticism of the California and Washington programs, see *id.* at 147–49.

136. Even narrow exceptions, however, cannot account for new, developing industries that do not fit neatly within the definition of any current industry.

137. At the very least, every industry can argue that it produces enough academically beneficial internships to preempt WHD from classifying any of the industry's unpaid internships as illegal.

138. See generally Curiale, *supra* note 63.

139. *Id.* at 1553–54.

Under this new exemption, if qualified employers create DOL-approved “intern-training” programs, then they can pay interns a subminimum wage.¹⁴⁰ Ideally, Curiale’s exemption and its associated program would ensure that interns who deserve compensation receive wages for their work and that the number of illegal unpaid internships dwindles.¹⁴¹ Nevertheless, Curiale’s proposal is problematic for two reasons.

First, employers must exert significant effort to establish an intern-training program and, in exchange, gain only the right to pay their interns 15% less than the normal minimum wage.¹⁴² The employer must not only submit a detailed proposal but also stay within strictly defined intern-training program parameters.¹⁴³ For instance, if either an employer’s number of interns fluctuates or the length of the intern-training program varies, then the employer must start over and reapply for a new exemption.¹⁴⁴ Even if an employer’s intern-training program does not change, the employer’s exemption is valid for only two years.¹⁴⁵

Potential employers who are already unwilling or unable to pay their interns a minimum wage are unlikely to undergo the hassle of the intern-training program approval process, especially for a paltry 15% minimum wage reduction. Many illegal internships evade DOL detection,¹⁴⁶ and Curiale’s bureaucracy does little to incentivize employer participation in the intern-training program that she proposes. Even today, small companies often escape minimum wage scrutiny because interns have little incentive to individually litigate a minimum wage claim.¹⁴⁷ As long as they can evade DOL detection, smaller businesses would still have a strong incentive to ignore Curiale’s program and thereby avoid the requirement to pay their interns the remaining 85% of the minimum wage.

The second complication with Curiale’s proposed intern-learner exemption is that it offers no new mechanism for enforcement. Its requirements are easy to evade or falsify, and the WHD Administrator depends on the employer to implement the intern-training program that

140. *Id.* at 1554.

141. *Id.* at 1531, 1559–60.

142. *Id.* at 1554.

143. *Id.* at 1554–55.

144. *Id.* at 1554.

145. *Id.*

146. See Angie Mohr, *The Ethics and Economics of Unpaid Internships*, INVESTOPEDIA, (May 28, 2012), <http://www.investopedia.com/financial-edge/0512/the-ethics-and-economics-of-unpaid-internships.aspx> (“[T]he Labor Department will only investigate based on complaints. Interns are unlikely to report their employers’ labor violations for fear of damaging their relationship and future opportunities.”).

147. See *supra* Section I.C for a discussion of current unpaid internship litigation.

the employer describes in the initial application. WHD may deny an application for a certificate,¹⁴⁸ but once WHD exempts an employer, WHD has little ability to ensure the employer complies with the intern-training program.

As interns are already unlikely to report discrepancies,¹⁴⁹ it is ineffective to rely on interns to report noncompliance. Curiale's proposal fails to give interns new motivation to report abuses. Given that educationally deficient internships can easily evade DOL detection, and given that Curiale's highly bureaucratic requirements deter educationally beneficial internships, a different regulatory mechanism must protect students and ensure employer compliance.

III. MODIFY, CODIFY, AND DELEGATE: THREE STEPS TOWARD INTERNSHIP REFORM

Unpaid academic internship regulations are ineffective when they operate either through a cumbersome exception or by industry-by-industry distinction. These approaches make artificial determinations that fail to distinguish between educationally beneficial and educationally deficient internships. These approaches distinguish unpaid internships only in relation to one another—they cannot make the necessary individualized determinations of educational value that effective regulation requires.

A. *The Department of Education's Role in Internship Regulation*

The first step toward effective internship reform is delegation. An effective regulatory solution must distinguish educationally beneficial internships from educationally deficient internships, and Congress must delegate to the proper agency the authority to make these determinations.

DOL, the current regulatory agency, is not the proper agency for the job because DOL prioritizes economic considerations above educational value. DOL's mission is to “foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.”¹⁵⁰ Education-related concerns are neither specifically mentioned within the mission statement nor readily observable in DOL's current regulatory efforts. DOL's framework demonstrates that the agency is not equipped to

148. See Curiale, *supra* note 63, at 1554.

149. See Mohr, *supra* note 146 (“Interns are unlikely to report their employers' labor violations for fear of damaging their relationship and future opportunities.”).

150. *Our Mission*, U.S. DEP'T OF LABOR, <http://www.dol.gov/opa/aboutdol/mission.htm> (last visited June 17, 2014).

maximize educational value and legalize educationally beneficial opportunities.

Instead, the ED is better situated to achieve these fundamental goals. Unlike DOL's mission, ED's mission aligns with the concerns of unpaid academic internships: "to promote student achievement and preparation for global competitiveness by fostering educational excellence and ensuring equal access."¹⁵¹ ED is also the appropriate regulatory agency because ED is already tasked with "[i]dentify[ing] major issues in education and focus[ing] national attention on them."¹⁵² Because ED already seeks to maximize educational value and to create meaningful learning opportunities, ED can quickly transition into a key internship-regulating role. Congress's first step toward internship reform should therefore be to enact a law that delegates to ED—not DOL—the power to regulate unpaid academic internships.

B. Proposed Revisions

The next steps in Congress's unpaid academic internship reformation should be (1) to modify WHD's six-prong test and (2) to codify a new version of the test, a version that will serve as a starting point for ED's unpaid academic internship regulation. Though WHD would no longer play an active regulatory role in unpaid academic internship regulation, Congress should not extinguish WHD's six-prong test. The six prongs evolved through decades of case law,¹⁵³ and it would prove nearly impossible to ignore this lengthy, albeit conflicting, pedigree. Yet as currently written, Fact Sheet #71 facilitates neither easy understanding nor easy application of the precedent to the realities of unpaid academic internships.

Two minor modifications and one major modification will incorporate fundamental elements of case law and enable ED to better regulate unpaid academic internships. First, ED should lead its list of prongs with the standard it intends to apply to unpaid academic internships. Second, ED should describe the type of unpaid academic internship it intends to regulate. Third, ED should describe prohibitions on unpaid academic internships. And fourth, ED should describe the mutual understandings employer and intern must share. The following table summarizes the proposed revisions:

151. *What We Do*, U.S. DEP'T OF EDUC., <http://www.ed.gov/about/what-we-do.html> (last modified Feb. 2, 2010).

152. *Id.*

153. See *supra* Section I.B for a discussion of case law analyzing *Walling v. Portland Terminal Co.* and Fact Sheet #71.

CURRENT FACT SHEET #71 PROVISIONS	PROPOSED REVISIONS
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;	1. The internship experience is for the benefit of the intern; as long as the internship primarily benefits the intern, the employer may derive some advantage from the intern's activities;
2. The internship experience is for the benefit of the intern;	2. During the internship, the intern receives training and supervision similar to the training and supervision that the intern would receive in a traditional educational environment;
3. The intern does not displace regular employees, but works under close supervision of existing staff;	3. The intern does not displace paid employees; and
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;	4. The intern and the employer understand that, upon completion of the internship, the intern is neither entitled to wages nor entitled to a job.
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.	

1. Separating Displacement and Supervision

The first minor modification Congress must make is to rearrange the content of Fact Sheet #71's first and third prongs and craft two new provisions:

CURRENT FACT SHEET #71 PROVISIONS	PROPOSED REVISIONS
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. During the internship, the intern receives training and supervision similar to the training and supervision that the intern would receive in a traditional educational environment;
3. The intern does not displace regular employees, but works under close supervision of existing staff;	3. The intern does not displace paid employees;

The above revisions group similar topics, separate dissimilar topics, and emphasize the significance of each requirement. Though a link exists between displacement and supervision,¹⁵⁴ the two provisions are not inextricably related. The displacement requirement is primarily concerned with labor issues, not educational value, whereas supervision has more in common with academic value than labor issues.

When it stands alone, the displacement requirement emphasizes WHD’s no-tolerance policy for unpaid internships that infringe upon existent labor interests. Without the modifying clause regarding supervision, the third prong can clearly indicate that an internship is illegal if an unpaid intern displaces a paid worker. The supervision requirement’s new location in the second prong also promotes clarity and alleviates employer confusion. Whereas the original six prongs left employers to wonder whether their workplace environment modeled a traditional educational environment, the incorporation of the supervision requirement into the educational environment provision demonstrates one way in which employers may satisfy this requirement.¹⁵⁵

2. Consolidating Disclosure

Second, Congress should combine Fact Sheet #71’s fifth and sixth prongs to clarify the test’s disclosure requirements:

154. See FACT SHEET #71, *supra* note 31 (using the first criteria to describe supervision and the third criteria to describe displacement).

155. *Id.* (“[I]f the employer is providing . . . [internships] under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience.”).

CURRENT FACT SHEET #71 PROVISIONS	PROPOSED REVISIONS
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and	4. The intern and the employer understand that, upon completion of the internship, the intern is neither entitled to wages nor entitled to a job.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.	

Though the fifth and sixth prongs both operate to promote full disclosure between interns and their employers, the words of the current six-prong test do not accomplish this goal. As currently written, mutual understanding and disclosure between an intern and an employer are components in only the sixth prong: “The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.”¹⁵⁶ The fifth prong contains no such disclosure component. Instead, the fifth prong simply states that “[t]he intern is not necessarily entitled to a job at the conclusion of the internship.”¹⁵⁷

So while the employer and intern must both understand that the intern is not entitled to wages, they need not both understand that the intern should not expect a job at the conclusion of the internship. This interpretation suggests that as long as an employer knows that an intern should not expect a job at the internship’s conclusion, a court can find that the internship satisfies the fifth prong, even if the intern was unaware that she should not expect a job. Under this interpretation, the fifth prong does not promote candor and does not adequately protect students. Congress can solve these problems if it merges the fifth and sixth prongs and requires full disclosure of both wage rules and job prospects. With this minor modification, Congress can eliminate both a senseless discrepancy and a potential inequity in bargaining power.

3. Adopting a Modified Primary Beneficiary Standard

Most unpaid academic internships are illegal because they do not satisfy Fact Sheet #71’s fourth prong: employers cannot derive *any* immediate advantage or benefit from an intern’s “activities.”¹⁵⁸ WHD’s

156. *Id.*

157. *Id.*

158. *Id.* (emphasis added); *cf.* *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (noting that FLSA allows one to work on the premises of another for her own personal advantage); *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971) (noting that FLSA does not protect those who work for their own advantage).

bright-line standard oversimplifies decades of judicial precedent and presents the best area for major modification.

As evidenced by the disagreement amongst the Second, Fourth, Fifth, Sixth, and Tenth Circuits,¹⁵⁹ there is no widely accepted legal standard to determine whether an unpaid internship complies with FLSA. Few courts demand strict compliance with the six-prong test.¹⁶⁰ More typically, courts adopt some iteration of the six-prong test as the basis for a broader factual inquiry.¹⁶¹ WHD, however, refuses to consider the more individualized aspects of internships and instead demands strict compliance with the six-prong test in every instance. To complicate matters further, WHD's interpretation of the six-prong test is riddled with internal conflicts and inconsistencies.

WHD's use of undefined and vague terms, for example, introduces interpretive flexibility in the second prong.¹⁶² WHD states that "[t]he internship experience is for the benefit of the intern,"¹⁶³ but the test fails to define "benefit." Fact Sheet #71's first explanatory paragraph introduces further ambiguity into the meaning of "benefit."¹⁶⁴ The second part of the paragraph's title, "Primary Beneficiary Of The Activity," evokes the *Solis* primary benefit approach, not the test's purported bright-line standard.¹⁶⁵

The portion of WHD's explanatory paragraph that prohibits an intern from "perform[ing] . . . routine work . . . on a regular and recurring basis" strays even further from the bright-line standard and moves toward a primary benefit approach.¹⁶⁶ The explanatory language suggests that the employer may benefit from an intern's work as long as the employer is not dependent on the intern.¹⁶⁷ Yet this suggestion directly contradicts the test's fourth prong that states that an employer cannot derive *any* benefit.¹⁶⁸ It is unclear how to resolve these conflicts in the current test.

Rather than attempt to resolve the conflicts of an outdated, stringent standard, Congress should codify the primary benefit legal standard to incorporate moderation and internal consistency:

159. See *supra* Section I.B for a discussion of the various standards courts apply to minimum wage cases.

160. See *supra* Section I.B.

161. See *supra* Section I.B.

162. FACT SHEET #71, *supra* note 31.

163. *Id.*

164. *Id.*

165. *Id.* (capitalization in original); *Solis v. Laurelbrook*, 642 F.3d 518, 525 (6th Cir. 2011).

166. FACT SHEET #71, *supra* note 31; *Solis*, 642 F.3d at 525.

167. FACT SHEET #71, *supra* note 31.

168. See *id.* (stating that the employer should "derive[] no immediate advantage" from the internship).

CURRENT FACT SHEET #71 PROVISIONS	PROPOSED REVISIONS
2. The internship experience is for the benefit of the intern;	1. The internship experience is for the benefit of the intern; as long as the internship primarily benefits the intern, the employer may derive some advantage from the intern's activities;
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;	

The revised standard not only legalizes mutually beneficial unpaid academic internships but also affords ED and courts discretion to regulate borderline cases. The primary benefit standard addresses the realities of unpaid academic internships and maximizes the number of educationally beneficial opportunities available to students.

CONCLUSION

Academic internships benefit students. They provide opportunities to discover new careers, network with professionals, and learn different skills. Yet under Fact Sheet #71's current guidelines, nearly all unpaid academic internships fail WHD's six-prong test.

Fact Sheet #71 fails to effectively regulate unpaid academic internships because it imposes upon students and employers unrealistic requirements that undermine opportunities to foster students' professional growth. The failure of the current test to address economic and employment realities leads to inconsistent enforcement and inconsistent judicial interpretation.

Though some employers undoubtedly abuse this source of unpaid labor, Congress and ED can minimize unfair practices and maximize educational value if they regulate unpaid academic internships on a more individualized basis and differentiate between educationally beneficial unpaid academic internships and educationally deficient unpaid academic internships. Modifying WHD's six-prong test, codifying a new test, and delegating regulatory power to ED all promote the permanency that students, employers, and courts seek. Unpaid academic internships play a vital role in the development of the American workforce. Congress cannot permit conflicts in precedent and

rigid regulations to shortchange students, employers, and the American economy of a strong, qualified, and competitive workforce.