

Exploring Internship & Externship Programs with the Impact of the Fair Labor Standards Act and ABA Std. 305(e)



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Benefits of Intern/Extern Programs



These programs enhance

- the student's legal education;
- current resume;
- student's professional development
- future employment prospects; and
- integrate practical skills training into the student's education, per the Carnegie Foundation report and ABA Standard 305

The Unpaid Internship



- Law schools allow non-profit employers to post unpaid internship opportunities for their students.
- Some law schools also allow 'for-profit' employers to post unpaid internship opportunities.
- One concern, among others, is that unpaid internships may violate the Fair Labor Standards Act (FLSA)
- Additionally, state employment and labor laws may further define and/or restrict when employers may use unpaid interns.

Fair Labor Standards Act



- The FLSA sets the standards for wages and overtime pay.
- It requires employers to pay covered employees at least the federal minimum wage and overtime pay.
- The Wage and Hour Division administers the act.
- Under the Act, any person who is employed must be compensated for the services they perform.
- “Employ” is defined broadly as to mean “suffer or permit to work.”

FLSA



- The FLSA recognizes exceptions for interns who:
 - Under certain circumstances, volunteer to perform services for a state or local government agency. (29 USC 203(e)(4)(A))
 - Humanitarian purposes for private non-profit food banks 29 USC 203(e)(5)
 - Volunteer their time, freely and without anticipation of compensation for religious, charitable, civic or humanitarian purposes to non-profit organizations. (Sup. Ct. decision; recognized by WHD)
 - ✦ However, as evidenced by the note in Fact Sheet 71, WHD is reviewing whether the 6 prong test for trainees should apply to non-profits as well.

FLSA



- Internships with for-profit employers, however, will most likely be viewed as employment unless they are found as trainees.
- “If you are a for profit employer or you want to pursue an internship with a for profit employer, there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.” –Nancy Leppink, Dir. of US Dept of Labor, Wage & Hour Div. (NY Times Apr. 2, 2010)
- The concern- are for-profit employers (law firms) unwittingly running afoul of the Fair Labor Standards Act’s (FLSA) minimum wage provisions.

FLSA



- As stated in Fact Sheet #71, the Supreme Court has said that the term “suffer or permit to work” “cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”
 - WHD Fact Sheet #71
 - Walling v. Portland Terminal Co., 330 U.S. 149,151-52 (1947)

Test for Unpaid Interns



- Thus, the determination of whether an internship (or training program) is excluded from the Act's minimum wage and overtime provisions depends upon all the facts and circumstances of each program.
- The Supreme Court has come up with 6 criteria that must be considered to evaluate whether an internship or training program will not violate the FLSA.

The Six Criteria



1. The Internship, even though it includes actual operation of the employer's facilities, is similar to training that would be given in an educational or vocational environment;
2. The internship is for the intern's benefit;
3. The intern does not displace regular employees and works under the supervision of existing staff;
4. The employer derives no immediate advantage from the interns and, on occasion, the operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

The Six Criteria



- Traditionally, an employer must meet all 6 requirements in order to have an unpaid intern and not violate the FLSA.
- Some courts/cases, however, have looked to the totality of the circumstances and balanced each factor to determine whether an unpaid internship is subject to FLSA.

Criticism of Using Unpaid Interns



- Disadvantages – low income students
 - ✦ Can't take advantage of these opportunities-can't afford to
 - ✦ Don't have the connections
- Exploitation – exploits students
- If not “employee” then not protected by employment discrimination laws
- Decrease paid opportunities

Guidelines for Compliance



- To help make the unpaid internship in compliance with the FLSA requirements here are some basic guidelines which can be taken from Fact Sheet #71:
 1. The more the internship is structured around a classroom or academic experience or organized like an academic endeavor, the more likely it will be viewed as an extension of the student's educational experience.
 - a. Set up a separate internship program with training materials/handbook apart from those for paid employees
 - b. Consider grading the interns on a scale akin to an academic endeavor
 2. Do not replace a paid employee with an unpaid intern.



3. Interns should be closely supervised in their work .
4. No expectation of permanent employment should be raised or discussed as a result of the internship. Don't say it is a trial period.
5. The internship should have a fixed duration.
6. Set clear goals and expectations at the start of the internship.
Be clear from the outset that the interns will not be paid.

Utilizing Externship Programs



- They are academic programs designed to give students real world experience and develop skills
- Governed by ABA Standard 305
- Some schools do not allow for-profit placements.
- But if you can, work with your schools and employers, to develop training/intern programs with the employers that will fit into your school's program.

ABA Standard 305: Study Outside the Classroom



(e) A field placement program shall include:

1. A clear statement of the goals and methods, and a demonstrated relationship between the goals and methods to the program in operation.
2. Adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy program goals and are sufficiently available to students.
3. A clearly articulated method of evaluating each student's academic performance involving both a faculty member and the field placement supervisor;

ABA Standard 305: Study Outside the Classroom



4. A method for selecting, training, evaluating, and communicating with field placement supervisors;
5. Periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for field work in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate;
6. A requirement that students have successfully completed one academic year of study prior to the participation in the field placement program;
7. Opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn four or more academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously

Concerns in Allowing “For-Profit” Sites



- Do not want to favor or disfavor law firms or companies in a particular market
- Do not want to hurt employment opportunities for our students, alumni and other attorneys
- If a law firm or any other entity charges for time spent by a volunteer law student, that firm or entity would likely face some serious issues under the federal wage and hour laws.

Concerns in Allowing “For-Profit” Sites



- Because the firm’s primary goal is to make money.
- If the rules are changed to allow pay to externship students, the “duty” of the law school to find, develop, supervise and maintain competent and dedicated field supervisors will be greater – and the needed resources to accomplish that task will increase.
- Sites are encouraged to allow students to sit in and observe hearings, meetings, etc. So is a client to be billed for the time a student spends observing?

Concerns in Allowing “For-Profit” Sites

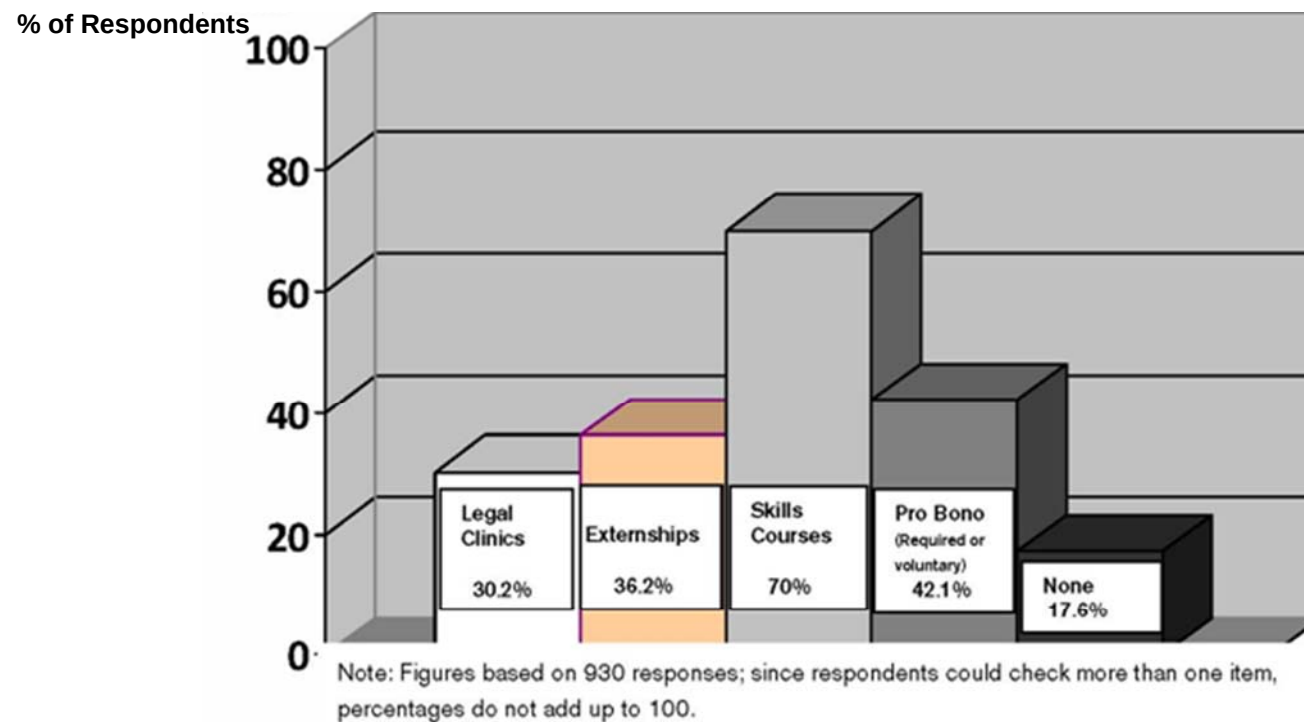


- Trying to figure out the employment issues regarding minimum wage, health benefits, tort liability, etc., as the externs more closely approach employee/agency relationships in the private placements.

2010 Survey of Law School Experiential Learning Opportunities and Benefits



Participation in Externships/Field Placements



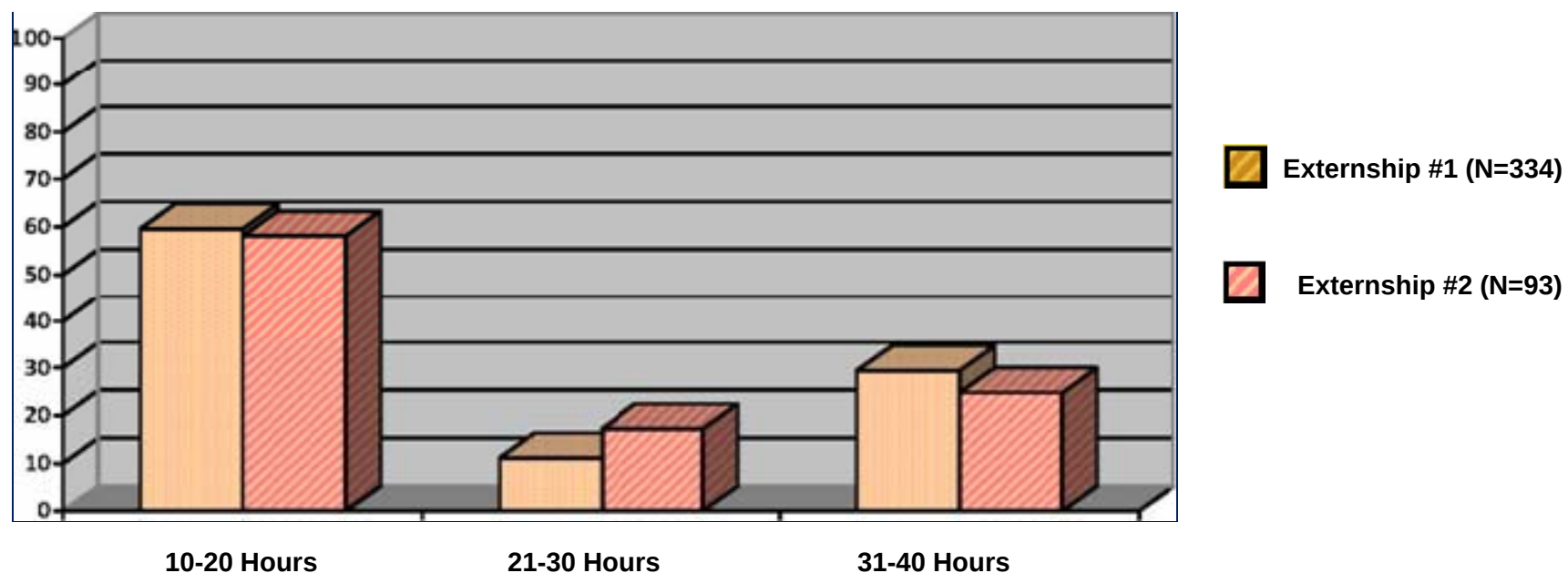
Percent Participation in Externship(s)/Field Placements(s) by Practice Area



Litigation (N = 529)	42.2%
Transactional (N = 301)	26.9%
Lobbying or regulatory (N = 98)	33.7%

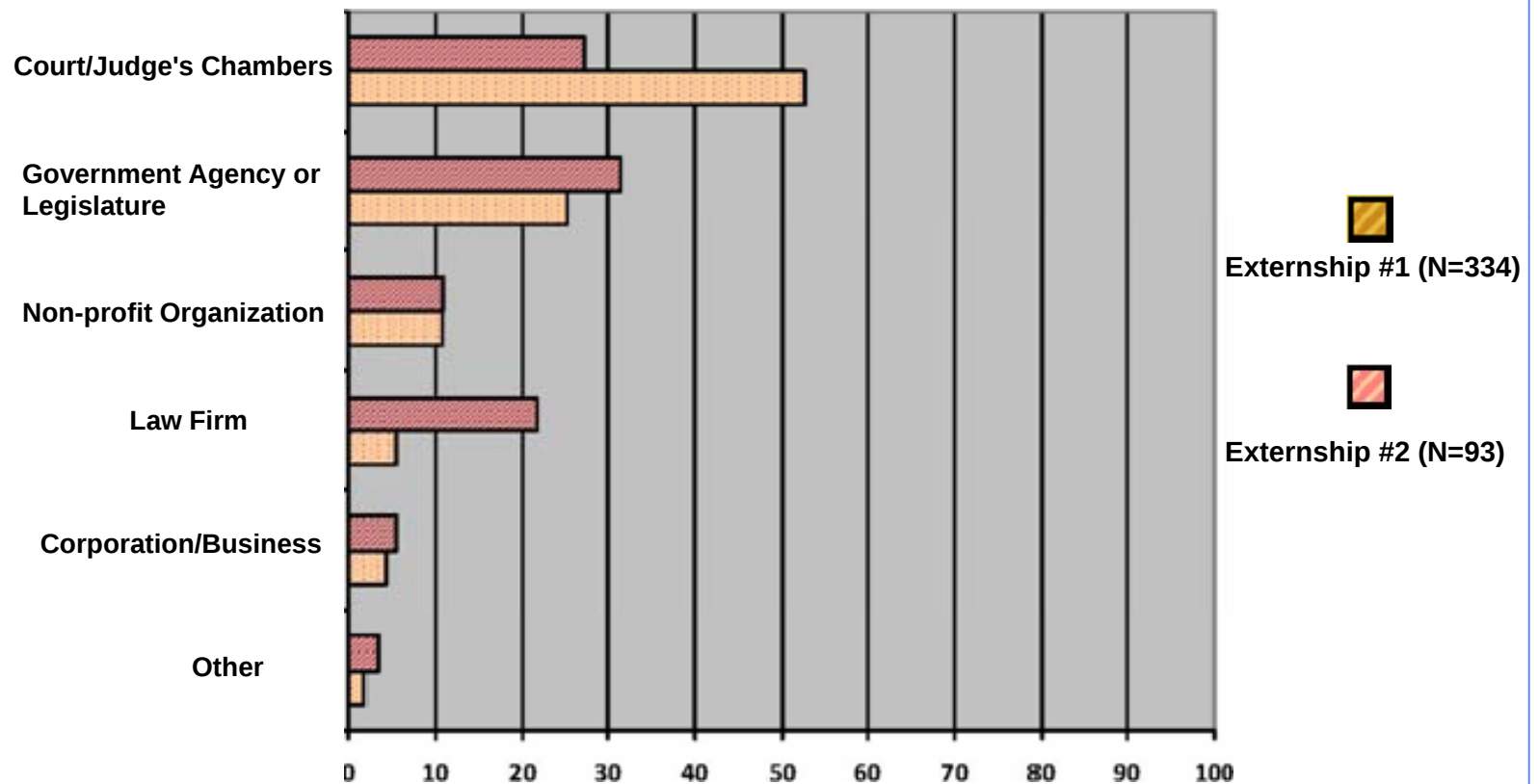
Note: Since not all respondents reported their practice area, counts do not add to the total number of respondents.

Hours Worked per Week in Externship(s)/ Field Placement(s)



Note: Figures based on respondents who participated in one or more externship and answered this question.

Externships(s)/Field Placement(s) Settings



Note: Figures based on respondents who participated in one or more externship and answered this question.

General Usefulness of Learning Experience in Preparing for Practice of Law



	Legal Clinics (N = 279)	Externships/Field Placements (N = 333)	Skills Courses (N = 637)	Pro Bono Work (required or volunteer) (N = 329)
1 Not at all	3.9%	3.9%	3.6%	17.0%
2	11.8%	12.6%	20.4%	38.0%
3	21.2%	23.4%	37.5%	28.0%
4 Very useful	63.1%	60.1%	38.5%	17.0%

Note: All figures are based on respondents who reported participating in the activity and rated its usefulness.