

# CHAPTER 3

## Major Legal Considerations Pertaining to Internships

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*The burgeoning intern economy developed largely in the absence of federal guidelines or clarifying legal precedents until recently, creating significant ambiguity around interns' rights, internship providers' responsibilities, and institutions' potential liabilities. During the past decade, litigation has helped clarify the relationship among students, their university or college, and their internship providers under current employment and education laws. This chapter surveys the major legal developments concerning internships, including compensation, harassment, and discrimination issues, with the core question being whether an internship is treated as an employment relationship under the law. With this briefing, relevant stakeholders can seek advice of their local counsel for further clarification about legal rights and responsibilities concerning interns as they aim to implement higher quality, accessible internship opportunities, especially for students who are interested in politics and public policy.*

### INTRODUCTION

**T**he worlds of politics and public policy have long been associated with unpaid and low-paid labor, and well before internships became common. Volunteering to support candidates for office is an American civic tradition, with tasks ranging from passing out campaign literature to drafting position papers. Furthermore, countless young people have found their ways to city halls, state capitals, and Washington DC to gain experience in government and policy making.

While these more casual arrangements continue, many such opportunities have been formally recast as internships. During the past four decades, this trend has dovetailed with the growth of an American “intern economy,” marked by increasing expectations that students in degree programs should seek out internships to complement their classroom learning (Perlin 2012; Yamada 2002). Professional work experience, credentials for future education and employment, and networking opportunities are commonly touted as the benefits of doing internships. Increasingly, colleges and universities have partnered with internship providers to create affiliated programs, thereby allowing institutions of higher learning to offer academic credit in return for practical experience.

Until relatively recently, this intern economy grew without external oversight, becoming, in essence,

a *de facto* required, intermediate stage of post-secondary education, bridging the worlds of classroom learning and entry-level professional employment. The legal status of those designated as interns, and the corresponding liability-related responsibilities of both internship providers and universities associated with internship programs, were not well defined (Yamada 2002). This was especially so with regard to potential protections and liabilities under minimum wage and employment discrimination statutes.

The past decade, however, has witnessed growing attention being paid to the legal implications of internships, including lawsuits and policy initiatives that are sharpening our focus on how the intern economy relates to employment and education law (Perlin 2012; Yamada 2016a; Yamada 2016b). These developments have had considerable “on the ground” impacts, putting organizations that hire interns and post-secondary educational institutions that facilitate internships on notice that liability exposure cannot be ignored. They also have raised important questions of what legal protections should extend to those working in internship capacities. These matters are notably pertinent to internships in fields that are popular options for students studying political science and related disciplines.

This chapter examines the primary legal issues surrounding internships, especially in the realms of employment law and education law, with special attention paid to internship settings popular with students studying political science, public policy, and public administration. While intended primarily to inform educational stakeholders and internship providers who are directly involved with administering and overseeing internships, it will also be useful to students who are exploring their internship options and wondering what, if any, legal protections might cover them if certain situations arise. In addition, the chapter will examine some of the deeper legal and social policy issues pertinent to the growing intern economy.

Accordingly, the second section examines the basic employment and education framework around internships, and the subsequent section discusses best practices concerning internships in the contexts of both liability exposure and access to internship and accompanying career opportunities in the fields of politics and public policy. The chapter concludes with some closing observations about the intern economy, attendant social policy issues, and creating opportunities for participation in public life.

*Before proceeding, please note three disclaimers:*

First, the forthcoming discussion heavily emphasizes federal employment and education law. While it is beyond the scope of this chapter to provide a comprehensive primer on all applicable legal developments, it is important to note that on occasion state and local laws and ordinances may enter the picture. That said, readers who seek an explanation of major legal issues pertinent to internships commonly sought by political science students will find it here.

Second, it follows that the content provided here is for informational purposes only and should not be interpreted or relied upon as legal advice. Especially for those responsible for creating and administering internship programs, consultation with counsel well versed in employment law and education law relevant to interns is strongly urged. This word of caution is provided for more than the standard obligatory reasons. The legal implications of internships can be very tricky, and the law itself continues to evolve. Many of the legal issues discussed here have been subjects of litigation only relatively recently, which suggests a body of law still in development. As suggested above, state legislation and local ordinances may address intern rights issues as well. Future executive orders, legislation, and ordinances may materially impact the legal status of interns. At the federal level, especially, a new presidential administration may result in major changes.

Finally, I readily disclose that I have been both a scholar and an advocate on these issues. My research and scholarship on the legal implications of unpaid internships began some 20 years ago, and it quickly led to a firm conclusion that protections for interns require significant expansion (Yamada 2002; Yamada 2016a; Yamada 2016b). This includes a more inclusive application of minimum wage laws and the closure of disturbing loopholes in employment discrimination and sexual harassment laws. Accordingly, during the past decade, I have participated in legal advocacy and public education initiatives supporting stronger protections for interns, including proceedings discussed here.

## LEGAL FRAMEWORK

It is important to clarify at the outset that there is no official legal definition of “intern.” Although fields such as medicine formalized the status of intern long ago, there is no general corollary in the structure of employment law. This is among the reasons why cases addressing intern employment rights have been litigated in recent years.

The main legal issues surrounding internships include: (1) potential obligations of internship providers to pay interns pursuant to minimum wage laws; (2) potential protections and liability exposure concerning interns under employment discrimination laws; and (3) obligations to prevent and respond to sex discrimination and sexual harassment under federal education law in internship programs affiliated with educational institutions.<sup>1</sup> These legal issues are relevant to interns, internship providers, and colleges and universities that are facilitating internships or sponsoring internship programs.<sup>2</sup>

As the discussion below will explain, distinctions among internships in the private, non-profit, and public sectors can carry legal significance. Therefore, it may be helpful to identify popular types of internship placements for political science students associated with these sectors. Examples of private sector internship placements include political and public affairs consulting firms, public opinion polling firms, media companies of all types (though some are non-profits), and corporate departments devoted to regulatory matters. Examples of non-profit internship placements include advocacy groups, political campaigns, policy shops and think tanks, labor unions, and community development and charitable agencies.<sup>3</sup> Public sector internship placements include virtually any local, state, regional, or federal governmental entity.

### Minimum Wage and Overtime Laws

Are interns entitled to the minimum wage and overtime pay under the Fair Labor Standards Act of 1938 (FLSA 1938), the federal law that prescribes wage and hour standards? The answer is a highly qualified *maybe* for internships with private sector, for-profit organizations, and *highly doubtful* for internships with non-profit and public-sector entities.

During the early 2010s, a flurry of lawsuits sought court rulings that interns are entitled to compensation under the FLSA and corresponding state laws (Yamada 2016a). Most of these legal claims were brought against private sector, for-profit employers. This distinction is significant, given that internships in political and policy settings are predominantly in the non-profit and public sectors. As such, we need to parse out the potential application of labor standards statutes to different categories of organizations that hire interns.

### Private sector internships

In 2018, the US Department of Labor (DOL), under the Trump Administration, issued new guidelines for determining when a private sector, for-profit internship provider is exempt from paying an intern at least the federally mandated minimum wage, as well as overtime pay when warranted (DOL 2018). These guidelines were contained in a revised memorandum designated as Fact Sheet #71: Internships Under The Fair Labor Standards Act. In the document, the DOL endorses a “primary beneficiary test” that asks whether the internship provider or the intern derives the primary benefits of the internship experience. If the latter, then the intern is not an employee under the FLSA and thus is not entitled to compensation.

To make this determination, the DOL cites the following factors to be weighed, with no single one regarded as controlling:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship (DOL 2018).

The primary beneficiary test inures to the benefit of internship providers that do not wish to pay their interns, especially those who partner with educational institutions and who require interns to acknowledge that they are neither getting paid nor are entitled to paid employment once the internship concludes. It also puts the burden of questioning the lawfulness of an unpaid internship on individual applicants, and few are likely to do so in view of the risks involved.

The DOL's 2018 guidelines incorporate the primary beneficiary test as adopted in *Glatt v. Fox Searchlight Pictures, Inc.* (2015), a class action lawsuit brought by unpaid interns who worked for a motion picture distributor and sought compensation under both the FLSA and New York Labor Law. The lead plaintiff, Eric Glatt, had interned in the accounting department of the movie *Black Swan*. The US Court of Appeals for the Second Circuit rejected an earlier legal test adopted by the DOL under the Obama Administration that required internship providers to meet a more stringent set of standards to be exempt from paying interns. Among other things, this earlier test required internship providers to demonstrate that they received "no immediate advantage from the activities of the intern" in order to earn an exemption. Instead, the Court adopted the primary beneficiary test, which is widely considered as making it easier for internship providers to claim exemptions from paying their interns.

### Non-profit and public sector internships

At present, the legality of unpaid internships in the non-profit and public sectors is more clear-cut. The DOL interprets the FLSA as to generally permit unpaid internships in the non-profit and public sectors. In the aforementioned Fact Sheet #71, the DOL explains minimum wage exemptions under the statute for non-profit and public sector internship providers:

The FLSA exempts certain people who volunteer to perform services for a state or local government agency or who volunteer for humanitarian purposes for non-profit food banks. [The Wage and Hour Division of the DOL] also recognizes an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations. Unpaid internships for public sector and non-profit charitable organizations, where the intern volunteers without expectation of compensation, are generally permissible (DOL 2018).

### Employment Discrimination Laws

Employment discrimination laws are among the major sources of potential legal protections for interns and liability exposure for internship providers. Successful discrimination claims may entitle a claimant to a variety of relief, including the possibility of emotional distress and punitive damages. However, in order to claim these protections, interns must be considered employees under the statutory definitions of employee status. Accordingly, the following section will: (1) summarize the major federal employment discrimination statutes and their respective protected classes; (2) examine the critically important threshold legal standards used to determine whether interns are employees under these laws; and (3) discuss the major employment discrimination claims that may protect interns and create liability risks for internship providers.

## Major Federal Employment Discrimination Laws

The following are summaries of the major federal laws enforced by the US Equal Employment Opportunity Commission (EEOC):

### *Title VII of the Civil Rights Act of 1964 (Title VII 1964)*

Title VII prohibits an employer from discriminating against an employee or job applicant on the basis of “race, color, religion, sex, or national origin” (Title VII 1964). It includes the Pregnancy Discrimination Act, which prohibits employment discrimination on the basis of pregnancy or childbirth. Title VII covers employers with 15 or more employees.

Of special note are two forms of discrimination: sexual harassment and LGBTQ discrimination.

**Sexual harassment.** Title VII’s prohibitions against sex discrimination include sexual harassment. Sexual harassment claims typically arise in two ways. The first is called a “quid pro quo” (*this for that* in Latin) claim, whereby a condition of employment—such as a raise or promotion—is directly tied to an employee’s submission to unwelcome sexual advances. This may come in the form of an inducement, a threat, or both.

The second, and more common, type of sexual harassment claim is the creation of a hostile work environment. In *Harris v. Forklift Systems, Inc.* (1993), the US Supreme Court articulated the current legal test for determining what constitutes an unlawful hostile work environment under Title VII, identifying two prongs that must be proven. First, the target of harassment must subjectively perceive the work environment to be hostile or abusive. Second, the work environment must be objectively hostile or abusive, i.e., as seen through the eyes of a “reasonable person.”

To determine the latter objective prong, factors that may be considered “include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Tangible behaviors may include, but are not limited to, repeated sexual vulgarities, innuendo, or humor directed at an individual; unwelcome sexual overtures, and inappropriate physical touching.

**LGBTQ discrimination.** In a major case decided in 2020, *Bostock v. Clayton County, Georgia*, the Supreme Court held that Title VII’s prohibition against sex discrimination covers sexual orientation and gender identity (*Bostock v Clayton County* 2020). The Court held that “(a)n employer who fires an individual merely for being gay or transgender defies the law.” Prior to this decision, discrimination in employment against LGBTQ individuals was legal in over half of the states. *Bostock* puts all employers on notice that discrimination on this basis is now an unlawful employment practice under federal law.

### *Equal Pay Act of 1963 (EPA 1963)*

The EPA requires men and women to receive equal pay for equal work, within the same workplace. Although the EPA is part of the Fair Labor Standards Act, whose provisions are normally enforced by the DOL, it is enforced by the EEOC.

### *Age Discrimination in Employment Act of 1967 (ADEA 1967)*

ADEA prohibits an employer from discriminating against an employee or job applicant on the basis of age. This law was designed to protect older workers against job bias. Thus, an individual must be age 40 or over to be a protected party. ADEA applies to employers with 20 or more employees.

### *Title I of the Americans with Disabilities Act of 1990 (ADA 1990)*

The ADA prohibits an employer from discriminating against qualified individuals with a disability in all aspects of the employment relationship. The ADA is most frequently invoked in claims alleging an employer’s failure to provide a reasonable accommodation for a disability. It applies to employers, including state and local governments, with 15 or more employees.

### *Rehabilitation Act of 1973*

The Rehabilitation Act protects federal employees against disability discrimination, similar to how the

ADA protects private sector employees and other public employees.

#### *Genetic Information Non-Discrimination Act of 2008 (GINA 2008)*

GINA protects employees against discrimination on the basis of genetic information. The statute applies to employers with 15 or more employees.

#### *Anti-Retaliation Protections*

Every one of the aforementioned federal employment discrimination laws includes an anti-retaliation provision that prohibits employer retaliation against those who report, file complaints about, and/or cooperate in investigations and proceedings concerning alleged discrimination. Retaliation allegations are raised as standalone legal claims.

### **Are Interns Protected Under Employment Discrimination Laws?**

In order for interns to be protected by federal employment discrimination laws, they must fall within the statutory definition of employee. Once again, let us quickly provide a summary answer to this question before going into details: (1) Paid interns are likely to be considered employees covered by federal employment discrimination laws, especially if they are compensated directly by their internship provider; and (2) unpaid interns are unlikely to be considered employees covered by these laws.

The relevant employment discrimination laws are notably unhelpful in determining whether those hired in non-standard work relationships are covered by their protections. Title VII, ADEA, ADA, and GINA all define “employee” as “an individual employed by an employer.” This circular definition offers little clarification on whether interns are covered parties. When statutory definitions are so unhelpful, we must turn to judicial interpretations and administrative determinations for guidance.

The easy cases are when interns are hired, supervised, and directly paid by their internship host. In such instances, they will be deemed an employee of that entity under these laws and can bring claims under them. In essence, their status will be treated as a traditional, short-term, and/or part-time employment relationship.

As to whether unpaid interns are protected by these laws, the leading federal court decision addressing this issue, decided in 1997, suggests that they are not. *O'Connor v. Davis* involved an undergraduate social work student, Bridget O'Connor, who alleged that she had been sexually harassed by a staff psychiatrist, James Davis, during an internship at a psychiatric care clinic in New York (*O'Connor v. Davis* 1997). O'Connor claimed that Davis's harassing behavior, which included repeated sexual vulgarities and overtures, began early in her internship and continued thereafter. She brought her concerns to her supervisor at the clinic, who did nothing to remedy the situation.

In an opinion addressing whether O'Connor could bring suit under Title VII, the US Court of Appeals for the Second Circuit observed that compensation “is an essential condition to the existence of an employer-employee relationship.” Accordingly, because the psychiatric care clinic did not directly pay O'Connor (though she was paid by the federal work-study program), the Court found that she was not employee within the meaning of Title VII and thus could not bring a claim for sexual harassment.

Although subsequent litigation on this question has not been abundant, a federal district court in *Wang v. Phoenix Satellite Television US, Inc.* (2013) approvingly cited *O'Connor v. Davis* in holding that Xueden Wang, a graduate student in journalism who did an unpaid internship with a media company, could not bring a sexual harassment claim under the New York City Human Rights Law. Although Wang's claim alleged, among other things, that she had been subjected to repeated sexual overtures and unwelcome touching by her supervisor, the court held that because she “received no remuneration for her services,” her “hostile work environment claim must fail.”

In the *Wang* case, at least, the fallout from the court's decision helped to prompt legislative change. In 2014, New York City amended its Human Rights Law to cover unpaid interns.

In fact, in addition to New York City, a small number of states and municipalities now confer varying protections against discrimination and sexual harassment to unpaid interns under their own employment laws. These include California, Connecticut, Illinois, New York, Oregon, New York City, and Washington DC. For institutions of higher education and internship providers, these state and local legal developments underscore the importance of consulting with local employment counsel to ensure

compliance.

Finally, it is important to note the Congressional Accountability Act of 1995 (CAA 1995), discussed in greater detail below. Among other things, the CAA's protections against discrimination and harassment apply to unpaid interns.

## Major Types of Employment Discrimination Claims<sup>4</sup>

### *Intentional Discrimination*

Intentional discrimination claims involve either an individual employee or group of employees alleging discrimination, such as a failure to hire or promote, wrongful termination, or segregated work assignments motivated by protected class membership. This is the classic form of a discrimination claim. In such instances, an allegedly discriminating party's intentions are typically inferred by their actions.

### *Hostile Work Environment (Harassment)*

The creation of a hostile work environment on the basis of protected class status is considered a form of intentional discrimination. As discussed above, most of the major case law has developed in the context of sexual harassment. In addition, harassment on the basis of other protected classes covered by federal discrimination laws is also unlawful.

Sexual harassment is especially pertinent to the intern context, given periodic news reports of harassing behavior coming out of legislative settings and political campaigns. Furthermore, with many students choosing to be out about their sexual orientation or gender identity, harassment of LGBTQ individuals merits attention as well.

### *Disparate Impact Discrimination*

Disparate impact discrimination occurs when a facially neutral employment policy or practice has the effect of excluding or minimizing opportunities for those of legally protected classes, and the policy or practice cannot be defended on grounds of job-relatedness and business necessity.

A facially neutral policy or practice applies to everyone, such as a requirement that all applicants for certain positions take an aptitude test with a minimum pass rate. If the aggregate results of administering that test demonstrate a wide statistical variation in pass rates among groups on the basis of race, sex, or other protected classes, then it may be an unlawful employment practice. In order to continue using that test, the employer must show that it is an effective and reliable screening device for hiring individuals to those positions.

### *Failure to Provide a Reasonable Accommodation*

The ADA's protections against disability discrimination include an employer's obligation to provide a reasonable accommodation for an employee's qualifying disability. This may include, for example, physical alterations to the work environment (such as a wheelchair ramp or adjusted desk height) or accommodations for written employment tests (such as extra time). Title VII's protections against religious discrimination require employers to make reasonable accommodations for religious faith. Under both the ADA and Title VII, an employer may respond to a reasonable accommodation request by claiming the defense of undue hardship, asserting that the requested accommodation is too expensive or too disruptive.

Many colleges and universities have experienced dramatic increases in requests for disability-related accommodations. Whether this trend applies to internship settings is not clear, but it should be noted as a possibility.

### *Retaliation*

Retaliation allegations are raised as standalone legal claims. They are among the most common counts included in discrimination lawsuits.

For example, suppose an intern covered by Title VII reports sexual harassment by their supervisor to the organization's human resources (HR) office. HR proceeds to investigate the complaint, which

includes interviewing the intern's supervisor. The supervisor, angered over the accusation, responds by taking away useful assignments from the intern and giving them a poor evaluation. From a legal standpoint, the intern may have both sexual harassment and retaliation claims against the organization.

### **Congressional Accountability Act of 1995 (CAA 1995)**

Especially relevant to this volume, it is important to correct a common ongoing misconception that Congress and the rest of the federal legislative branch are broadly exempt from protective employment statutes. The Congressional Accountability Act of 1995 filled this gap in federal workplace protections by requiring Congress and associated agencies to comply with most federal employment statutes that apply to the private sector and other governmental agencies and institutions. The covered statutes include the Fair Labor Standards Act and the employment discrimination laws discussed above. Significantly, the CAA's protections against discrimination and harassment extend to unpaid interns. Claims under the CAA are to be filed with the Office of Congressional Workplace Rights.

### **Title IX of the Education Amendments of 1972 (Title IX 1972)**

Title IX prohibits sex discrimination in "any academic, extracurricular, research, occupational training, or other education program or activity" administered by post-secondary institutions that receive federal financial assistance. The Office for Civil Rights at the US Department of Education enforces Title IX. Claimants who successfully prove intentional discrimination may recover monetary damages. Given the widespread use of federal financial aid and grant programs, this statute applies to almost every accredited college and university.

Pertinent to this chapter, Title IX obliges schools to take preventive and responsive measures concerning sex discrimination at affiliated internship program placements. Sexual harassment is a considerable focus of current Title IX enforcement efforts.

However, pursuant to the federal appeals court ruling in *O'Connor v. Davis* (1997) discussed above, internship providers probably do not face Title IX liability for on-site discrimination or harassment. The court held that hosting the internship did not turn the psychiatric hospital where an unpaid intern experienced sexual harassment into a potentially liable administrator of an education program under Title IX, and thus the hospital was not proper defendant under the statute.

## **BEST PRACTICES: TWO DIMENSIONS**

The important question of what constitutes best practices in the legal context of internships has two, perhaps conflicting, dimensions. Depending on values, ethics, and priorities, best practices for internship providers and educational institutions in terms of minimizing liability exposure may not necessarily mesh with best practices for students and others in terms of maximizing opportunities and providing working conditions safe from mistreatment.

### **The Bare Minimum: Liability-Reducing Practices for Internship Providers and Educational Institutions**

If one defines best practices for internship providers and educational institutions solely through the lens of minimizing liability exposure, then assessments of the relevant legal risks and design of preventive and responsive policies and procedures quickly become evident. The following points, building on the discussion in Part II, shape the parameters of this minimalist approach.

- For-profit internship providers may be exempt from paying interns under the federal minimum wage law if they can satisfy the Primary Beneficiary Test favored by the US Department of Labor. To minimize their liability exposure, they can arrange their internship offerings to meet as many of the factors under the primary beneficiary test as possible. This includes re-

quiring interns to acknowledge that no compensation will be provided and that they are not entitled to paid employment after the internship is over.

- Non-profit and public sector internship providers are likely exempt from paying interns under the Fair Labor Standards Act, under the DOL's current interpretation of the law. To minimize their liability exposure, some internship providers in these sectors require interns to acknowledge in writing that they are volunteers.
- Paid interns are very likely to be covered by federal employment discrimination laws. To minimize their liability exposure, internship providers should treat paid interns as employees for purposes of policies and programs concerning diversity education, sexual harassment prevention and response, and similar in-house measures.
- Unpaid interns are unlikely to be covered by federal employment discrimination laws. Internship providers who do not pay their interns are thus much less likely to face liability exposure under these statutes.
- Educational institutions are obliged under Title IX to protect students enrolled in their internship programs from sex discrimination and sexual harassment at the host sites. To minimize their liability exposure, colleges and universities should consult guidelines from the US Department of Education, Office for Civil Rights. Specific measures may include orientation briefings for interns; training and education programs for program administrators, affiliated faculty, and affiliated internship providers; and policies and procedures for reporting, investigation, and resolution.

## **The Better Way: Ethical Practices to Expand Opportunities and Protections for Interns**

If internship providers and educational institutions want to go beyond what the law requires in ways that expand opportunities and protections for interns, then a protocol of best practices starts to look much different. This may, frankly, expose them to greater liability exposure, but arguably, it is the right thing to do.

### **Paying interns**

If internship providers and educational institutions wish to maximize opportunities for students and others of all economic backgrounds and diversity groups to obtain internship experiences, then they should support and facilitate paid internships. These priorities are especially significant for internships in politics and public policy, which long have been among the “glamour industries” in which unpaid internships are common, along with media, entertainment, and fashion (Yamada 2002). Internships in these fields open doors to opportunities that shape and influence public debate, opinion, taste, and culture. Restricting vital entry points to individuals who can afford to work for free creates, in effect, a pipeline narrowed by economic class disadvantages and exclusion of historically disadvantaged groups.

A prime example of an exclusionary practice is the White House internship program (<https://www.whitehouse.gov/get-involved/>). Touted as a “highly competitive” program, it requires a minimum work commitment of 45 hours per week, yet under Democratic and Republican administrations alike, it has provided no compensation and no housing assistance. By limiting participation to those who can afford to provide free labor while living in one of the nation's most expensive housing markets, this marquee opportunity reinforces unequal access to experiences that can have formative career impacts. Hopefully this practice will change in the face of growing criticism of unpaid internships in high-profile settings.

Paying interns has the added benefit of creating an authentic employment relationship. Paid internships are free of the faint (or not-so-faint) smell of exploitation that comes with providing and expecting free labor. At the same time, in return for compensation and other benefits of a job, an intern is expected to provide quality work. In a good way, this harkens back to the days before internships became so common, when most young people gained early work experience and honed their work ethic

in entry-level jobs unrelated to their career aspirations.

Paid internships also release internship providers from feeling semi-obliged to offer an enhanced “experience” to interns. Instead, the internship can focus on doing the work at hand, whether it means writing a draft of a position paper, collecting signatures to qualify a ballot measure, or being assigned to take food orders for the day.

It should be acknowledged that unpaid internships have their strong defenders (Yamada 2016a). During the early 2010s, when lawsuits challenging unpaid internships attracted national media coverage, critics of the litigation defended unpaid internships as training experiences and characterized interns seeking back pay as “entitled.” Colleges and universities have lobbied the Department of Labor not to engage in aggressive enforcement of minimum wage laws against internship programs.

Offering paid internships can occur in several ways:

- The internship provider pays its interns directly, as it would any other employee, and treats internships as fixed-length employment arrangements;
- An affiliated institution of higher education or a third party (such as a foundation or other philanthropic entity) provides funding to cover stipends for interns who otherwise would not be paid; or,
- The federal work-study program is accessed to pay students to work in non-profit and public-sector internships, or, on some occasions, in for-profit internships directly related to a student’s course of study.

Internship providers and higher education institutions have used these various arrangements for many years, without apparent difficulty, but with potential liability exposure as summarized in the following subsection. Each arrangement presents its own legal and bureaucratic requirements. (For example, a student may earn academic credit for a work-study job, but subject to limitations detailed by federal regulations.) Once formalized, however, the logistics are simply repeated for future new interns.

For conventional internship providers and associated parties in public policy settings, the funding mechanisms should be easy enough to work out. Political campaigns and lobbying activities, however, may present additional bureaucratic machinations, especially if interns are not paid directly by the internship provider. Interns working in a lobbying capacity may also have to comply with applicable regulations and reporting requirements.

### **Protecting interns**

Even before the #MeToo and Black Lives Matter movements sharpened our focus on important issues of mistreatment, bias, and exclusion, these concerns had been prominent in fields where internships are popular, including politics and public policy. For example, legislative and political campaigns have not been strangers to reports of sexual harassment and similar inappropriate conduct directed towards interns.

Accordingly, it would behoove all internship providers, including those that are popular destinations for students of political science, as well as educational institutions sponsoring internship programs, to commit to preventing discrimination and harassment and creating welcoming environments for diversity of all kinds.

As the legal discussion above suggests, the best way to ensure that interns will be protected under federal employment discrimination laws is for internship providers to pay them directly, as employees. By contrast, not paying interns, or providing compensation through third-party sources, may preclude or complicate interns’ attempts to access these statutory protections, unless the internships are located in the small number of states or municipalities that extend their own anti-discrimination protections to unpaid interns, as discussed above (see “Are Interns Protected Under Employment Discrimination Laws?”).

Even if internship providers and/or associated educational institutions determine that discrimination laws may not protect their interns, through employee handbooks and student policies they may contractually agree to safeguard interns against discriminatory behavior and assume liability where

appropriate. This would, of course, carry legal obligations, but it would constitute an act of social responsibility that messages a genuine commitment to inclusion and diversity.

Finally, educational institutions that host or sponsor internship programs should take their Title IX responsibilities seriously, including educating both interns and affiliated internship providers about sexual harassment protections.

## CONCLUSION

As the foregoing discussion indicates, legal issues concerning internships have come under closer scrutiny during the past decade or so. From the standpoint of paying interns and protecting them from discrimination and harassment, judicial decisions have clearly sided with a restrictive view on what legal safeguards may be available to them. As presented here, this leads us to a duality of “best practices” for educational institutions and internship providers, with one approach attempting to minimize liability exposure and another attempting to maximize opportunity and safety.

In urging the latter option, I reiterate my observation in an earlier writing that “the status of interns connects to broader social concerns about the future of work and the contingent workforce, the funding of higher education (including the dramatic rise of student loans), and the challenges of creating a sustainable, entry-level job market for those attempting to enter professions and vocations” (Yamada 2016b, 948). Simply attaching the label of “intern” to what otherwise would likely be considered a fixed-length, entry-level job now potentially excuses employers from paying the minimum wage and from facing liability for discrimination and harassment. Colleges and universities are complicit in this dynamic by charging full tuition for academic credit, earned by working without pay for internship providers that are reaping the benefits.

We know that in the realms of politics and public policy, good internships can be remarkable, even life-changing, experiences. However, the popularity of unpaid internships in these fields and the current legal state of affairs advantage those who can afford to work for free and who may not need protections against discrimination and harassment. If we want to promote truly diverse flows of talent into civic life, then this is not how to do it.

In sum, the intern economy has become a place where core precepts of equal opportunity, compensation for work rendered, and protections against workplace mistreatment have been sacrificed in return for experience, networking, and connections for those who can afford it—increasingly with judicial approval. Hopefully, updated chapters in future editions of this book and similar volumes will reflect changes in the law that embrace basic legal safeguards for those designated as interns.

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**Primary statutory and legal materials***Fair Labor Standards Act of 1938*

The full text and a summary of the Fair Labor Standards Act (29 USC §201) and other helpful information are available at the website of the US Department of Labor, Wage and Hour Division: <https://www.dol.gov/agencies/whd/flsa>.

*Federal Employment Discrimination Laws*

The full texts and summaries of the federal employment statutes discussed here—including the Age Discrimination in Employment Act of 1967 (29 USC §621), Americans with Disabilities Act of 1990 (42 USC §12101), Equal Pay Act of 1963 (29 USC §206), Genetic Information Non-Discrimination Act of 2008 (42 USC §2000), Rehabilitation Act of 1973 (29 USC §701), and Title VII of the Civil Rights Act of 1964 (42 USC §2000e)—and other helpful information are available at the website of the US Equal Employment Opportunity Commission: <https://www.eeoc.gov>.

*Congressional Accountability Act of 1995*

The full text and summary of the Congressional Accountability Act (2 USC §1301) and other helpful information are available at the website of the US Office of Congressional Workplace Rights: <https://www.ocwr.gov/about-ocwr/overview/about-caa-reform-act>.

*Title IX of the Education Amendments of 1972*

Full information about Title IX (29 USC §1681) training and enforcement can be obtained at this US Department of Education website: <https://sites.ed.gov/titleix/>.

*Case Law and Other Materials*

*Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020).

*Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2015).

*Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

*O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997).

*Wang v. Phoenix Satellite Television US, Inc.*, 976 F.Supp.2d 527 (S.D.N.Y. 2013).

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**ENDNOTES**

1. Because of the potential fluidity of legal standards for interns, these questions are as close to an issues checklist as is comfortably provided in a volume whose shelf life will likely exceed its immediate publication for some time. Universities and internship providers should use these questions to guide their consultations with legal counsel, as well as take into account the matters raised in the section named “Best Practices” in this chapter.
2. As to terminology used in this chapter: first, it uses the term “internship providers” rather than employers, because the latter term presumes a legal relationship that may not be present, for reasons discussed. Second, some educational institutions may refer to internships as externships, but in this context there is no legal distinction between the terms.
3. While for the purposes of this chapter these entities are all included under the banner of non-profit organizations, the Internal Revenue Service makes significant distinctions between them in terms of tax-exempt status.
4. This summary is based on the author’s experience of teaching a survey-level law school Employment Discrimination course for some 20 years. It is designed to provide an informative overview.