

## Legal Issues in College and University Internship Programs

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### Introduction

According to the National Association of Colleges and Employers (NACE), employers plan to slightly increase the number of new college graduates they hire in 2011, which represents the first increase in hiring since 2009.<sup>1</sup> However, while there appears to be some growth in hiring, that growth is slow.<sup>2</sup> Even though the entry level job market may be improving, it is still important for students to gain the experience that will equip them to compete for fewer jobs. Likewise, employers are looking for the most efficient manner to identify qualified job applicants without expending time and resources scouring campuses for the right candidate. The solution for many students and employers is the internship program. Through internships, students can gain valuable experience in their chosen field and integrate academic learning with employment experience. Many students believe an internship will give them a competitive advantage in the marketplace for post-college employment.<sup>3</sup> In fact, an internship can increase a student's chance of getting a job with the employer for whom they intern.<sup>4</sup> Internships benefit employers, too. Employers can "try out" the student as an employee and often use the internship period for job training, thereby eliminating that step if the student is hired. In addition, academic programs have the opportunity to gain a reputation within the business community by directing students to meet the needs of employers.<sup>5</sup>

While advantageous for employers, students, and colleges, internship programs can also give rise to important legal issues.<sup>6</sup> This paper will examine five legal issues which have proven problematic for college internship programs: 1) unpaid student interns; 2) illegal alien students; 3) students with felony convictions; 4) foreign students on student visas; and 5) employer noncompete agreements. In each instance, the authors will briefly examine the legal issues

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<sup>1</sup> NACE College Hiring Index Shows Steady Improvement in Job Market for Class of 2011, NAT'L ASS'N OF COLLEGES AND EMP'RS, (Dec. 8, 2010) [http://www.nacweb.org/printerFriendly.aspx?printpage=/Press/Releases/NACE\\_College\\_Hiring\\_Index\\_Shows\\_Steady\\_Improvement\\_in\\_Job\\_Market\\_for\\_Class\\_of\\_2011.aspx?referral=pressroom&menuid=273](http://www.nacweb.org/printerFriendly.aspx?printpage=/Press/Releases/NACE_College_Hiring_Index_Shows_Steady_Improvement_in_Job_Market_for_Class_of_2011.aspx?referral=pressroom&menuid=273).

<sup>2</sup> NACE Index: Hiring Slows, Recruiting Activity Resumes, NAT'L ASS'N OF COLLEGES AND EMP'RS, (Feb. 2, 2011) [http://www.nacweb.org/s02022011/hiring\\_index/](http://www.nacweb.org/s02022011/hiring_index/).

<sup>3</sup> Miriam Rothman, *Lessons Learned: Advice to Employers from Interns*, 82 J. OF EDUC. FOR BUS. 140, 143 (2007).

<sup>4</sup> *Interns More Likely to Have Job Offers, Spotlight Online for Career Services Professionals*, NAT'L ASS'N OF COLLEGES AND EMP'RS, (May 26, 2010) [http://www.nacweb.org/Publications/Spotlight\\_Online/2010/0526/Interns\\_More\\_Likely\\_to\\_Have\\_Job\\_Offers.aspx](http://www.nacweb.org/Publications/Spotlight_Online/2010/0526/Interns_More_Likely_to_Have_Job_Offers.aspx) (citing 2010 NACE Student Survey statistic that 42.3 percent of students who completed an internship received at least one job offer versus 30.7 percent of seniors without internship experience).

<sup>5</sup> Janice S. Henry, Susan S. Rehwaldt & George M. Vineyard, *Congruency Between Student Interns and Worksite Supervisors Regarding Critical Elements of an Internship Experience*, 19 INFO. TECH., LEARNING, & PERFORMANCE J. 31 (2001).

<sup>6</sup> The authors base the issues and scenarios in the paper on personal experiences they have encountered at their university as an attorney/faculty member and internship coordinator, respectively.

present and make recommendations for how college and university internship programs may avoid legal problems related to these issues.

## I. Unpaid Student Interns

*Rachel is a conscientious accounting major with a GPA of 3.8. She is looking forward to graduation next semester. Rachel prepares thoroughly for all of her classes; she is active in many campus organizations and events. She would like to work for a large CPA firm when she graduates in one semester, but she does not have any professional work experience on her resume. Harry Swift, partner in a local CPA firm, has contacted the Dean with a personal request for an accounting intern. Because of the economic downturn, Mr. Swift said the internship would be unpaid. However, he added, there is a strong possibility that a full time position could be available for the accounting intern upon graduation. The Dean sent a special request to the internship coordinator for a student intern for Mr. Smith.*

*Should Rachel be placed as an intern with the CPA firm? Does the firm have an obligation to pay Rachel? What obligation or responsibility does the university have if Rachel remains an unpaid intern but received course credit for the internship?*

Throughout the history of college student internships there has been a persistent misunderstanding within the business community that student interns are available as “free help.”<sup>7</sup> In unstructured programs, universities, with the complicity of students and businesses, have accepted a non-paid status in order to offer some level of professional work experience to students. In fact, this can undermine the value and reputation of a college internship program and, often, the quality of the student’s experience. The dilemma has been due in part to lax enforcement by the Department of Labor (DOL) and the large pool of applicants for unpaid positions.<sup>8</sup> However, a growing body of employment law indicates that these unpaid internships may be illegal, and the DOL has indicated an intent to more closely monitor worker misclassifications.<sup>9</sup>

The Fair Labor Standards Act (FLSA) provides little guidance for distinguishing between trainees and employees.<sup>10</sup> The FLSA defines an employee as “any individual employed by an employer.”<sup>11</sup> The Act further requires that eligible employees who are engaged in commerce or the production of goods for commerce be paid the minimum wage.<sup>12</sup> An employer’s failure to

<sup>7</sup> Internship experts estimate that 50-60 percent of all student internships are unpaid. See, Dawn Gilbertson, *Earning it: Glamorous Internships with a Catch: There’s no Pay*, N.Y. TIMES (Oct. 19, 1997), <http://www.nytimes.com/1997/10/19/business/>.

<sup>8</sup>*Id.*

<sup>9</sup> Secretary of Labor Hilda Solis announced in February, 2010 that the Wage and Hour Division would hire 90 additional enforcement personnel to curb misclassification. See *Solis’ Proposed Budget Opens Door for 358 More DOL Inspectors, Staff*, *The Employment Law Post*, HUMAN RESOURCE NEWS (Feb. 1, 2010), <http://employmentlawpost.com/hrnews/2010/02/01/solis-proposed-budget-opens-door-for-358-more-dol-inspectors-staff/>.

<sup>10</sup> *Reich v. Parker Fire Protection Dist.*, 992 F.2d. 1023, 1025 (10th Cir. 1993).

<sup>11</sup> The Fair Labor Standards Act of 1938, 29 U.S.C. §203(e)(1). The U.S. Supreme Court has used “economic reality” as the test for employment under the FLSA, but this is used for determining employee-independent contractor status. *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985)(quoting *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33(1961)).

<sup>12</sup> The Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a).

pay student interns can violate the FLSA and according to one estimate allows employers collectively to reap roughly \$40 million in free labor every year.<sup>13</sup> Therefore, the initial question that must be answered is whether student interns qualify as “employees” under the FLSA.<sup>14</sup> If the student intern does meet the employee test, the FLSA requires the employer to pay at least the minimum wage to the intern.

The Wage and Hour Division of the Department of Labor issued an opinion in 2004 which provides some guidance on whether interns are subject to FLSA standards.<sup>15</sup> The Division concluded that students will not be considered employees for FLSA purposes “where educational or training programs are designed to provide students with professional experience in the furtherance of their education, and the training is academically oriented for the benefit of the students”<sup>16</sup> provided that the following six criteria are met:

1. The training is similar to that which would be given in a vocational school<sup>17</sup>;
2. The training is for the benefit of the trainee;
3. The trainees do not displace regular employees, but work under close supervision<sup>18</sup>;
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion the employer’s operations may be actually impeded;<sup>19</sup>
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainee understand that the trainees are not entitled to wages for the time spent in training.<sup>20</sup>

In April, 2010, the Wage and Hour Division clarified that all of the factors must be met to claim that wage and overtime provisions do not apply to an intern.<sup>21</sup> In one case, a DOL Opinion

<sup>13</sup> David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 225 (2002)(citing Jim Frederick, *Internment Camp: The Intern Economy and the Culture Trust*, THE BAFFLER, 1997, No. 9, at 51-58.

<sup>14</sup> An unpaid college intern is not an employee for purposes of Title VII. *See*, O’Connor v. Davis, 126 F.3d 112, 115-116 (2d Cir. 1997). However, apprentices are employees for purposes of the Family Medical Leave Act. *See*, *Frees v. UA Local 32 Plumbers & Steamfitters*, 589 F.Supp.2d 1221, 1229 (W.D. Wash. 2008), and unpaid student interns may receive workers compensation benefits in some states. *See*, e.g. *Kinder v. Indus. Claim Appeals Off.*, 976 P.2d 295 (Colo. App. 1998).

<sup>15</sup> The term “intern” appears in the FLSA only once, in section 203(e)(2), exempting Congressional interns from the definition of “employee.” However, the Department of Labor has guidelines for the treatment of trainees.

<sup>16</sup> *FLSA Status of Student Interns*, FLSA 2004-5NA, EMP. STANDARDS ADMIN., U.S. DEPT. OF LABOR (May 17, 2004), [http://www.dol.gov/esa/whd/opinion/FLSANA/2004/2004\\_05\\_17\\_05FLSA\\_NA\\_internship.htm](http://www.dol.gov/esa/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm).

<sup>17</sup> According to the Wage and Hour Division, the FLSA exclusion is more likely to apply if the program is “structured around a classroom or academic experience as opposed to the employer’s actual operations.” *Fact Sheet #71: Internship Programs under The Fair Labor Standards Act*, WAGE AND HOUR DIV., U.S. DEPT. OF LABOR (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.htm>.

<sup>18</sup> The intern should not perform routine work for the business on a regular and recurring basis. *Id.*

<sup>19</sup> This appears to be the most difficult element in the analysis. The safest activities for unpaid interns appear to be those which are purely for teaching purposes and do not involve the employer’s day-to-day tasks. Lindsay Coker, *Legal Implications of Unpaid Internships*, 35 EMPLOYEE REL. L. J. 35, 37 (2009).

<sup>20</sup> The Division derived the six criteria from the U.S. Supreme Court’s decision in *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

<sup>21</sup> *Fact Sheet #71: Internship Programs under The Fair Labor Standards Act*, *supra* note 17.

Letter response indicated that they would closely examine each of the six factors for compliance in unpaid internships.<sup>22</sup> This seems to apply particularly to the fourth factor, so that if an employer uses interns “as substitutes for regular workers or to augment its workforce” then the interns should be treated as employees and paid minimum wages.<sup>23</sup> One point of dispute within the courts, however, concerns whether the criteria are to be read as requirements (as DOL contends) or factors for students’ exclusion from the FLSA requirements.

The courts have been less than consistent in their determination of what is needed to meet the FLSA exclusion. The Fifth Circuit Court of Appeals has interpreted precedent to require that all six criteria must be met to exclude the employer from FLSA minimum wage provisions.<sup>24</sup> In *American Airlines*, the Fifth Circuit found that a training program for the airline’s new employees met the six criteria for excluding those trainees from the FLSA.<sup>25</sup> Specifically, the airline trainees “did not replace any regular American employees,” and American Airlines did not benefit from the training until after the trainees had completed the training program.<sup>26</sup>

However, in *Reich v. Parker Fire Protection District*, the Tenth Circuit Court of Appeals concluded that an “all or nothing” approach was not required with regard to the six criteria.<sup>27</sup> Because it had no controlling precedent on the issue, the Tenth Circuit analogized the internship issue to employee-independent contractor issues. In those cases, the question of employee status is resolved by considering “a totality of the circumstances.”<sup>28</sup> Thus, the court concluded that the six criteria were “relevant but not conclusive” to the determination of whether the firefighter trainees in the case were employees under the FLSA.<sup>29</sup>

The Fourth Circuit, in *McLaughlin v. Ensley*, applied a primary beneficiary test, departing from the six criteria all together.<sup>30</sup> The court determined that the proper inquiry was whether the student trainees “principally benefitted” from the work they did in deciding whether the employer met the FLSA exclusion. This split among the circuits concerning how the six factors for FLSA employment status is determined should be resolved. The U.S. Supreme Court should rule to determine whether a student’s internship must meet all six requirements, or some preponderance of them, to exclude the employer from the FLSA minimum wage requirements.

In the meantime, one author has suggested that the Wage & Hour Division should create a new category of “learners” relating to interns which would clarify the exemption available to employers.<sup>31</sup> Since the FLSA already contains an exemption for “learners,” the “intern-learner” would be a logical extension of the current classification and could be created through the

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<sup>22</sup>See, *Opinion Letter from Barbara Relerford*, OFFICE OF ENFORCEMENT POLICY, FAIR LABOR STANDARDS TEAM (May 17, 2004), [http://www.dol.gov/whd/opinion/FLSANA/2004/2004\\_05\\_17\\_05FLSA\\_NA\\_internship.pdf](http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.pdf).

<sup>23</sup> *Fact Sheet #71: Internship Programs under The Fair Labor Standards Act*, *supra* note 17.

<sup>24</sup> *Donovan v. Am. Airlines*, 686 F.2d 267 (5th Cir. 1982).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Reich v. Parker Fire Prot. Dist.*, (10th Cir. 1993).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 n.2 (4th Cir. 1989).

<sup>31</sup> Jessica L. Curiale, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 6 HASTINGS L.J. 1531, 1549 (2010).

administrative rulemaking process.<sup>32</sup> In order to qualify for the intern-learner wage exemption, the Wage & Hour Division could require the employer to meet all six criteria as outlined above. If the employer's internship does not meet all six criteria, the employer would be required to pay the student minimum wages.<sup>33</sup> This proposal would benefit employers and internship programs by providing very clear guidelines for exempting their interns from minimum wage requirements. It would be incumbent upon employers and internship programs to make sure that the requirements are met, since the failure to meet those requirements would result in payment of wages to interns.

In a simpler approach, another author has suggested that a student intern who participates in a school-sponsored internship program would not be deemed an employee for FLSA purposes if:

1. Academic credit is granted (unpaid internship);
2. The educational institution requires that the work performed by the intern will develop skills specifically related to the student's educational program; and
3. The educational institution assigns one of its own administrators or faculty members to oversee the student's internship.<sup>34</sup>

This approach would solidify the academic orientation of the student's internship and most likely meet all six criteria for FLSA employee exemption.

### Recommendations

A college or university internship program must determine what it can do to protect its internship program from the murky legal waters of unpaid internships. It is likely that many unpaid college internships do not meet all six criteria. Internship programs must strive then to ensure that their unpaid internships meet all of the six criteria of risk falling under the requirements of the FLSA. Furthermore, one must assume that any paid internships would not meet the sixth criteria (trainees are not entitled to wages for the time spent in training), so there is little or no "gray area" with intern pay. If the intern is being paid, the pay must meet the guidelines of the FLSA. It is quite likely that some paid internships are not in full FLSA and state compliance on minimum wage issues, including overtime calculations.<sup>35</sup>

Clear action by the Wage & Hour Division is also recommended to further clarify the exemption available to student interns. As recommended by Curiale, the Wage & Hour Division should adopt the intern-learner exemption from the FLSA minimum wage requirements.<sup>36</sup> Given the breadth and number of internship programs in colleges and universities across the country, clear guidance would assist both employers and internship programs in developing and structuring internships which are more beneficial to the students.

Finally, survey research is needed to reveal how university internship programs determine the paid or unpaid status of interns. Anticipated obstacles to be addressed in the survey should include the inconsistencies produced by the common practice of having

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<sup>32</sup> *Id.* at 1551.

<sup>33</sup> *Id.* at 1554.

<sup>34</sup> Yamada, *supra* note 13, at 236.

<sup>35</sup> A recent survey by the National Association of Colleges and Employers (NACE) found that 90% of responding employers pay all of their interns. *NACE Research Brief: 2010 Internship & Co-op Survey*, NAT'L ASS'N OF COLLEGES & EMPLOYERS (May, 2010), <http://www.nacweb.org>.

<sup>36</sup> Curiale, *supra* note 31.

autonomous internship coordinators in each school within the college or university. Further differences will be expected between large and small universities. Large universities, with sponsors from Fortune 500 companies competing for interns, benefit from the advice and oversight of corporate labor and employment attorneys who advise the company sponsor. Smaller colleges and those not located in urban settings have internship sponsors from small and start up operations that may not be fully advised of FLSA regulations. A college that is marketing an internship program and developing new sponsors will have a hard sell if the client is asked to follow federal and state laws that are ambiguous.

## II. Illegal alien students

*Victor is on full scholarship, and he has a 4.0 GPA. He is an active member of a service organization on campus. Victor is fluent in both English and Spanish. A local non-profit organization needs an outstanding bi-lingual student to work on a database of minority owned businesses. Is the university internship program permitted to question Victor's legal immigration status? If one of the internship sponsors knows that Victor is not in the United States legally, does the sponsor have the obligation to reveal this information? Is the sponsor prohibited from revealing the information? Is Victor allowed to work without pay in order to gain important work experience?*

The landmark Supreme Court case of *Plyler v. Doe*<sup>37</sup> guaranteed free primary and secondary education for any child, regardless of immigration status. Thus, many colleges do not require proof of immigration status for admission, so illegal aliens are accepted in public and private schools and colleges throughout the United States. However, the Immigration Nationality Act of 1996 prohibits access to in-state tuition benefits by undocumented students.<sup>38</sup> It requires that an “alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit.”<sup>39</sup> States are free to offer such benefits, however, and in 2001, Texas became the first state to offer in-state tuition and state financial aid to illegal immigrants.<sup>40</sup> According to one article, nearly 3,700 illegal immigrants were enrolled and paying in-state tuition at Texas public institutions by fall 2004.<sup>41</sup> California,

<sup>37</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>38</sup> Immigration Nationality Act of 1996, 8 U.S.C. § 1623.

<sup>39</sup> *Id.* The Development, Relief and Education for Alien Minors Act (the DREAM Act, S. 774) would allow states to determine residency for purposes of higher education benefits. It would provide conditional legal status to an individual who was under the age of 16 when he or she entered the country and meets other requirements. These students could obtain a permanent resident status after two years of college or military service. However, the bill has been stalled in Congress for several years. See, *In-State Tuition and Unauthorized Immigrant Status*, NAT'L CONF. OF STATE LEGISLATURES (Jan. 28, 2010), <http://www.ncsl.org/IssuesResearch/Immigration/InStateTuitionandUnauthorizedImmigrants/tabid/13100/Default.aspx>. It recently passed the House but failed in the Senate, with little chance of resurfacing in the near future. Lisa Mascaro & James Oliphant, *Dream Act's Failure in Senate Derails Immigration Agenda*, L.A. TIMES (Dec. 19, 2010), <http://articles.latimes.com/2010/dec/19/nation/la-na-dream-act-20101219>.

<sup>40</sup> Patrick McGee, *Colleges See Rise in Illegal Aliens*, KNIGHT RIDDER TRIBUNE BUSINESS NEWS, WASHINGTON, (Jul. 21, 2005) at p. 1.

<sup>41</sup> *Id.*

Illinois, Kansas, New Mexico, New York, Utah, and Washington soon followed by allowing illegal alien students to apply and receive in-state tuition at public colleges or universities.<sup>42</sup> In fact, the immigration status of these students may not be included in their permanent academic records if the university does not screen applicants for admission based on their legal status. Thus, when these students apply for internships, an internship coordinator would not know if a student applicant was in the United States legally before recommending that student to an employer.

Upon being accepted as an intern by a prospective employer, however, the employer may require some documentation of legal status or citizenship for all prospective workers. If the student intern is an illegal alien, this could create legal liability for the employer for violating the Immigration Reform and Control Act of 1986 ("IRCA"). At best, it may cause some embarrassment for the college or university that recommends a student intern who would not qualify for employment at the conclusion of the internship.

Because employers often use internship programs as hiring vehicles, it is necessary to consider legal restrictions on the hiring of foreign nationals. The Immigration Reform and Control Act of 1986 was enacted in part to deter employers from hiring individuals unauthorized to work in the United States. IRCA placed the burden on the employer to verify the employment eligibility of every employee hired after November 6, 1986 and provided for civil and criminal penalties for employers who *knowingly* hire an illegal alien.<sup>43</sup> In order to comply with IRCA, employers must ensure that a United States Citizenship and Immigration Services ("USCIS") Form I-9, Employment Eligibility Verification, is completed for each employee.<sup>44</sup> The form mandates that employers verify an employee's work authorization by requiring the employee to present any of a number of documents that establish identity and authorization to work in the United States.<sup>45</sup>

The Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), signed on September 30, 1996, included changes to the employment verification provisions.<sup>46</sup> The IIRIRA contains provisions which enhance employer sanctions but also attempt to make employer compliance an easier task. Employers are given some protection under the law as long as they make a good faith attempt to comply. If a violation is found by the government, the employer is allowed at least ten (10) business days to correct the violation.<sup>47</sup> However, if the employer does not correct the violations in a timely manner, penalties may be imposed. The cost of noncompliance for hiring violations alone ranges from \$250 to \$2,000 per illegal alien.<sup>48</sup>

With such penalties, employers cannot afford to take chances hiring illegal alien student interns. If the student is recommended for a paid internship, the employer can be held liable for

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<sup>42</sup> Since 2006, four other states have made illegal aliens ineligible for in-state tuition. Daniel Wood, *States Move Against In-State Tuition for Illegal Immigrants*, CHRISTIAN SCIENCE MONITOR (Apr. 3, 2009), <http://www.csmonitor.com/2009/0403/p02s01-usgn.html>. Oklahoma passed a law allowing in-state tuition for illegal aliens but later repealed it.

<sup>43</sup> Immigration Reform and Control Act of 1986, 8 USC § 274A(1), emphasis added.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Illegal Immigration Reform and Immigrant Responsibility Act, Publ L. 104-208, 110 Stat. 3009 (1996).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

violating the IRCA if that student intern is an illegal alien. As stated above, paying a student intern would subject the employer to FLSA requirements, and the employer would also have to comply with the IRCA.<sup>49</sup> If the internship is unpaid, the issue is less clear. Neither the IRCA nor the IIRIRA define employment or who is considered an employee. There is no case, administrative order, or opinion which has addressed illegal alien student interns. We may presume that the DOL guidelines for FLSA exemptions (outlined above) would also apply to illegal alien student interns. The larger question is whether the employer would be held liable for “employing” an illegal alien in violation of the IRCA if that worker was an unpaid student intern. Again, there is no real guidance to answer this question.

However, internship coordinators may not be well equipped to determine which student applicants are illegal aliens and which are documented, because either they do not have access to those records or status records are not kept by the college or university. For the employer and the college or university, the lack of information in this area could actually result in legal liability for the employer.

### Recommendations

College and university internship programs should consider restricting the internship program to U.S. citizens and legal residents. The internship application could also contain an affirmative declaration that the student applicant is eligible to work in the United States. Internship programs could also consider verifying the status of legal residents by screening for passports or visas.

Again, research is needed to determine the extent of the problem within U.S. college internship programs. A survey to determine how many internship programs screen for passports, visas or social security numbers is needed. Further research should also determine whether colleges refuse to offer internships to illegal alien students, or perhaps only offer unpaid internships to those students.

### **III. Students with Felony Convictions**

*Leroy had a 3.5 GPA. He was active in the top service organization on campus. He applied for an internship with a large corporation, was accepted in the preliminary round, but rejected when he filled out the employment application and revealed the felony on his record. Leroy explained the circumstances to the university internship coordinator. He was anxious to have an internship on his transcript.*

Should Leroy be dropped from the internship program because of the felony? Should the internship coordinator ask Leroy about the felony for which he was convicted? Does the university have an obligation to permit these students, who otherwise qualify, to participate?

If ex-offenders are offered employment opportunities, it could stem the likelihood of their re-entry into the prison system.<sup>50</sup> College is a positive first step for many felons who have paid their debt to society and wish to improve their chances for employment. However, college

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<sup>49</sup> The Secretary of Labor, Hilda Solis, recently ran a public service announcement on national television stating that documented and undocumented workers have the right to be paid for their work. See, ConservativeAct, *Obama's DOL Secretary Hilda L Solis You Have the Right to Be Paid Fairly Whether Documented or Not*, YOUTUBE (June 21, 2010), [http://www.youtube.com/watch?v=1lmvCzp\\_Y2A](http://www.youtube.com/watch?v=1lmvCzp_Y2A).

<sup>50</sup>Jennifer Leavitt, *Walking a Tightrope: Balancing Competing Public Interests in the Employment of Criminal Offenders*, 34 CONN. L. REV. 1281 (2002).

entrance applications often do not address this issue. Public institutions in some states are prohibited from barring ex-offenders from admission and cannot ask about conviction records, while other institutions do ask and consider conviction records in the admission process.<sup>51</sup> One infamous example was Gina Grant's early acceptance to Harvard "five years after pleading no contest in January 1991 to voluntary manslaughter for killing her mother, hitting her skull 13 times with a candleholder during a heated argument."<sup>52</sup> The high school straight –A student lost her early admission to Harvard after a story about her was published in the *Boston Globe Magazine*. According to Harvard, Grant's early admission was withdrawn because Grant lied on her admission application.<sup>53</sup> Grant's application questioned whether the applicant had "been put on probation or disciplined."<sup>54</sup>

Asking job applicants to indicate whether they have been convicted of a crime is generally permissible. During the 1980's, some states went so far as to enact legislation which restricted the employment opportunities for ex-offenders.<sup>55</sup> Still other states have passed laws which prohibit discrimination against ex-offenders in public or private employment.<sup>56</sup> Thus, the rules for hiring ex-offenders will vary by state.

However, the Equal Employment Opportunities Commission (EEOC) has decided that disqualifying people who have criminal records from jobs can be discriminatory because the practice disproportionately affects African American and Hispanic men.<sup>57</sup> The EEOC has ruled repeatedly that covered employers cannot simply bar felons from consideration, but must show that a conviction-based disqualification is justified by "business necessity."<sup>58</sup> The legal test requires employers to examine the (1) nature and gravity of the offense or offenses, (2) length of time since the conviction or completion of sentence, and (3) nature of the job held or sought. Under this test, employers must consider the job-relatedness of a conviction, the circumstances of the offense, and the number of offenses.<sup>59</sup>

With such disparity between college admission and employer practices with respect to felony convictions, it is important for the internship program to ensure that a student with a felony conviction is not recommended to an employer which prohibits hiring convicted felons. Obviously, if the college or university screens applicants for their criminal history, the internship program is less likely to encounter a convicted felon student. However, if the college or

<sup>51</sup> See David Moltz, *No Felons Allowed*, INSIDE HIGHER ED. (June 25, 2010), <http://www.insidehighered.com/news/2010/06/25/felons>.

<sup>52</sup> John Allard, *Harvard Rejects Paroled Teen-ager/Lexington Murder Shadows Career Path*, THE STATE.COM, Apr. 8, 1995 at p. A1, retrieved from [http://jackswerling.com/docs/newspaper/063\\_Gina.pdf](http://jackswerling.com/docs/newspaper/063_Gina.pdf).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 280 (Mar. 2004).

<sup>56</sup> Leavitt, *supra* note 49 at 1287.

<sup>57</sup> See, Raymond Peeler, *Title VII Arrest & Conviction Records opinion letter*, (U.S. Equal Employment Opportunity Commission) Dec. 1, 2005, retrieved from [http://www.eeoc.gov/foia/letters/2005/titlevii\\_arrest\\_conviction\\_records.html](http://www.eeoc.gov/foia/letters/2005/titlevii_arrest_conviction_records.html).

<sup>58</sup> *EEOC Compliance Manual*, § 604 Appendices. See also, *Gregory v. Litton Systems Inc.*, 472 F.2d 631 (9th Cir. 1972).

<sup>59</sup> *Id.*

university does not screen applicants for criminal history, the internship program could encounter an embarrassing situation if the program recommends a student with a felony record to an employer which prohibits the hiring of convicted felons.

### Recommendations

If it is allowable under state law, college internship programs should screen applicants for their criminal history. If a conviction is revealed, the internship program has the opportunity to gather more information about the conviction, the length of time since the conviction, and completion of sentence. Gathering such important information at the initial entry into the internship program would save the college from some obligation to reveal the conviction to the sponsoring employer. Another consideration for internship programs would be refusing to place interns who have felony records; however, the authors would advise against this approach based on the EEOC rulings discussed above.

For further research, a survey of college internship programs should be conducted to determine how many programs screen for felony convictions.

## **IV. Foreign Students on Student Visas**

*Ayla, a college junior majoring in finance, was anxious to secure an internship before she graduated. She had been able to work as a student assistant in the university library for two semesters. However, she was anxious to secure a position in finance with a U.S. company before she graduated. Ayla was convinced that employment in her major was essential in order to obtain a top position in finance when she graduated. Ayla was attending college on an F-1 visa and wanted to know if she qualified for an internship. The university internship coordinator had never registered a foreign student.*

Do foreign students qualify for paid or unpaid internships? How does the internship coordinator identify foreign students on student visas? Is it the responsibility of the internship program to ask about nationality and visas?

Colleges and universities welcome foreign students for their diversity and for their tuition contribution. Foreign students need work experience, particularly because employment experience is missing from many of their resumes. Academic and language students get F-1 visas while vocational and technical school students get M-1 visas.<sup>60</sup> Students must be accepted by a US government-approved school and have the financial means to study full-time to qualify for a student visa. Students are eligible to apply for work authorization to complete practical training after being in F-1 status for one full academic year provided that the student is in good academic standing.<sup>61</sup> Also, in certain cases, F-1 students are allowed to work based on economic necessity. However, an F-1 student may not accept off-campus employment at any time during the first year of study.<sup>62</sup> A student with an F-1 visa may accept on-campus employment from the school without State Department permission.

This issue becomes important for foreign national students because if the student is found to be “out of status” without authorization, the student could violate the terms of his or her visa.

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<sup>60</sup> Students in colleges, universities, seminaries, conservatories, academic high schools, elementary schools, other academic institutions, and in language training programs, 8 CFR 214.2(f), retrieved July 12, 2010 from <http://www.uscis.gov/ilink/docView/SLB/HTML/SLB/0-0-0-1/0-0-0-11249/0-0-0-17184/0-0-0-17538.html>.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

In 2008, the Department of State proposed a new rule which would allow U.S. colleges or universities to conduct internships with foreign students. A foreign national student may participate in a student internship program for up to 12 months while pursuing an undergraduate degree, with an additional 12 months allowed for a masters level degree.<sup>63</sup> If the internship is unpaid, the foreign national student would not have to seek any authorization from immigration authorities.

### Recommendations

It is in the best interest of the student for the college or university internship program to coordinate its placement activity with the international student advisory office or similar office which governs international students. The internship program must be aware of the student's visa requirements and ensure that placement in an internship would not jeopardize the student's status within the United States. Also, the internship program should determine the procedure foreign students use to apply for curricular practical training (CPT) or any other method of obtaining permission to work in an internship. Recommendations for further research would examine the procedure used to identify international students without U.S. citizenship who are applying for internships and what considerations, if any, are given to international students when determining whether to place the intern in a paid or unpaid position.

### **V. Employer Noncompete Agreements**

*Jeff was offered an attractive paid internship with a well known local financial planner. When completing his employment paperwork for the firm, Jeff was asked to sign a noncompete agreement. Jeff brought the noncompete agreement to his internship program coordinator. As a student intern, is Jeff legally required to sign the noncompete agreement? What are the future career implications if he does sign the agreement?*

Covenants not to compete, or noncompetition agreements, impede the ability of an employee to compete against his or her former employer.<sup>64</sup> For employers, the fundamental business interest protected in these agreements is preventing employees from using business information and contacts established during the employment relationship to compete with the employer after termination.<sup>65</sup> However, employees have a generally recognized interest in pursuing gainful employment in their chosen profession or trade. Thus, despite their long history, noncompetition agreements are often criticized as dwelling “on a fault line that runs between freedom of contract and substantive control over contract.”<sup>66</sup>

Though many states differ on the extent to which they enforce noncompete clauses, most do enforce them at some level. Nineteen states have enacted some form of legislation governing noncompetition clauses with differences among them in substance.<sup>67</sup> Several states, such as California, Montana, and North Dakota, have passed legislation making employee

<sup>63</sup> *E-Newsletter, U.S. IMMIGRATION NEWSLETTER* (Dept. of State), Vol. IX, Jul. 2, 2008.

<sup>64</sup> Frank J. Cavico, *Extraordinary or Specialized Training as a Legitimate Business Interest in Restrictive Covenant Employment Law: Florida and National Perspectives*, 14 ST. THOMAS L. REV. 53, 54 (2001).

<sup>65</sup> *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381 (Tex. 1991).

<sup>66</sup> Kate O'Neill, *'Should I Stay or Should I Go?'*—*Covenants Not to Compete in a Down Economy: A Proposal for Better Advocacy and Better Judicial Opinions*, 6 HASTINGS BUS. L.J. 83 (2010).

<sup>67</sup> *Id.* at 96.

noncompetition clauses unenforceable.<sup>68</sup> The remainder regulate such clauses and covenants through legal schemes which may be based on different theories such as tort, agency and property principles.<sup>69</sup> What unifies these laws however is the condition that the employer has some legitimate business need for the noncompetition clause, most commonly employee training, customer relations, and/or confidential proprietary information.<sup>70</sup> In substance, most of these laws require “that noncompete clauses be: 1) A part of a valid contract; 2) Necessary to protect an employer’s legitimate business interest; and 3) Reasonable in geographic scope and time.”<sup>71</sup> Such a standard balances the employee’s interest in gainful employment with the employer’s interest in preventing unfair competition due to a former employee’s use of information, knowledge or contacts gained during employment.<sup>72</sup>

How this issue may arise in internships causes additional concerns, and there is no authority regarding the legal implications of student interns and noncompete agreements.<sup>73</sup>

A student intern would likely be presented with any employment documents, including a noncompete agreement, upon commencement of the internship. The term “cubewrap agreement” has been used to describe such agreements when presented to new employees after they have accepted employment.<sup>74</sup> “Their purpose is not to memorialize a negotiated set of terms, but to extract waivers of rights,” changing the common law and statutory default rules to better reflect employers’ interests.<sup>75</sup> Requiring that student interns sign such agreements upon arriving to begin an internship is patently unfair to the student intern. An intern only works for the employer for a limited period of time, usually about 4 months, would typically have limited access to any proprietary information, and likely has limited contact with customers or clients. All of these factors when present would weigh heavily against the employer’s interest in limiting the intern’s ability to compete with the employer post-internship. It may be true that in certain industries a student intern would have access to some proprietary information; however, the economic, contractual, and tort theories which support such agreements would rarely be present in internship relationships.

Additionally, to enforce a noncompete agreement against a student intern, the employer would need to show that it had provided the intern with something specialized or unique, rising

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<sup>68</sup> *Id.* Colorado refuses to enforce noncompete agreements except for high-level employees. See, Steven M. Gutierrez, Joseph D. Neguse, and Steven Collis, *The Human Limits of Human Capital: An Overview of Noncompete Agreements and Best Practices for Protecting Trade Secrets from Unlawful Misappropriation*, 36 EMPLOYEE REL. L. J. 59, 64 (Summer 2010).

<sup>69</sup> Gutierrez, Neguse, and Collis, *supra* note 68 at 64.

<sup>70</sup> O’Neill, *supra* note 65 at 99.

<sup>71</sup> Gutierrez, Neguse, and Collis, *supra* note 68 at 67.

<sup>72</sup> *Id.* at 69.

<sup>73</sup> In one case, Scheuermann was a student enrolled in a commodity futures trading program when he signed a non-disclosure and noncompete agreement. He ultimately quit work at Traders and started his own trading site. The court stated in a footnote that the agreement Scheuermann signed as a student may also apply to any disclosures made to him while a student. *Traders Int’l v. Scheuermann*, 2006 U.S. Dist. LEXIS 61995, (S.D. Tex. 2006).

<sup>74</sup> See, Rachel Arnow-Richman, *Cubewrap Contracts: The Rise of Delayed Term, Standard Form Employment Agreements*, 49 ARIZ. L. REV. 637 (2007). The term is analogous to shrinkwrap agreements used on consumer products like software. The consumer who purchases the product is not aware of the terms until after breaking the shrinkwrap.

<sup>75</sup> *Id.* at 639.

to “the level of ‘extraordinary’ value.”<sup>76</sup> This argument specifically addresses the typical requirement that a valid noncompete agreement must involve the legitimate business interest of the employer. Thus, an employer has a greater interest and investment to protect in a noncompete agreement if it has invested time and money in training or educating the employee. To justify the imposition of a noncompete agreement, however, this “training” test “will demand that the employer provide more training, knowledge, education, or skills than that ordinarily required by simply performing the tasks associated with the job.”<sup>77</sup> Given these factors and the wide differences in legal requirements and limitations on noncompete agreements among the states, college and university internship programs are advised to expressly limit the use of them in internship relationships.

What, then, does this mean for the student intern who’s been asked to sign a noncompete agreement by the employer? First, the student intern would not be precluded from agreeing to and being bound by a noncompete agreement. Second, the nature of an internship which is limited in time may make a noncompete agreement unenforceable. Thus, noncompete agreements are less likely to be enforced against student interns since they possess less expertise than regular employees and may not enter the job market immediately after the internship.<sup>78</sup>

### Recommendations

If the student internship is unpaid and for credit, the student intern has a stronger argument for avoiding the noncompete clause. If however, the employer discloses trade secret or customer information and the intern is also paid, then perhaps the case is stronger that a unilateral contract was created that would allow the employer to bind the intern to a noncompete clause. Even in that event, however, the scope of the noncompete would likely be quite short, given the relatively short duration of the internship. However, the authors found no legal authority to support that proposition, and students who are asked to sign a noncompete agreement as part of an internship should be advised to seek the advice of an attorney before signing any such legal document.

## **VI. Conclusion**

Every internship program may not confront all of these issues, but chances are that every internship program will confront at least one of them. Problems are best averted when the student and the employer are apprised of potential issues before committing to a particular student or employer. College and university internship programs should develop and disseminate internship manuals or brochures which address the aforementioned issues which may arise during the course of an internship. Knowing the legal issues that may arise in internship programs and having a plan of action to deal with them will ultimately protect the program, the student, and the employer.

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<sup>76</sup> Frank J. Cavico, *Extraordinary or Specialized Training as a Legitimate Business Interest in Restrictive Covenant Employment Law: Florida and National Perspectives*, 14 ST. THOMAS L. REV. 53, 97 (2001).

<sup>77</sup> *Id.*

<sup>78</sup> Rochelle Kaplan, *Common Questions about Internships*, LEGAL ISSUES (Nat’l Ass’n of Colleges and Employers), Winter, 2005.