

UNPAID INTERNSHIPS: THE HISTORY, POLICY, AND FUTURE IMPLICATIONS OF “FACT SHEET #71”

NATALIE BACON*

I. INTRODUCTION

With respect to unpaid internships, there is a disconnect between the law and business practices. While unpaid internship law has strict requirements for which businesses must comply, standard business practice is to have unpaid interns work in ways that violate the law. The federal government sought to diminish this disconnect by issuing *Fact Sheet #71: Internship Programs under the Fair Labor Standards Act* (“Fact Sheet #71”).¹

In April 2010, The Wage and Hour Division (“WHD”) of the Department of Labor (“DOL”) issued Fact Sheet #71.² Fact Sheet #71 lists six criteria that must be met for a person to legally qualify as an unpaid intern.³ The strict criteria under Fact Sheet #71 only apply to for-profit firms and do not apply to non-profit firms or government organizations.⁴ Individuals at non-profit firms and government organizations are

* Juris Doctor, The Ohio State University Moritz College of Law, expected 2011.

¹ *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act*, DEP’T OF LAB. (April 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>; Stephanie Steinberg, *Unpaid Internships Can Cost—or Pay off for—College Students*, USA TODAY, July 26, 2010, http://www.usatoday.com/news/education/2010-07-27-internship27_ST_N.htm.

² Steinberg, *supra* note 1.

³ *Id.* The six criteria, which are discussed more fully below are:

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.

Id.

⁴ *Id.*

considered “volunteers,” and are therefore excluded from the definition of interns.⁵ For-profit firms must comply with Fact Sheet #71 or they may be prosecuted for labor violations⁶ while non-profit firms do not have to comply with Fact Sheet #71 because the individuals donating their time are classified as volunteers.⁷

By issuing Fact Sheet #71, the Obama administration suggests that it intends to hold for-profit firms to the DOL’s guidelines more strictly than in the past.⁸ That is to say, while the laws governing interns have not changed, issuing Fact Sheet #71 is effectively sending a clear message to for-profit firms that the current administration is likely to increase its enforcement of the rules.

Internships play a significant role in today’s society for many reasons. Internships are important to individuals seeking to learn about a particular area, gain experience in a particular field, build connections and have a competitive advantage over those who do not have internships. The 2010 Job Outlook Survey, published by the National Association of Colleges and Employers (“NACE”), reported that “75 percent of employers prefer job candidates with relevant work experience [and m]ore than 90 percent prefer to hire interns or co-ops who have worked for their organization.”⁹ Individuals are aware of the importance of internships and seek to break into their fields via internships.¹⁰ Not only do individuals seek internships for their own desires, but “[e]ducators are increasingly realizing that the integration of study and practice is a more powerful way to learn.”¹¹ Students rely on internships for getting into their careers. The NACE reported that individuals who had held internships were “considerably more likely to receive a job offer than their counterparts who did not have any experiential education in their background. Approximately forty-two percent of graduates with internships who applied for a job received an offer compared with only thirty percent for students who had no internship experience.”¹² Thus, employers increasingly look for individuals with internship experience when hiring.

⁵ *Id.*; Fair Labor Standards Act, 29 U.S.C. § 203(4)(A) (2006).

⁶ Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES, Apr. 2, 2010, <http://www.nytimes.com/2010/04/03/business/03intern.html>.

⁷ *Fact Sheet #71*, *supra* note 1.

⁸ Greenhouse, *supra* note 6.

⁹ Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), <http://www.insidehighered.com/views/2010/07/13/aoun>.

¹⁰ Peter W. Fulham, *Unpaid Interns and Labor Laws: Gaining Experience, Enduring Abuse*, POL. DAILY (June 2009), <http://www.politicsdaily.com/2010/05/12/unpaid-interns-labor-laws-students-experience-abuse/>.

¹¹ Aoun, *supra* note 9.

¹² *2010 Student Survey*, NAT’L ASS’N OF C. & EMPLOYERS (Sept. 2010), available at http://www.nacweb.org/research/student_survey_brief/.

There is no official count of unpaid internships in the U.S., but the trend appears to be that more people are trying to get unpaid internships as a way to start their careers, especially in a down economy.¹³ Career Builder and Monster.com report that the number of unpaid internships is increasing since the recession.¹⁴ Similarly, the apparent trend is that private employers are seeking more unpaid interns.¹⁵ The director of the Career Development Center at Stanford University stated that he “sees definitive evidence that the number of unpaid internships is mushrooming—fueled by employers’ desire to hold down costs and students’ eagerness to gain experience for their résumés. Employers posted 643 unpaid internships on Stanford’s job board this academic year, more than triple the 174 posted two years ago.”¹⁶ Additionally, based on a 2008 study by the National Association of Colleges and Employers, half of all graduating students had internships, which is seventeen percent higher than numbers reflected in a Northwestern University study done in 1992.¹⁷ Although no hard numbers exist reflecting the amount of unpaid internships, some estimate that of the thousands of internships held each year, one-quarter to one-half of them are unpaid.¹⁸ Some people speculate that “[w]ith job openings scarce for young people, the number of unpaid internships has climbed in recent years, leading federal and state regulators to worry that more employers are illegally using such internships for free labor.”¹⁹ It is clear that while unpaid internship law remains the same, enforcement is changing.

The purpose of this note is to analyze the history of unpaid internships, the policy behind Fact Sheet #71, and the future implications Fact Sheet #71 may have on unpaid internships. The note will first discuss the history of unpaid internship law. The most significant historical points regarding internship law are the following: first, the passage of the Fair Labor Standards Act of 1938 (“FLSA”),²⁰ which established minimum wage standards; second, the 1947 United States Supreme Court case, *Walling v. Portland Terminal*,²¹ and finally, the issuance of Fact Sheet #71 in 2010.²² The criteria for determining unpaid internships from the passage of the FLSA to the present have developed without dramatic changes. The more prevalent change is the dominance of unpaid internships in today’s

¹³ Fulham, *supra* note 10.

¹⁴ Eve Tahmincioglu, *Working for Free: The Boom in Adult Interns*, TIME, Apr. 12, 2010, <http://www.time.com/time/magazine/article/0,9171,1977130,00.html>.

¹⁵ *Id.*

¹⁶ Greenhouse, *supra* note 6.

¹⁷ *Id.*; Hilary Stout, *The Coveted but Elusive Summer Internship*, N.Y. TIMES, July 2, 2010, http://www.nytimes.com/2010/07/04/fashion/04Internship.html?_r=1.

¹⁸ *Id.*

¹⁹ Greenhouse, *supra* note 6.

²⁰ 29 U.S.C. §§ 201–19 (2006).

²¹ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

²² *Fact Sheet #71*, *supra* note 1.

workforce. Understanding the history of unpaid internship law will set an important backdrop to the analysis of Fact Sheet #71.

After briefly explaining the history of unpaid internship law and analyzing the requirements under Fact Sheet #71, this note will discuss the policy surrounding Fact Sheet #71. This includes the various implications for both people seeking internships and for businesses. This note untangles and analyzes the effects that Fact Sheet #71 may have on people seeking internships and businesses that have interns.

Finally, this note will set forth the future implications of Fact Sheet #71 by giving suggested changes to the guidelines that could make internship law clearer and fairer. Changes to the guidelines include: requiring that the guidelines be applicable to non-profit and government employers; implementing a balancing test; or leaving regulation up to universities.

Ultimately, what the issuance of Fact Sheet #71 means for enforcement is yet to be seen; however, a better understanding of the history, policy, and future implications of Fact Sheet #71 will help for-profit firms comply with the law.

II. HISTORY OF UNPAID INTERNSHIP LAW

A. *Fair Labor Standards Act of 1938*

Federal law has basic requirements for employers with respect to paying its employees. The basis for such requirements is the Fair Labor Standards Act of 1938 (“FLSA”).²³ The FLSA grew out of the Great Depression and was controversial, even thought to be revolutionary for its time.²⁴ Without the initial support of the U.S. Supreme Court, President Roosevelt went to great lengths, using political pressure, to ensure bettering working conditions and wages for the working class.²⁵ The most significant reforms under the FLSA were banning child labor, setting a very moderate minimum wage and limiting the maximum hours in the work week.²⁶ The purpose of enacting the FLSA “was to ensure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”²⁷ So long as an employer is covered by the Act, it must pay its employees at least minimum

²³ 29 U.S.C. §§ 201–19.

²⁴ Jonathon Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, *Monthly Labor Review*, U.S. DEP’T OF LAB., June 1978, <http://www.dol.gov/oasam/programs/history/flsa1938.htm>.

²⁵ *Id.*

²⁶ 29 U.S.C. §§ 201–19; Grossman, *supra* note 24.

²⁷ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

wage.²⁸ However, employers do not have to pay persons other than employees.²⁹

Knowing the differences between an “employee,” an “intern,” and a “volunteer” as defined by the FLSA is essential to understanding the applicability of current internship law. First, under the FLSA, “employee” means “any individual employed by an employer.”³⁰ The FLSA defines “employ” as meaning “to suffer or permit to work.”³¹ The U.S. Supreme Court stated that employee “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.”³² Second, a person only qualifies as an “intern” if the six criteria under Fact Sheet #71 are met.³³ If any one of the six criteria is not met, the person qualifies as an employee. The criteria apply only to for-profit firms. Interns at non-profit firms and government agencies are classified as volunteers under the FLSA and therefore excluded.³⁴ Finally, the FLSA only covers employees who work with the expectation of payment, which does not include “volunteers.”³⁵ In 1985, the DOL amended the FLSA to ensure that volunteers were not discouraged.³⁶ The DOL clarified the definition of a “volunteer” through four opinion letters.³⁷ The FLSA states:

The term “employee” does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if—

(i) the individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and

(ii) such services are not the same type of services which the individual is employed to perform for such public agency.³⁸

²⁸ 29 U.S.C. § 206.

²⁹ *Id.* §§ 203(e)(1), 206.

³⁰ *Id.* § 203(e)(1).

³¹ *Id.* § 203(g).

³² *Portland Terminal Co.*, 330 U.S. at 152.

³³ *Fact Sheet #71*, *supra* note 1.

³⁴ 29 U.S.C. § 203(4)(A); *Fact Sheet #71*, *supra* note 1.

³⁵ *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, syllabus (1985).

³⁶ David K. Haase, *Client Advisory: DOL Clarifies Definition of Volunteer Under FLSA*, JENNER & BLOCK (Dec. 2005), http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C1135%5C26.%20DOL%20Clarifications%20Definition%20of%20Volunteer%2012.05.pdf.

³⁷ *Id.*

³⁸ 29 U.S.C. § 203(e)(4)(A).

Furthermore, interns at non-profits or government agencies “can be considered to be donating their time (as volunteers), and are thus not required to be paid even if they are performing qualifying activities as an “employee” under the six-point WHD test.”³⁹ Determining whether a person qualifies as a volunteer, rather than an intern or employee, under the FLSA is done by satisfying the following:

- (1) [an individual] performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered; although a volunteer can be paid expenses, reasonable benefits, or a nominal fee to perform such services;
- (2) offers services freely and without pressure or coercion; and
- (3) is not otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.⁴⁰

The FLSA will not apply to an individual who meets the criteria for a volunteer, as set forth above. Consequently, for-profit employers do not have to pay interns satisfying the guidelines under Fact Sheet #71, and non-profit employers do not have to pay interns because they are classified as volunteers.

With respect to this analysis, whether an intern must be paid turns on whether an intern qualifies as an employee. Interns are not classified as employees under the FLSA, as determined by the Supreme Court in *Walling v. Portland Terminal Co.*⁴¹

A. *Walling v. Portland Terminal Co.*

The Supreme Court case, *Portland Terminal*, decided in 1947, set the groundwork for unpaid internships.⁴² In *Portland Terminal*, the Court held that under the FLSA, “trainees” were not employees within the Act.⁴³ Unpaid railroad trainees followed around employees for about a week to learn the job before being hired.⁴⁴ The following standards were applied by the Court to determine that the trainees were not employees: the work was a practical training program; the trainees benefited from the experience; the work did “not displace any of the regular employees, who [did] most of the

³⁹ Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection: Reforming the Regulation of Student Internships*, ECON. POL’Y INST. 3 (Apr. 5, 2010), http://epi.3cdn.net/f7d635c82f7380fff0_8sm6bvxzrk.pdf.

⁴⁰ Haase, *supra* note 36.

⁴¹ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

⁴² *Id.*

⁴³ *Id.* at 149–53.

⁴⁴ *Id.*

work themselves” and were at all times supervised; the work did not “expedite the company business” and could “actually impede and retard it;” the trainees were not guaranteed an employee position for their work; and the employer never “undertook to pay, [n]or [did] the trainees ever expected to receive, any remuneration for the training period other than the contingent allowance.”⁴⁵ Furthermore, the Court held that under the FLSA, the definition of “employ,” meaning “suffer or permit to work,” could not mean an employee who provided aid or instruction to a person whose work served only his own interest.⁴⁶ The Court held that the trainees were not employees because the employer received no “immediate advantage” from the trainees’ work.⁴⁷ Because the trainees were not employees, they were not entitled to receive minimum wage pay.⁴⁸

It is widely accepted and unquestioned that *Portland Terminal* is the case from which the rules governing unpaid interns come.⁴⁹ A for-profit employer may only refrain from paying an individual trainee or intern who is not an employee if it satisfies the six requirements set forth in *Portland Terminal*.⁵⁰ Moreover, an employer will have to pay an intern who provides it with an immediate advantage⁵¹ because the intern no longer legally qualifies as an intern under the rules.⁵²

B. *Unpaid internships from Portland Terminal to March 2010*

Unpaid internship law between *Portland Terminal* in 1947 and the issuance of Fact Sheet #71 in April 2010 remained the same while the circumstances changed. With respect to the law, the DOL stated that it would apply the requirements the Court set forth in *Portland Terminal* to determine whether a person is a trainee or an intern, and therefore does not require payment.⁵³ The DOL declared that under *Portland Terminal* the

⁴⁵ *Id.* at 149–50.

⁴⁶ *Id.* at 152.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *See id.*; *Fact Sheet #71*, *supra* note 1; Edwards & Hertel-Fernandez, *supra* note 39; Greenhouse, *supra* note 6.

⁵⁰ *Portland Terminal*, 330 U.S. at 152.

⁵¹ “Immediate advantage” means that the intern cannot perform any work for the employer that is to the advantage of the employer, including errands and small tasks. *Unpaid Internships, Common but Illegal*, LAB. & EMP. L. BLOG (Nov. 4, 2007), http://laborlaw.typepad.com/labor_and_employment_law_/2007/11/unpaid-internsh.html.

⁵² *Portland Terminal*, 330 U.S. at 152.

⁵³ *See, e.g.*, WAGE & HOUR DIV., U.S. DEP’T OF LABOR, OP. LETTER NO. FLSA2004-5NA (May 17, 2004); WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FIELD OPERATIONS HANDBOOK, CH. 10: FLSA COVERAGE – EMPLOYMENT

following requirements must be met to be classified as a trainee or an intern:

[1] [t]he training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; [2] [t]he training is for the benefit of the trainee; [3] [t]he trainees do not displace regular employees, but work under close observation; [4] [t]he employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer's operations may actually be impeded; [5] [t]he trainees are not necessarily entitled to a job at the completion of the training period; and [6] [t]he employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.⁵⁴

The substance of the *Portland Terminal* test has not been directly tested by the courts with respect to interns.⁵⁵ However, when the courts have applied the test to interns, the interpretations vary. “[T]he U.S. courts of appeals are divided as to whether an employer must satisfy *all* six tests to avoid an employment relationship with an intern or trainee, or may fail on one or more points if the *totality* of the circumstances nevertheless establishes that the intern is not an employee.”⁵⁶ However, courts have made it clear that workplace protections cover employees, not interns.⁵⁷

Although the law has remained the same from *Portland Terminal* in 1947 through the issuance of Fact Sheet #71 in 2010, the circumstances in which the law is applied are much different today than in 1947.⁵⁸ Even though no data exists reflecting the number of unpaid internships, it is widely accepted that more and more firms are bringing on interns.⁵⁹ There are even more internships in today's economy due to the recession that has left so many unemployed.⁶⁰

RELATIONSHIP, STATUTORY EXCLUSIONS, GEOGRAPHICAL LIMITS § 10b11 (Oct. 20, 1993), available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

⁵⁴ WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK, CH. 10: FLSA COVERAGE – EMPLOYMENT RELATIONSHIP, STATUTORY EXCLUSIONS, GEOGRAPHICAL LIMITS § 10b11 (Oct. 20, 1993), available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

⁵⁵ *Id.*

⁵⁶ Edwards & Hertel-Fernandez, *supra* note 39, at 2.

⁵⁷ *Id.*

⁵⁸ Greenhouse, *supra* note 6.

⁵⁹ *Id.*; Stout, *supra* note 17; Tahmincioglu, *supra* note 14.

⁶⁰ Tahmincioglu, *supra* note 14.

Before the government issued Fact Sheet #71 in April 2010, skepticism of the law gained momentum.⁶¹ Most notably, the Economic Policy Institute ("EPI") criticized the requirements for unpaid interns for the following reasons: first, a majority of interns are unprotected against harassment and discrimination because they do not qualify as employees, and therefore are not afforded employee protections; second, the regulations promote the growth of unpaid internships, which is limited to wealthy individuals who can afford to work for free; and finally, the requirements encourage replacing workers for unpaid interns.⁶² These criticisms are discussed more fully below.⁶³

With the criticisms of the traditional test in mind, the DOL issued Fact Sheet #71.⁶⁴ The DOL did not adopt the EPI's proposed test or any other test. Instead, the DOL restated and clarified the traditional test it used for classifying individuals as unpaid interns that was derived from *Portland Terminal*.⁶⁵

The DOL's issuance of Fact Sheet #71 may have been a reaction to the EPI's criticisms of the traditional guidelines.⁶⁶ One commentator speculated that "[s]hortly after receiving criticism from the Economic Policy Institute for its purportedly outdated regulations on the issue, the Wage and Hour Division of the DOL on April 21st released a fact sheet further explaining the test to be used to determine if an intern qualifies as an 'employee' who must be paid minimum wage and overtime compensation."⁶⁷ Thus, it is possible that because of the growing criticism of the guidelines, the government felt compelled to respond. The government could have responded to the criticism by changing the guidelines, but instead chose to reissue the traditional rules. What this means for the future of unpaid internships and whether enforcement will increase dramatically is yet to be seen. Because the government reissued the same guidelines, an analysis of the guidelines and the relevant terms is necessary.

⁶¹ Edwards & Hertel-Fernandez, *supra* note 39.

⁶² *Id.*

⁶³ *See infra* Pt.III.D.

⁶⁴ *Fact Sheet #71*, *supra* note 1.

⁶⁵ *Id.*

⁶⁶ Joshua L. Schwartz, *DOL Wage and Labor Division Clarifies Rules for Unpaid Interns in the For-Profit Sector*, BARLEY SNYDER LLC (June 18, 2010), http://www.barley.com/news/article.cfm?article_id=407.

⁶⁷ *Id.*

III. DOL'S GUIDELINES

A. *Background of the guidelines*

The WHD of the DOL issued *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act* in April 2010.⁶⁸ However, Fact Sheet #71 lists additional information, including specific factors that may be used to help determine whether an individual qualifies as an intern.⁶⁹ Although Fact Sheet #71 only restates the traditional law with clarifying factors, there is speculation that the DOL issued Fact Sheet #71 in response to the heightened criticisms of the guidelines.⁷⁰ It is believed that the DOL issued Fact Sheet #71 as a “clear warning signal” to for-profit employers hiring unpaid interns to be aware of and to comply with the law.⁷¹ Additional speculation is that the guidelines were issued because of the DOL's concern that for-profit companies are taking advantage of unpaid interns.⁷²

B. *The guidelines under Fact Sheet #71*

Whether an intern is excluded from being an employee under the FLSA depends on six criteria. The DOL restated the traditional guidelines established in *Portland Terminal* when it issued Fact Sheet #71. Fact Sheet #71 states that in classifying an individual as an intern, the following must be satisfied:

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,

⁶⁸ *Fact Sheet #71*, *supra* note 1.

⁶⁹ *Id.*

⁷⁰ Edwards & Hertel-Fernandez, *supra* note 39; Schwartz, *supra* note 66.

⁷¹ Kramer Levin Naftalis & Frankel LLP, *Department of Labor Puts Unpaid Internships Under the Spotlight*, EMP. L. UPDATE 2 (Aug. 2010), <http://www.kramerlevin.com/files/Publication/c76bff6b-a66a-42ae-af75-05744efcb71c/Presentation/PublicationAttachment/ac20d6c9-a830-4744-994e-05b28791c47b/EmploymentLawAugust2010.pdf>.

⁷² Steinberg, *supra* note 1.

6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁷³

Fact Sheet #71 states that if an individual is classified as an intern under these criteria, then he or she is not an employee under the FLSA and, therefore, does not receive minimum wage protections.⁷⁴ Fact Sheet #71 states that "[t]his exclusion from the definition of employment is necessarily quite narrow because the FLSA's definition of 'employ' is very broad."⁷⁵ Only where an individual satisfies all of the criteria under Fact Sheet #71 will an employer be permitted to exclude the individual from mandatory minimum wage requirements because he or she is an unpaid intern, not an employee.⁷⁶

C. *Analysis of the guidelines*

Along with restating the traditional test in Fact Sheet #71, the DOL listed factors to consider in determining whether any of the elements are met.⁷⁷ A complete analysis of the guidelines exists by looking at a combination of the following: the individual elements of the test, the related factors to each element, and any additional commentary pertaining to each element. A discussion of the element, the related factor, and additional commentary is discussed below in order of the criteria listed in Fact Sheet #71.

The first element listed in Fact Sheet #71 states that "[t]he 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."⁷⁸ The following are factors listed in Fact Sheet #71 relating to the first requirement. "The more an internship program 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 (this often occurs where a college or university exercises oversight over the internship program and provides educational credit)."⁷⁹ Fact Sheet #71 states that:

[T]he intern does not perform the routine work of the business on a regular and recurring basis, and the business is not dependent upon the work of the intern [I]f the interns are engaged in the operations of the employer or are

⁷³ *Fact Sheet #71, supra* note 1.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

performing productive work (for example, filing, performing other clerical work, or assisting customers), then the fact that they may be receiving some benefits in the form of a new skill or improved work habits will not exclude them from the FLSA's minimum wage and overtime requirements because the employer benefits from the interns' work.⁸⁰

Thus, the more the employer takes on the individual, trains him or her, and the more the individual learns like he or she would in a classroom or vocational school, the more likely the individual will not be classified as an employee.⁸¹ The intern is more likely to learn something from this type of training compared to doing clerical work or other activities for the benefit of the employer, which is the point of an individual being classified as an intern.

The second element listed in Fact Sheet #71 states that “[t]he internship experience is for the benefit of the intern.”⁸² The following factor is listed in Fact Sheet #71 pertaining to the second requirement. The more an intern learns skills applicable to various places of employment, not just for the employer, the more likely the intern is seen as receiving training.⁸³ The DOL stresses that the internship is for the benefit of the intern, not the employer. Therefore, the more the internship experience is like training or education, the more likely the intern is not classified as an employee. The second requirement is largely an inference that follows from the first factor. Combined, the first and second parts of the test reflect the idea that “the internship should be similar to the training given in a vocational school or academic institution, that the intern does not displace regular paid workers and that the employer ‘derives no immediate advantage’ from the intern’s activities—in other words, it is largely a benevolent contribution to the intern.”⁸⁴

The third element under Fact Sheet #71 requires that “[t]he intern does not displace regular employees, but works under close supervision of existing staff.”⁸⁵ The following are factors under Fact Sheet #71 relating to the third requirement of the test.

[I]f the employer is providing job 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, the activity is

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Greenhouse, *supra* note 6.

⁸⁵ Fact Sheet #71, *supra* note 1.

more likely to be viewed as a bona fide education experience . . . If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek . . . If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA . . . [I]f the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.⁸⁶

The third element is fairly straightforward when compared to the other elements required in the test.⁸⁷ The factors listed under Fact Sheet #71 that apply to the third element explain clearly when an individual does not displace employees and is closely supervised by the employer.⁸⁸

The fourth element listed under Fact Sheet #71 states that "[t]he employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded."⁸⁹ Fact Sheet #71 does not list any factors relating to the fourth element of the test. However, the fourth element is the most important element from an employer's perspective because "all the others will follow from whether the employer derives any immediate benefit from the activities."⁹⁰ What makes it difficult for employers to satisfy the fourth element is that "no work can be performed that is of any benefit at all to the company."⁹¹ That is to say that an intern cannot "deliver mail, sort files, file papers, organize a person's calendar, conduct market research, write reports, watch television shows and report on them, read scripts, schedule interviews, or any other job that assists the employer in any way in running their business."⁹² This element is particularly hard to satisfy and may be unrealistic given the nature of internships, where interns have been expected to work.⁹³

⁸⁶ *Id.*

⁸⁷ Rochelle Kaplan, *Legal Issues Surrounding Internships*, SAHRMA.ORG (Mar. 4, 2011), http://www.sahrma.org/images/studentchapter_legal_issues.pdf.

⁸⁸ *Fact Sheet #71*, *supra* note 1.

⁸⁹ *Id.*

⁹⁰ *Unpaid Internships, Common but Illegal*, *supra* note 51.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Internship Experience is Essential and Internship Opportunities Are Improving: New Federal Guidelines Governing Unpaid Internships Are Unrealistic*, INTERNSHIPS.COM (June 2010), <http://www.internships.com/spring2010survey>.

The fifth criterion listed in Fact Sheet #71 requires that “[t]he intern is not necessarily entitled to a job at the conclusion of the internship.”⁹⁴ The following are factors under Fact Sheet #71 pertaining to the fifth requirement of the test.

The internship should be of a fixed duration, established prior to the outset of the internship . . . [U]npaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period . . . If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.⁹⁵

Where employment can be linked to a prior internship with a firm, the employer may be in violation of the fifth step of the test.⁹⁶ This element is a straightforward part of the test that is required for an individual to qualify as an intern.⁹⁷ However, “the fact that an employer may ultimately hire the student does not make the intern an employee as long as the employer did not promise the student a job prior to or during the internship.”⁹⁸

The final element listed in Fact Sheet #71 states that “[t]he employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.”⁹⁹ Fact Sheet #71 does not list any factors relating to the sixth element of the test.¹⁰⁰ The sixth element is fairly straightforward because all that is required is that both parties know the intern is not entitled to wages.¹⁰¹ Employers have the option of paying student interns by way of a stipend for meals, lodging, or tuition without such items being considered “wages.”¹⁰²

This discussion detailed how each element of the test, the related factors, and additional commentary combine to form a complete analysis of the requirements for satisfying the criteria listed in Fact Sheet #71. By including additional factors in Fact Sheet #71, the DOL sought to clarify how to apply the traditional test without making any changes to the traditional requirements for qualifying as an intern under *Portland*

⁹⁴ *Fact Sheet #71, supra* note 1.

⁹⁵ *Id.*

⁹⁶ *Id.*; Edwards & Hertel-Fernandez, *supra* note 39, at 2.

⁹⁷ Kaplan, *supra* note 87.

⁹⁸ *Id.*

⁹⁹ *Fact Sheet #71, supra* note 1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

Terminal.¹⁰³ The additional factors may provide more clarity and guidance in how to apply the criteria; however, because the guidelines were not changed, great criticisms still remain.

D. *Criticism of Fact Sheet #71*

Criticisms of the guidelines, even after issuing the additional related factors in Fact Sheet #71, remain strong. First, a criticism of the guidelines is that interns remain unprotected the way the current law is written.¹⁰⁴ Interns remain unprotected because the guidelines are based on *Portland Terminal*, a decision from 1947, a time “when many apprenticeships were for blue-collar production work.”¹⁰⁵ Employers think the guidelines make it drastically more difficult for them to have internship programs.¹⁰⁶

Furthermore, interns remain unprotected because only employees, not interns, are protected in the workplace from discrimination and harassment under Title VII of the Civil Rights Act of 1964.¹⁰⁷ “Employee” is not defined under Title VII; however, the first step that courts use to determine whether an individual is an “employee” is whether he or she is paid.¹⁰⁸ Courts continue to find that an unpaid intern is not an employee under Title VII and, therefore, not protected against workplace discrimination or harassment.¹⁰⁹ “This is particularly important given the vulnerable position most student workers are in during internships; they are generally on the lowest rung of a workplace hierarchy and working not for the compensation (if any), but rather for the educational experience and recommendations from supervisors and employers for future opportunities.”¹¹⁰ An example of how this is a problem is demonstrated by “Kathryn Edwards, a researcher at the Economic Policy Institute and co-author of a new study on internships, [who] told of a female intern who brought a sexual harassment complaint that was dismissed because the intern was not an employee.”¹¹¹ Because individuals are classified as interns and, therefore, excluded from the definition of employee, workplace protections do not cover interns, leaving them at great risk for abuses while interning.¹¹²

¹⁰³ *Id.*

¹⁰⁴ Greenhouse, *supra* note 6.

¹⁰⁵ *Id.*

¹⁰⁶ Aoun, *supra* note 9.

¹⁰⁷ Edwards & Hertel-Fernandez, *supra* note 39, at 3.

¹⁰⁸ *Id.* at 2–3.

¹⁰⁹ *Id.* at 3.

¹¹⁰ *Id.*

¹¹¹ Greenhouse, *supra* note 6.

¹¹² Edwards & Hertel-Fernandez, *supra* note 39, at 3.

Second, an additional criticism of the guidelines is that they harm employees.¹¹³ The usual criticism of the guidelines involves the employer or the intern; however, this critique is especially important because it underlies the fact that problems related to Fact Sheet #71 arise beyond the parties who are directly affected. Because the guidelines are sometimes seen as lacking clarity and certainty, the ambiguity permits employers to replace workers with unpaid interns.¹¹⁴ Employers tend to replace employees with unpaid interns when the market is competitive and the economy is down.¹¹⁵ Employees are disadvantaged because they are “crowded out of employment.”¹¹⁶

Third, enforcing the guidelines is particularly difficult because neither employers nor interns report the violations.¹¹⁷ Interns hesitate to sue the employer for three significant reasons. First, interns do not want to be “blacklisted” by the employer; second, interns want to be able to use the employer as a reference;¹¹⁸ and finally, interns want to be known as reputable in their profession and do not want to be seen as “troublemakers” or minimize their chances of success in their field.¹¹⁹ The incentive for students not to report violations of the guidelines is driven by “[t]he crucial role of internships in obtaining later employment and the highly competitive market for placement mean[ing] that no one student has an incentive to report their employer, even in cases of blatant abuses, since another student will readily work for free.”¹²⁰

Fourth, unpaid internship positions limit the applicant pool to those who can afford to work for free.¹²¹ Unpaid internships are dependent on an individual’s “economic means, thus institutionalizing socioeconomic disparities beyond college.”¹²² Where a wealthy individual can take an unpaid internship position because he can afford to live without pay for a period of time, “[l]ow-income students are either denied the opportunity to participate in these valuable experiences, or must take on significant debt in order to receive the same advantages as their wealthier peers. Given the critical importance of internships in securing employment after graduation (particularly in fields that require a high degree of training), low-income students find themselves at a particular disadvantage.”¹²³

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Unpaid Internships, Common but Illegal*, *supra* note 51.

¹¹⁹ Greenhouse, *supra* note 6.

¹²⁰ Edwards & Hertel-Fernandez, *supra* note 39, at 2.

¹²¹ *Id.*

¹²² *Id.*

¹²³ Greenhouse, *supra* note 6.

The importance of unpaid internships and the effect they have on the wealthy and non-wealthy is demonstrated by the following example. The New York Times reported that Brittany Berckes, a senior student, interned for a cable news station and expressed that her parents were not pleased about her working for no pay.¹²⁴ However, Berckes stated that “some of my friends can’t take these internships and spend a summer without making any money because they have to help pay for their own tuition or help their families with finances . . . That makes them less competitive candidates for jobs after graduation.”¹²⁵ Thus, because of Berckes’ socioeconomic status, she was able to intern without pay, giving her an advantage against her lower income classmates.¹²⁶ The guidelines encourage distinguishing between the wealthy and non-wealthy and, therefore, are economically discriminatory.¹²⁷

Fifth, the guidelines make it more difficult for employers.¹²⁸ Nancy J. Leppink, the acting director of the DOL, stated that “[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.”¹²⁹ Employers’ responses to the new guidelines vary. Some employers have chosen to “bulletproof their internship programs,” while others have changed unpaid internships to paid internships.¹³⁰ Still other employers have decided to cut back on the number of internships offered, while other employers have completely removed their internship programs.¹³¹ An example comes from “Dave Phillipson, the organizer of CEO Space, a California-based network of entrepreneurs, [who] said he had been working on starting an internship program this summer but abandoned it ‘because of this silly ruling.’”¹³² Employers view the reissuance of the guidelines as a threat to for-profit firms, a threat that “could have a chilling effect on the willingness of employers to offer internships—paid or unpaid.”¹³³ Finally, a concern expressed by Barbara Lang, the vice president and chief executive of the D.C. Chamber of Commerce, is that employers cannot afford paying interns and “[u]nless [the] government is going to provide some subsidy along with these requirements, they won’t be able to provide

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Stout, *supra* note 17.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Aoun, *supra* note 9.

these experiences anymore.”¹³⁴ Because some employers are likely to have difficulty in affording unpaid interns and because some interns are likely to have trouble interning without pay, the guidelines have a negative economic impact on both parties who are directly impacted by the guidelines.

Sixth, the guidelines are difficult to interpret.¹³⁵ Arguably, the guidelines do not match up with the way internships actually work, so there is great “difficulty of evaluating actual internship programs and mapping their attributes to the six-point test.”¹³⁶ In one example, the DOL could not determine whether a college internship program satisfied the guidelines.¹³⁷ The DOL struggled to determine whether the internship consisted of work or whether it was an educational experience.¹³⁸ Where it was unclear, the DOL balanced “whether the work performed by the intern would ‘offset the burden presented to the employer from the necessary training and supervision’ and if the experience ‘provides the students with educational experiences unobtainable in a classroom setting.’”¹³⁹ Only after determining if either criterion is met are individuals likely to qualify as interns under the guidelines.¹⁴⁰ This example of the DOL’s confusion surely demonstrates the difficulties employers may have in deciding who classifies as an intern. Furthermore, the courts of appeals are divided as to whether all six requirements must be satisfied under the guidelines, or whether based on the totality of the circumstances an individual is an intern not an employee.¹⁴¹ Where the courts and the DOL are equally confused in close cases, it seems unreasonable to expect employers to be able to always determine whether an individual is an employee or an intern.

Seventh, a final criticism of the guidelines is that they are unrealistic.¹⁴² A spring 2010 survey by Internships.com of 300 career professionals reveals that ninety-eight percent of the people believe employers favor applicants with internship experience over those without the experience.¹⁴³ Similarly, ninety-six percent of the people agreed that those with internship

¹³⁴ Molly Henneberg, *Obama Administration Considers Cracking Down on Unpaid Internships*, FOX NEWS (Apr. 17, 2010), <http://www.foxnews.com/politics/2010/04/17/obama-administration-considers-cracking-unpaid-internships/>.

¹³⁵ Edwards & Hertel-Fernandez, *supra* note 39, at 2.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Internship Experience is Essential and Internship Opportunities Are Improving*, *supra* note 93.

¹⁴³ *Id.*

experience are at a competitive advantage compared with those without the experience.¹⁴⁴ However, forty-four percent of the people surveyed found the new federal guidelines requiring that the employer receive no immediate advantage from the intern to be unrealistic while only nine percent viewed the requirement realistic.¹⁴⁵ Knowing how to go forward in a world where internships are increasing without running afoul of the guidelines is ultimately going to be a challenge because of the unrealistic rule that interns cannot provide an immediate advantage to the employer.¹⁴⁶

The criticisms of the guidelines reflect the concerns from employers, interns, employees, and the courts. Since the DOL reissued the same guidelines in April 2010,¹⁴⁷ frustrations remain because reissuing the same test did not substantively change the way individuals are classified as interns.¹⁴⁸

IV. POLICY

A. *Reissuing the same guidelines changes everything*

Fact Sheet #71 restates the guidelines that have been effective since 1947.¹⁴⁹ While it is true that nothing legally changes by reissuing the guidelines, the enforcement of these guidelines is changed significantly.¹⁵⁰ The DOL did not have to reissue the guidelines since the law was already in place.¹⁵¹ Analyzing why the DOL issued the guidelines is the key to understanding the changing atmosphere of unpaid internships after Fact Sheet #71.

The main reason for issuing Fact Sheet #71 is that the Obama administration is cracking down on employers bringing on unpaid interns.¹⁵² Despite the fact that Fact Sheet #71 restates the law that has been in effect since *Portland Terminal* in 1947, the effect of the reissuance is meant to put employers on alert that the government plans to be tougher in enforcing the guidelines than was previously the case.¹⁵³ The government reissued the guidelines because it is "concerned about

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Fact Sheet #71*, *supra* note 1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *See* Greenhouse, *supra* note 6.

¹⁵¹ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

¹⁵² *See* Greenhouse, *supra* note 6.

¹⁵³ Greenhouse, *supra*, note 6; Kramer Levin Naftalis & Frankel LLP, *supra* note 71.

companies taking advantage of interns.”¹⁵⁴ Employers understand the reissuance of the guidelines as putting them on alert; some employers even viewed it as a threat of enforcement.¹⁵⁵ Although the reissuance of the guidelines changes nothing legally, it is a warning to employers to follow the rules because the government will be enforcing them.¹⁵⁶ For employers who failed to comply with the guidelines in the past, Fact Sheet #71 is a warning that if they do not start to comply with the rules, the government will prosecute them for unfair labor practices.¹⁵⁷

B. How the new guidelines affect people seeking internships

There are pros and cons to the guidelines that affect people seeking internships. In total, reissuing the guidelines helps interns. One purpose of the guidelines is to protect individuals holding internship positions.¹⁵⁸ The guidelines are “simply a more stringent application of the longstanding FLSA.”¹⁵⁹ Their goal is laudable: to protect students from being used as free labor, particularly by for-profit companies.¹⁶⁰ Fact Sheet #71 is essentially the DOL “cracking down on employers who break minimum wage laws, investigating and fining companies that are taking advantage of (mostly) young people for whom paid jobs are scarce.”¹⁶¹ The guidelines are a way to protect interns from giving up free labor as well as to “level the playing field between interns who can afford to work for free and those who can’t.”¹⁶² Vice president of EPI, Ross Eisenbrey, stated “[i]f you can’t have an unpaid internship because you need to work, you’re poor, or your family just doesn’t have the means, you’re cut out and that’s wrong.”¹⁶³ While the guidelines are intended to help interns, issues with respect to enforcement will inevitably be worked out over time. Government enforcement is yet to be seen; however, the purpose of the guidelines is likely to serve the interest of interns in the long run.

While the purpose and intention of the guidelines are legitimate, there are some ways that the guidelines work to the detriment of interns. First, the guidelines arguably make interns worse off by precluding them from classification as employees because they lack discrimination protection.

¹⁵⁴ Steinberg, *supra* note 1.

¹⁵⁵ See Aoun, *supra* note 9.

¹⁵⁶ See Greenhouse, *supra* note 6.

¹⁵⁷ Fair Labor Standards Act, 29 U.S.C. § 203 (2006); Greenhouse, *supra* note 6.

¹⁵⁸ 2010 Student Survey, *supra* note 12.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Courtney Rubin, *Watch Out: That Unpaid Intern Could Cost You*, INC. (Apr. 6, 2010), <http://www.inc.com/news/articles/2010/04/what-unpaid-interns-could-cost-you.html>.

¹⁶² Henneberg, *supra* note 134.

¹⁶³ *Id.*

Since, interns are not considered employees they are unprotected by workplace employee protections. The guidelines are disadvantageous because “many interns [are left] unprotected by workplace discrimination and harassment statutes such as the Civil Rights Act, Americans with Disability Act, and the Age Discrimination in Employment Act.”¹⁶⁴ With respect to discrimination laws, the definition of who qualifies as an “employee” is not defined under Title VII; however, “the question of whether an individual is compensated for his or her work by an employer is the first test for determining employee status. Accordingly, unpaid interns, or even interns paid by an entity other than an employer, do not receive workplace discrimination protection.”¹⁶⁵ The lack of protection interns receive is especially relevant and concerning because interns are at the bottom of workplace totem pole, making them particularly vulnerable in the case of discrimination.¹⁶⁶ This suggests that the guidelines should reach further and extend greater protection to interns. Second, the guidelines state that an intern may only perform minimal work, if the intern is to perform any work at all.¹⁶⁷ This limitation of performing “no or minimal work” may be a detriment to the intern because the most effective way to learn is arguably through work.¹⁶⁸ The guidelines that require “no or minimal work” are “antithetical to the premise of experiential learning.”¹⁶⁹ Under these rules, internships or co-op positions would deteriorate into job shadowing, a pale imitation of true experiential learning.¹⁷⁰ While it is true that this aspect of the guidelines will make it so interns cannot perform work that benefits the employer, this restriction will ultimately serve to protect the interns so they are not being treated as employees, doing work for no pay.

Finally, it is argued that the guidelines make it more difficult for individuals to obtain internships. There is speculation that the reissuance of the guidelines is a “crackdown [that] may actually limit opportunities” for individuals seeking internships.¹⁷¹ Several examples illustrate this point. First, there is Alyssa Wolice who was a journalism major at American University and had three promising internship offers at a sports organization and two news organizations.¹⁷² Alyssa was forced to turn down all three offers because all employers insisted that she obtain credit

¹⁶⁴ Edwards & Hertel-Fernandez, *supra* note 39, at 1.

¹⁶⁵ *Id.* at 3.

¹⁶⁶ *Id.*

¹⁶⁷ *Fact Sheet #71*, *supra* note 1.

¹⁶⁸ *Internship Experience is Essential and Internship Opportunities Are Improving*, *supra* note 93.

¹⁶⁹ Aoun, *supra* note 9.

¹⁷⁰ *Id.*

¹⁷¹ Stout, *supra* note 17.

¹⁷² *Id.*

for her internship through the university.¹⁷³ Because she had reached her maximum credit hours for internships allowed by the university, Alyssa was forced to turn down all three internship opportunities.¹⁷⁴ Alyssa stated that even if she had not yet used her available credit hours that she would not have been able to take any of the positions because she could not afford to pay her university the \$1000 it would cost for the credits.¹⁷⁵

Another example is from an M.B.A. student who had an internship at a venture capital firm during one summer but had difficulty finding as much as fifteen hours a week of internship work the following summer after the government issued the guidelines.¹⁷⁶

Finally, Sarah Green, an art history major at Emory University, had an internship at the Metropolitan Museum of Art.¹⁷⁷ The following year, in her attempt to return to New York, Green applied for paid and unpaid internships.¹⁷⁸ Green was turned down from every position for which she applied, with some employers stating that “they’d cut back on the number of interns they now hire.”¹⁷⁹ Green stated that she took the rejection “as a sign” that she “was not meant to work in the fine arts.”¹⁸⁰ Green decided to apply to a graduate program geared toward advertising for art.¹⁸¹

While these examples are only a few of many, they show how the reissuance of the guidelines makes it more difficult for individuals to land internships. However, the difficulty of obtaining internships may prove to be worthwhile if the guidelines protect interns in the long run. Since the guidelines were recently issued, employers may be hesitant to bring on interns because they are unsure how to comply with the law. Over time, this should change and it should be clearer how the government will enforce the guidelines and what is expected of interns and employers. In the mean time, interns may find it more difficult to land internships; however, they will not be abused by the process. If the guidelines protect interns from abuses like working for no pay, then the guidelines surely are to the benefit of interns, even if they do make it more difficult to obtain an internship in the short run.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

C. How the guidelines affect small businesses

The reissuance of the guidelines not only affects individuals seeking internships, but also affects small businesses in positive and negative ways. Although there are positive effects for businesses with respect to the guidelines, the greatest effects are negative.

The positive effects of the guidelines for employers are incredibly small. One positive aspect of internships for businesses is that internships are gaining popularity in small businesses as small businesses are increasingly bringing on more interns.¹⁸² While recognizing the limitations on what interns can do, small businesses find interns valuable because internships serve as a tryout for permanent employment without the cost of wages.¹⁸³ Therefore, the guidelines may be a helpful tool to small businesses because they could ensure compliance with the law.

However, it is unclear whether small businesses are aware and understand the issuance of Fact Sheet #71. While small business owners understand that unpaid internships require training and supervision, they are unaware of the six criteria set forth in the guidelines in April 2010.¹⁸⁴ An example of a small business using interns comes from Lise Romanoff, director of Vision Films Inc., who states that the company “‘can’t treat them like an employee,’ . . . [but instead is] ‘using them in a complementary way.’”¹⁸⁵ While the hope is that the guidelines will serve to create more awareness and compliance with the law, the crux of the effects of the guidelines on businesses are essentially negative.

The guidelines make it difficult for small businesses because “small businesses could well fall into the enforcement net.”¹⁸⁶ A commentator analogized an employer’s failure to comply with the guidelines as a “trip down the labor law rabbit hole,” which refers to the tremendous legal trouble that an employer will be in for violating the rules of unpaid internships.¹⁸⁷ An additional concern involves the uncertainty of the degree of increased enforcement. Small business owners “have been hesitant to take on interns” because of uncertainty in how the guidelines will be

¹⁸² Cyndia Zwahlen, *Unpaid Internships Gaining Popularity at Small Firms*, L.A. TIMES, June 28, 2010, <http://articles.latimes.com/2010/jun/28/business/la-fi-smallbiz-interns-20100628>.

¹⁸³ NicoleD, *The Truth Behind Unpaid Internships*, SBA (June 10, 2010, 8:27 AM), <http://community.sba.gov/community/blogs/expert-insight-and-news/business-law-advisor/truth-behind-unpaid-internships>.

¹⁸⁴ Nina Kaufman, *Summer Interns: Are Small Businesses Flirting with Disaster?*, ENTREPREN. DAILY DOSE (June 30, 2010), <http://can0x.blog.entrepreneur.com/2010/06/summer-interns-are-small-businesses-flirting-with-disaster.php>.

¹⁸⁵ Zwahlen, *supra* note 182.

¹⁸⁶ Kaufman, *supra* note 184.

¹⁸⁷ *Id.*

enforced.¹⁸⁸ Some business owners are frustrated and do not see the guidelines as a proper measure. Yaron Brook, director of the Ayn Rand Institute, noted his frustrations by stating the following: “[s]o what if they have to do some work unrelated to their desired fields—like making coffee or covering the lunch shift at the reception desk? We all do some tasks at work that aren’t directly related to our careers . . . Indeed, no one becomes a lawyer because it’s fun to tote around a 20-pound briefcase or fill out expense reports, but it’s all part of the job in a chosen field.”¹⁸⁹ This criticism is directed at the substance of the guidelines and how they negatively impact the nature of businesses (i.e., there are always unpleasant tasks to be done in businesses and there is no reason why interns should be precluded from taking part in such tasks).

The guidelines prohibit an intern from doing work that is “to the advantage of the employer.”¹⁹⁰ This element is particularly problematic for employers. There are arguably few things that will not fall into the category of benefiting the employer.¹⁹¹ “[F]ew internships are really considered worthwhile (by the intern’s standards) unless there’s some real-world experience that comes out of it.”¹⁹² However, even if the intern gets an educational experience out of the internship, if the employer also benefits from the intern’s work, the employer violates the guidelines, and therefore, must pay the intern.¹⁹³ “[S]mall businesses have on their hands—not an intern whom they don’t have to pay—but an unpaid employee who may be entitled to back pay and other penalties.”¹⁹⁴ Employers who bring on interns and have them do work that benefits the employer will run afoul of the guidelines, making it incredibly difficult for employers to legally have unpaid interns.

Aside from the practical problems that coincide with applying the guidelines to small businesses, the rules make it difficult for small businesses to understand.¹⁹⁵ One survey of 305 colleges by Internships.com reported that in the past year unpaid internship postings increased by sixty-

¹⁸⁸ *Resources for Entrepreneurs: Small Businesses Increasingly Turning to Unpaid Internships*, GAEBLER (June 29, 2010), <http://www.gaebler.com/News/Small-Business-Finance/Small-businesses-increasingly-turning-to-unpaid-internships-19862400.htm>.

¹⁸⁹ *Unpaid Internships? No Such Thing*, BLOOMBERG BUSINESSWEEK, http://www.businessweek.com/debateroom/archives/2009/06/unpaid_internships_no_such_thing.html (last visited March 29, 2011).

¹⁹⁰ *Fact Sheet #71*, *supra* note 1.

¹⁹¹ Kaufman, *supra* note 184.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See* Zwahlen, *supra* note 182.

eight percent, while paid internships increased by only thirty percent.¹⁹⁶ The survey showed that forty-one percent of the schools “said a lack of clarity about how to comply with the Labor Department’s internship guidelines has been a disincentive for participation by small and medium-size firms.”¹⁹⁷ If small business owners want to bring on unpaid interns, it may be difficult to do so for fear of violating the law.

D. Proposed changes to the guidelines

Whether the guidelines in Fact Sheet #71 are the best way to regulate internship law is debatable. There are alternative ways to regulate interns other than the test the current guidelines require. Below is a description of alternatives to the way internship law may be governed.

One suggested measure is to require that the current guidelines be applicable to non-profit and government employers. The purpose for this would be to require the government to live up to its own ambiguous standard that applies to for-profit firms. The likely result of the rules applying to government employers is that the government would change the law or clarify the law more precisely so as not to make them ambiguous. The argument for this action is that “interns at non-profit and governmental organizations are just as likely to find internships where they simply perform administrative or other work that replaces full-time workers.”¹⁹⁸ Because there is no meaningful distinction between interning at a for-profit firm compared to a non-profit or government organization, the same guidelines that apply to for-profit firms should govern non-profit and government organizations.¹⁹⁹ Republican Congressman Darrell Issa of California thinks the law should apply to the government and non-profits.²⁰⁰ Issa sent the White House a letter requesting “a listing of the number of unpaid interns and volunteers at the White House . . . along with a short description of their duties.”²⁰¹ Issa believes the government should have to live up to “its own standard.”²⁰² As Issa asserted, “[i]f the government can’t do it, certainly it’s not fair to ask the private sector to do it in this case.”²⁰³ The rationale is that if the government had to comply with Fact Sheet #71, then the law would change because the government certainly has interns who perform work in violation of the rules. This is a way for the government to see how difficult Fact Sheet #71 makes the law for

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Edwards & Hertel-Fernandez, *supra* note 39.

¹⁹⁹ *Id.*

²⁰⁰ Henneberg, *supra* note 134.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

employers, which would likely result in the government changing the guidelines.

An additional alternative to the current guidelines is to adopt a test comparing the economic advantages of the parties. The EPI suggests that an appropriate balancing test would better determine whether an individual qualifies as an intern or an employee.²⁰⁴ The EPI's test would require comparing what it deems to be the two most important parts under the current guidelines.²⁰⁵ The test would compare the experience being primarily for the intern against the direct benefit the employer receives from the internship.²⁰⁶ The test would require comparing "the *per-hour cost to the employer of an intern* (through supervision and training) relative to the *per-hour benefit to the employer of an intern* (through an intern's production)."²⁰⁷ Where the cost to the employer exceeds the benefit to the individual, then the individual is considered an intern.²⁰⁸ However, where the benefit to the individual exceeds the cost to the employer, then the individual is considered an employee and must be paid.²⁰⁹ The test uses the employer's cost as the proxy because EPI claims it would be too difficult to measure the benefit that the intern receives.²¹⁰ With this test in place there would be no six-step test, and the analysis would turn into more of a case-by-case basis, which is more accurate than a bright-line rule.

A final alternative to the current guidelines is to abolish the rules and adopt a *laissez-faire* policy of leaving regulation up to educational institutions.²¹¹ Admittedly, there are individuals seeking interns outside the scope of educational institutions (people other than students); however, the vast majority of internships employ students. This alternative is geared toward students seeking internships not people outside of educational institutions seeking internships. This option is a less complex way to apply rules to interns by requiring employers to follow the rules of individual schools. In a higher education article, Joseph Aoun stated that "[w]e all share the Department of Labor's concerns about the potential for exploitation, but the role of determining the educational value of an internship or co-op should rest with educational institutions. Colleges and universities must continue their active monitoring of experiential learning programs, and place students in secure and productive environments that further their education."²¹² Decreasing government regulation of internship

²⁰⁴ Edwards & Hertel-Fernandez, *supra* note 39, at 4.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Aoun, *supra* note 9.

²¹² *Id.*

law and having universities determine the applicable internship standards would be analogous to labor unions in collective bargaining. Employees bargain through unions with the employers. Similarly, students could bargain through their universities with the employers. Universities, like labor unions, have the size and strength to bargain effectively. Because this option calls for completely abolishing the government regulation of internships, it is unlikely that a laissez-faire solution will be given much weight as the law exists today. However, if the guidelines prove problematic in the future, this option could play an important role in understanding alternatives.

The alternatives suggested each have varying levels of regulation with respect to internship law. It is likely that these options will not be given much consideration in the near future until the impact of Fact Sheet #71 is known.

V. CONCLUSION

Fact Sheet #71 restates the law pertaining to unpaid interns since 1947. Although Fact Sheet #71 does not substantively change the law defining what qualifies someone as an unpaid intern, it is meaningful for two reasons: first, Fact Sheet #71 clarifies the required criteria by listing additional factors to be considered when applying the criteria; and second, Fact Sheet #71 is an alert to employers that while the guidelines remain the same, the current administration plans to increase enforcement to ensure compliance with the law.

Criticism of unpaid internship law grew increasingly toward the end of the decade and the government responded by issuing Fact Sheet #71. The government chose not to implement changes to the traditional test as to what constitutes an intern. Thus, it is important that for-profit employers learn the requirements of Fact Sheet #71 if they have unpaid interns. Small businesses need to pay particular attention to the law since they may be targeted as the government increases enforcement of unpaid internship violations. While unpaid internship law maintains the same legal standards from *Portland Terminal* in 1947, the implications for the future are great post-Fact Sheet #71 due to the government's likely course of action to increase enforcement. Since the long-term effects of Fact Sheet #71 are largely unknown, it is imperative that firms adhere to the guidelines in order to avoid violating the law.

Fact Sheet #71 has various affects on employers and interns. Individuals seeking unpaid internships may struggle in their attempts to find experience in any given profession because employers may limit their internship opportunities after Fact Sheet #71 or because they may not be able to afford an internship without pay. If there are fewer internship opportunities because of Fact Sheet #71, then people seeking internships

will be unable to gain experience in a particular field. Another possibility is that during a dire economy (like the current recession), for-profit firms will increase the available internship positions. If this is the case then wealthy individuals will be afforded the opportunity to intern, while the non-wealthy will be unable to take internship positions because they cannot afford to work without pay.

Both employers and individuals seeking unpaid internships should know the law in order to protect their own interests. Employees should understand the law to ensure they are not discriminated against in favor of an employer bringing on unpaid labor, in violation of the law. Small businesses may have to take affirmative steps to make sure their internship programs remain within the bounds of the law. Because the signal from the current administration is to adhere to the guidelines as re-issued and not to adopt a new standard, it is best that firms understand the boundaries of the guidelines and follow the rules to the best of their abilities.

Because it is imperative that businesses understand the law with respect to unpaid interns, different sets of advice to employers on how to go forward after Fact Sheet #71 are as follows. One law firm issued the following tips for employers who have unpaid interns. First, it is important that the employer knows its own motive.²¹³ At any time, the employer should be able to state the purpose of the internship program and give an explanation as to how the employer does not receive a benefit.²¹⁴ Second, the employer should be clear by having the unpaid intern sign a form stating that the intern is not entitled to wages.²¹⁵ Third, the employer should have goals for the internship program, structuring it so that it reflects a learning experience like a college class, not like work.²¹⁶ An example way to do this is to create a syllabus for the internship program.²¹⁷ Fourth, the employer should make the internship for a fixed period of time, like a college class and not like a job.²¹⁸ Fifth, an employer should not discuss possible employment for the intern during the internship program.²¹⁹ This will avoid any confusion as to the intern's role during the internship.²²⁰ Finally, employers should form partnerships with schools so that student interns can get school credit for the internship.²²¹ An intern who receives

²¹³ Kramer Levin Naftalis & Frankel LLP, *supra* note 71.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

school credit for his or her experience is more likely to pass the DOL's scrutiny.²²²

An additional list for employers seeking to bring on unpaid interns comes in the form of a "dos and don'ts" list issued by Businessweek.²²³ Bruce Weinstein first says the employer should ensure that the intern gains "something genuinely useful."²²⁴ Weinstein states that an intern gains useful knowledge about the profession through simple activities, such as listening in on discussions with management and learning how to use public relations tools.²²⁵ Second, Weinstein suggests that an employer steer clear of ordering an intern to do its "dirty work" (e.g., do not have interns continuously filling the coffee pot).²²⁶ Third, Weinstein's advice to an employer is to show an intern appreciation by thanking the intern for his or her work.²²⁷ By showing gratitude, an intern is more likely to feel appreciation for his or her work even though the employer is unable to provide compensation.²²⁸ Fourth, Weinstein cautions an employer not to hire someone with whom the employer has a close relationship (e.g., a family friend or a friend's child).²²⁹ When hiring someone with whom the employer has a close relationship, Weinstein states that this presents a dual relationship that can often present problems, such as compromising friendships.²³⁰ Finally, Weinstein tells an employer to have open communication with an intern, in order to ensure he or she has appropriate expectations regarding the experience as well as the compensation (or lack thereof).²³¹

With this advice in mind, as well as the other available resources to help employers understand how best to comply with Fact Sheet #71, small businesses should be able to bring on unpaid interns and stay in compliance with the law. While the future of unpaid internship regulation remains unclear given the ambiguities in the law and the uncertainty about enforcement, taking the initiative to be as informed as possible can only prove to be beneficial to both interns and employers.

²²² *Id.*

²²³ Bruce Weinstein, *Dos and Don'ts of Unpaid Internships*, BLOOMBERG BUSINESSWEEK, May 28, 2010, http://www.businessweek.com/managing/content/may2010/ca20100526_469308.htm.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

Copyright of Entrepreneurial Business Law Journal is the property of Ohio State University College of Law and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.