

INTERNSHIPS IN THE NEW YORK NOT-FOR-PROFIT THEATRE:  
PAST, PRESENT AND TOWARDS A NEW FUTURE

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## Introduction

The trajectory of theatre careers in America has evolved over the last few decades with the increase in graduate schools at accredited institutions, the development of formalized internship programs, and the economic crash of 2008. The landscape that millennials now find themselves in is very different from the one in which the current theatre leaders and their former mentors grew up.<sup>1</sup> This thesis will serve as one of the first investigations of the expansive internship culture found in the theatre, specifically looking at not-for-profit theatre internships in New York City. First and foremost, the perspective of this exploration will be in support of the industry and its continued success, drawing out both the benefits and risks of internships in their current form. In my research I posed the following questions: *What is the future of internships in our field? How will the trends of related industries affect (or potentially threaten) the stability of our small industry? And finally, what are the best practices and necessary changes that must be adopted in order to allow the field to survive potential scrutiny?* Using these questions as a guide, research has been conducted and structured through the lens of the legal constructs at play, taking a close look at the United States Department of Labor (DOL) and New York State Department of Labor (NYS DOL) policies on internships. While the laws are often unclear, it is safe to say that certain internship programs position companies in a legal grey zone when employing unpaid or stipended<sup>2</sup> interns. Given the unique practical nature of the theatre industry, which relies on specific hands-on learning for young people entering the field to acquire

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<sup>1</sup> Among the current theatre leaders I spoke with for this thesis, many were mentored by Barry Grove at Manhattan Theatre Club, including Jeremy Blocker (NYTW), Andrew Hamingson (St. Ann's Warehouse), Lisa McNulty (Women's Project), Blake West (MCC), etc.

<sup>2</sup> For the purposes of this thesis, the word "stipended" denotes a type of intern that is paid a stipend for work accomplished, which is less than minimum wage. The stipend may or may not be subject to federal or state withholdings for tax purposes.

adequate skills and build a professional network, it is near impossible for theatre internships to fit within the DOL's specific regulations on what constitutes an appropriate unpaid internship.

Since the DOL will not alter internship criteria in the immediate future, it is the responsibility of the theatre industry to develop standards that can hold up against the DOL's stipulations in legal disputes, in order to protect those theatres that do find themselves in the grey area. Through this exploration, I will outline current trends and propose changes that could protect theatres from legal scrutiny, while also positively impacting future generations and the industry as a whole.<sup>3</sup>

Since a radical switch to paid internships would be fiscally taxing for most, if not all, not-for-profit theaters and is unlikely to happen in the near future, we can at the very least improve upon the educational and experiential outcomes for interns by restructuring existing internship programs in the not-for-profit theatre to help them fall closer in line with the DOL's regulations.

Over the past year, I have interviewed and met with leaders of not-for-profit institutions large and small. I have met with former and current interns, lawyers, accountants, human resources professionals, and leaders of service organizations. I have met with those widely considered to be trailblazers in the field, as well as those who are only beginning to carve out a path in the theatre. In meeting with this range of industry professionals (amounting to several dozens of interviews and research on more than 50 organizations), I was surprised at how open the industry has been to discussing concerns, issues and past practices that are beginning to be examined under a cold, harsh light. The general sense that I have come away with is that we are on the cusp of change. The industry is aware, now more than ever, of the need to reevaluate and

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<sup>3</sup> One of the pivotal benefits that would arise from restructured internship programs, or more specifically, paid internships, is an impact on the ever-present issue of diversity in our field. While the focus of this thesis rests in the legal implications of unpaid internships, it is important to note the basic assumption that diversity is an issue in the field and must be addressed. This thesis will not argue this point or its negative or positive implications.

restructure. For the purpose of this thesis, I will focus solely on arts administration internships in not-for-profit theatres in New York City. While there has been a surge in legal cases against many commercial entertainment businesses, many of these cases are ongoing and are, thus, confidential. The disposition of the majority of these cases is currently uncertain, and the interpretation of the law continues to be in a state of flux. One thing seems to be clear: many commercial internship programs are now facing penalties as a result of investigations launched by the Internal Revenue Service (IRS), the DOL, and bands of former interns. In the case of programs that do not comply with the criteria that delineate acceptable unpaid internships, the companies are obligated instead to comply with the labor laws that govern employer-employee relationships. To begin the investigation of not-for-profits in New York, I looked at the Alliance of Resident Theatres/New York's (A.R.T./New York) Tier 1, A and B membership categories, which include theatre companies with a budget size of \$1 million or greater.<sup>4</sup> I have chosen \$1 million dollars as a minimum budget size in order to study companies that are large enough to employ a core set of staff members on payroll. Out of respect for the openness that was shown to me, and for the protection of our industry, none of the theatre companies I have researched will be named when referring to private business or legal matters. Instead, I have developed an anonymous theatre index from A – Z. For example, when illustrating a reference I will refer to a company as “Theatre A” – which includes a theatre with a budget sized at approximately \$8 million. In keeping with this system, I have combined certain companies with similar practices and budget sizes into one category, in order to include over 50 companies within the 26 “Theatre A – Z” index. A few exceptions to this anonymity will be made when referring to specific

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<sup>4</sup> In addition to the theatre companies that are members of A.R.T./New York, I also included several other theatre companies that do not maintain membership with A.R.T./New York, including, but not limited to, Manhattan Theatre Club, New York City Center, and St. Ann's Warehouse.

organizations in case studies. In these instances, I will highlight specific positive points that may be useful to the industry as a whole.

Theatre internships are an important part of the growth and development of budding professionals entering the field, and are one of the most successful ways of entering the industry by providing hands-on training and opportunities to make invaluable connections. However, unpaid and stipended internships, specifically, pose a legal threat to all not-for-profits that do not comply with the DOL's specific internship guidelines, which in themselves do not reflect a true understanding of the nuances and hands-on nature of the theatre industry. In addition, unpaid internships are also perpetuating a class divide in the field and financial instability for millennials who are being trained and are offering their services without remuneration. Given the current challenges faced by the commercial entertainment industry and other industries with similar internship structures, it seems that the continuation of the current internship practices will inevitably result in legal inquiry, which could greatly harm small not-for-profits, while also perpetuating a lack of diversity and a future of continued underpaid employment in the field. Although an ideal ultimate goal is, of course, to pay for all labor, this goal is an unrealistic one at this point in time and would take years of development and evolution. Many not-for-profit theatre organizations would not be able to operate at their current level without the support of early-career millennials; these institutions would be forced to undercut current programs or would bottom out financially. Therefore, since we can neither convert all interns to paid employees nor eliminate intern support altogether, we must at minimum improve upon the educational and experiential outcomes for current theatre interns, and restructure our internship programs to align with existing regulations.

Chapter One of this thesis will summarize the current internship landscape, including the various titles that exist in internship-like programs, as well as review a quantified data analysis of existing programs in New York City. One issue the industry faces is a lack of standardization, making it difficult to accurately quantify data on internship programs. Given the constant state of change that these programs undergo with each passing year, I will provide as much data as possible that will reflect a mere snapshot in time at the precise moment of my research, and will not reflect any prior or future seasons. Chapter One will conclude with an exploration of the legal criteria outlined by the DOL for what constitutes a volunteer.

Chapter Two will continue using the legal lens to focus on internships expressly, providing an overview of the way the law has regarded internships historically, leading up to the recent string of lawsuits in the commercial entertainment industry. While I will not be focusing on the commercial side of the industry for this paper, I will outline the history of internship-based legal disputes in order to ascertain whether the not-for-profit side of the industry could be threatened by the results of the commercial cases. This chapter will lay out the regulations released in 2010 surrounding internships, including six criteria given by the DOL, as well as an additional five criteria released by the NYS DOL.

After reviewing these criteria, Chapter Three will apply them to a wide range of current theatre internships, examining what the risks are to the industry, as well as potential arguments that could be used in legal cases by the intern community or law firms looking for labor cases. Chapter Four will outline similar issues that could arise through the payment of stipends, including an explanation of the misclassification of employees as interns as seen from the perspective of the IRS. Lastly, Chapter Five will propose potential changes to the field, both idealistic and realistic, in an attempt to start an open dialogue about the future, including a case



study of The Lark Play Development Center and the move from its former internship structure to a new Apprentice program over the last two years. This chapter will propose structural changes, outlining what the future may hold and how positive change can start to come about. Chapter Five will also outline intern perspectives based on interviews and discussions with interns, past and present, demonstrating how The Lark's program is attempting to provide solutions for some of today's common intern frustrations.

Chapter One:  
The History of Internships

Originating in hospitals and then expanding into the political sector, the internship boom has made its way to a number of industries over the past half century, including film and entertainment, publishing, fashion, finance, technology, etc. This chapter will explore the history of internships in industries throughout America, including the theatre industry, as well as the various titles that have evolved out of the internship boom. I will also provide a series of statistics based on data analysis of the current internship landscape in the New York not-for-profit theatre industry. However, one of the major issues faced by interns in these various industries is a lack of standardized wages, working hours, job responsibilities and titles. Therefore, given the ever-changing nature of internship programs in the field, and since there has been little to no research done on this topic to date, these figures will only present a sliver of information, a mere snapshot in time. Pulling from what little research has been done, I will make reference to one of the first-ever intensive studies of the recent internship boom, *Intern Nation*, written by Ross Perlin and published in 2011, applying any relevant points Perlin makes regarding the internship boom as a whole to the theatre industry specifically. With his book, Perlin ventured to create “the first exposé of this world of drudgery and aspiration” and he begins by explaining the following:

[L]ittle that is solid, sober and actionable is known about the internship explosion: how they are here, in what fields, and what social and economic consequences arise from what interns do. On the one hand, the rise of internships has come at a dazzling speed; on the other hand they have been naturalized, and young people can hardly believe a world before internships. Researchers and policy-makers have maintained a near-complete silence, despite the fact that internships were originally a creature of the academic and political spheres.<sup>5</sup>

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<sup>5</sup> Perlin, Ross. *Intern Nation*. Brooklyn, NY: Verso, 2011. xiii. Print.

Perlin's book runs the intern gamut, exploring internships in America, abroad, paid and unpaid, from those flipping burgers as paid Disney World interns, to those becoming the next rising stars of the White House as unpaid interns. While he briefly mentions anecdotes from within the theatre industry, I believe that his study does not encompass the unique obstacles faced in our field. Keeping this in mind, and since *Intern Nation* is the primary existing source in circulation for the study of internships, I will refer to his book as a relevant text for drawing parallels between the current internship culture in general and the theatre industry in particular, and will use Perlin's exploration to shine light on the way theatres have adapted the internship model.

Perlin takes a rather bleak stance against internships, condemning both paid and unpaid internships rather inconsistently. In the first chapter, Perlin uses Disney's internship program as a prime example to stimulate disdain for internship culture, taking a strong stance against internships in general. For example, Perlin is critical of Disney World's internship program for paying minimum wage to do what he refers to as "ordinary jobs." He argues that Disney has rebranded the execution of ordinary tasks (such as serving hamburgers and cleaning the parks) to fit into an "internship mold."<sup>6</sup> Earlier in the book he claims that the internship model has replaced an important stage in professional development: the "regular job." He explains that "regular jobs," which he classifies as being a waiter, camp counselor, or salesperson, "are shrugged off as irrelevant, despite the lessons they can offer."<sup>7</sup> His two arguments, that Disney should be chastised for paying young employees minimum wage to do "ordinary work" and that young professionals should also gain the valuable experience of "regular jobs" in their youth, are highly inconsistent. If Disney has strategically developed a program where the company hires

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<sup>6</sup> Perlin 3.

<sup>7</sup> Perlin xiii.

young employees, pays them minimum wage and brands the experience as an internship, then Disney is providing paid work with an additional value of support towards future employment. The inclusion of an internship at Disney on a high school graduate or college student's resume is no small credential, and Disney has coupled that credit with paid summer employment and ample learning opportunities for their interns. In Perlin's chapter entitled "The Happiest Interns in the World," he continues to describe the program, outlining seminars and benefits that Disney organizes for its interns, as well as Disney's transparency and accurate description of the internship program, including responsibilities, pay rates and hourly commitments on all program materials.<sup>8</sup> While Perlin's book is the first widespread opus dedicated to the internship boom issue, he is not alone in his anti-internship perspective, and his contempt is matched in theatre blogs such as HowlRound,<sup>9</sup> in addition to the New York Times, which has published articles by Perlin,<sup>10</sup> as well as international coverage on the challenges of unpaid internship,<sup>11</sup> and business news pieces on the legality of unpaid internships,<sup>12</sup> including a recent article titled, "Unpaid Interns Gain the Right to Sue."<sup>13</sup> The New York Times also featured an article about the malpractice and misuse of interns in the hit immersive theatre experience *Sleep No More*.<sup>14</sup> Evidently, while Perlin may be viewed as harsh, overly law-abiding or as a stickler for the rules,

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<sup>8</sup> Perlin 18.

<sup>9</sup> Feinberg, Annah. "Confessions of a Serial Intern." *HowlRound*. HowlRound, 21 Dec. 2011. Web. 10 May 2015.

<sup>10</sup> Perlin, Ross. "Unpaid Interns, Complicit Colleges." *The New York Times*. The New York Times, 02 Apr. 2011. Web. 10 May 2015.

<sup>11</sup> Innis, Michelle. "Australia Challenges Use of Unpaid Internships." *The New York Times*. The New York Times, 09 Nov. 2014. Web. 10 May 2015.

<sup>12</sup> Greenhouse, Steven. "The Unpaid Intern, Legal or Not." *The New York Times*. The New York Times, 02 Apr. 2010. Web. 10 May 2015.

<sup>13</sup> Grynbaum, Michael M. "Unpaid Interns Gain the Right to Sue." *The New York Times*. The New York Times, 15 Apr. 2014. Web. 10 May 2015.

<sup>14</sup> Perlin, Ross. "Unpaid Interns: Silent No More." *The New York Times*. The New York Times, 20 July 2013. Web. 10 May 2015.

his views are not isolated, nor without parallel. Therefore, this thesis will draw from his strident critiques, making comparisons within the theatre industry, where applicable.

Little concrete information is known about the history of internships, since the term has been used to denote a number of different functions, and the vast rise in internship programs has only surfaced in the last hundred years. From what is known of the history, the term was first used to refer to medical students in the late 1800s, and that usage remained consistent until circa World War II, when a plethora of industries implemented the term for a variety of positions.<sup>15</sup> In the 1900s, the medical industry found itself in what Perlin describes as a “widely uneven landscape of practices,” not unlike the current landscape of theatre internships.<sup>16</sup> In 1904-1905, the American Medical Association (AMA) created a Council on Medical Education to begin the process of standardization. This led to what is now the post-graduate year for medical students, after completing four years of study, working in teaching hospitals under direct supervision of experienced physicians.<sup>17</sup> Following medicine, the government was next in developing an internship model in the 1930s, bringing college graduates to Washington, D.C., for general training in public administration.<sup>18</sup> By the 1960s, internships were found in teaching, social work, psychology, insurance and criminal justice, and by the 1980s and 1990s, fashion magazines, technology start-ups, retailers, banks and financial institutions also began to develop internship programs. Natalie Lundsteen, who holds a PhD in Education from Oxford University and whose research has focused on internships saw firsthand “how interest in internships began growing in the late nineties.”<sup>19</sup> She was responsible for the first corporate headquarters internship

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<sup>15</sup> Perlin 30.

<sup>16</sup> *Ibid.*

<sup>17</sup> Perlin 31.

<sup>18</sup> Perlin 32.

<sup>19</sup> Perlin 36.

for Gap, Inc., which was a forerunner in the internship boom, preceding other corporate internships including a “Twintern” (twitter intern) for Pizza Hut and a Target internship program that grew to have over 1,000 interns in its first two years of operation.<sup>20</sup>

Regardless of what similar positions have been called in the past, apprenticeship-like learning or internships have always been an integral part of the theatre profession. Most leaders of the major not-for-profits today began with intern-like work (often unpaid), in order to learn from the leaders of their time and acquire access to the professionals in the field. Before accredited institutions formed certified academic programs, mentorship and passing down practices to rising generations were historically viewed as the main forms of education. The oldest not-for-profits, including The Public Theater (founded in 1954), Roundabout Theatre Company (founded in 1965), and Manhattan Theatre Club (founded in 1970) have essentially always had interns in some form. Even in the longest standing organizations, however, it is difficult to pinpoint the exact time that internship programs were first instituted, particularly because the programs themselves are constantly changing. I have not found consistency within any organization, some of which weave in and out of intern payment structures, education program support and the existence of internship programs at all. One of the leaders of Theatre A,<sup>21</sup> who has been with the company for almost twenty years, said that when he first joined the company, there was no official internship program. Occasionally the company would have intern-like positions in “the most loose possible way imaginable.” The first program that the company instituted, which no longer exists, was an education program for students funded by the Lila Wallace Readers Digest Foundation. The funding covered the cost of a part-time Education

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<sup>20</sup> *Ibid.*

<sup>21</sup> Theatre A is nearly \$8 million in size. See Appendix I for a full list of the theatre sizes referenced in this paper.

Coordinator, who managed the interns in “arts-making projects” and hands-on work within various departments. There was no payment for the students, but the leader interviewed explained that the program “felt more like free training or free courses.” Eventually, funding for that program dissolved, and the intern program developed into an ad hoc program run by the Associate Artistic Director to try to keep it going. With regard to the Education Coordinator, the representative of Theatre A explained that, over the past ten years, the company has had various times when it has been able to force a part time or full time Education Coordinator into the budget, but when finances become tighter, the position has been eliminated. Historically, this position has been reinstated during healthier fiscal periods, but the position has never been a permanent part of the company. Instead of a year-round program, the company currently has a summer internship program. When the company created this summer program, it polled former student interns to enlist their help in building an ideal summer experience. Originally, the internships within the program began as stipended positions, and the company also found money to reimburse travel expenses for its pilot interns. As this program has evolved, it has developed into a structured internship experience, and is now unpaid (although this varies year to year depending on funding). When speaking with former interns, one expressed that at the time she was interning at Theatre A, her position was part-time and paid \$200 per week (and was therefore, above minimum wage). Theatre A’s intern history is not unlike the way most theatre companies’ internship programs have developed over the last 50 years, describing an ongoing fluctuation in structure, pay rates and criteria for what defines an intern.

With the sudden spike in programs over the past few decades, internship culture has become pervasive and engrained in the workplace, both in the minds of young professionals who have never lived in a world without intern programs, as well as for employers who have built

intern work into the day-to-day operations of their companies. Across industries, and without regulation in any official capacity, being an intern can mean anything from making coffee, answering phones and befriending the copy machine, to managing social media, researching strategic developmental planning, and becoming a key collaborator in the execution of new programs and business ventures. How can one word encompass all of these roles? What does it really mean to be an “intern”? Phil Gardner of the College Employment Research Institute says, “We’ve just bastardized all the language across the landscape, nobody knows what anything means anymore.”<sup>22</sup> Looking at the broad scope of internship titles, one might find anything from interns, externs, part-timers, freelancers, permalancers, permatemps, trainees, observers, and shadowers, to the titles frequently used in the theatre industry: apprentices, fellows, residents, assistants, and, sometimes, volunteers.

In the late 19<sup>th</sup> century, the medical industry also implemented such names for intern programs in an attempt to delineate roles and responsibilities. In response to the “yessir” culture that developed for medical interns, William Mayo (founder of the famous Mayo Clinic) developed a three-year long training program for “fellows.”<sup>23</sup> The John Hopkins School also introduced the term “resident” to denote a more advanced person-in-training, who has surpassed the level of an intern.<sup>24</sup> In the not-for-profit sector, it is crucial to be able to identify the differences between the various terms that have arisen out of the internship boom to understand the level of skill and responsibility given to interns and, even more importantly, to demarcate the differences between a “volunteer” and an “intern”<sup>25</sup> for legal purposes. According to the NYS DOL, there is no section of the Labor Law that exempts “interns” at not-for-profit organizations

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<sup>22</sup> Perlin 26.

<sup>23</sup> Perlin 31.

<sup>24</sup> *Ibid.*

<sup>25</sup> The word “intern” in this case, encompasses all other terms, such as resident, fellow, etc.



from the minimum wage requirements or the criteria established by the DOL that constitute a fair unpaid internship.<sup>26</sup> However, if that person is considered to be a “volunteer” they may perform certain unpaid work in a not-for-profit organization. Of course, there are restrictions as to what unpaid volunteers may or may not do. Unpaid volunteers may not:

- “Replace or augment paid staff to do the work of paid staff
- Do anything but tasks traditionally reserved for volunteers
- Be required to work certain hours
- Be required to perform duties involuntarily
- Be under any contract to hire
  - By any other person or business
  - Express or implied
- Be paid for their services (except reimbursement for expenses).”<sup>27</sup>

In practice, it is difficult to define what constitutes a volunteer responsibility in the theatre, since the not-for-profit industry is largely built on donated services, openhanded support and volunteer labor of all kinds. A volunteer may be donating artistic services (actors often volunteer to perform at benefits), or can be fulfilling menial administrative tasks, such as envelope stuffing or filing. Frequently, one may find overlap between volunteer tasks and intern responsibilities, especially during special events. However, since there is no set standard, the following argument looks to the quantifiable research that can be done in order to distinguish what may constitute the prevailing volunteer tasks in the industry from an outside legal perspective. Out of the 50 not-for-profit theatre companies studied for this thesis, 45 companies

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<sup>26</sup> United States. New York State Department of Labor. *Wage Requirements for Interns in Not-For-Profit Businesses*, New York State: P726. 2011.

<sup>27</sup> *Ibid.*

were found to have a combination of internships and volunteer positions available. Among those 45 companies, 28 companies were found to offer volunteer opportunities that were separate from available internships.<sup>28</sup> Most often in the not-for-profit theatre, ushers are seen as volunteers who trade their time handing out programs and seating audience members before a production, in order to be able to partake in the performance free of charge. Out of the 28 companies, eighteen theatres included ushering as a volunteer responsibility (64%), and of those eighteen, ten companies offered no other volunteering responsibilities other than ushering (56%).<sup>29</sup> Therefore, the usher trade can be viewed as the most common type of volunteer work in the not-for-profit theatre as, based on the analysis above, more than half of the companies that offer volunteer positions consider volunteering to be ushering. According to the DOL's restrictions of unpaid volunteers, ushering at a not-for-profit theatre seems to be a reasonable responsibility qualifying for volunteer work: no paid staff members fill that responsibility, the volunteer is not required to fulfill a certain number of hours per week but can, instead, sign up at will to hand out programs at any given performance, the volunteer is unpaid and under no contractual obligation to complete the task. Therefore, according to the NYS DOL criteria, it is logical to assume that an outsider could view ushering as a task traditionally reserved for volunteers in the not-for-profit theatre. While this trade seems common and reasonable, there are some exceptions that call the practice into question. The same responsibilities may be paid on the commercial side of the industry, and ushers are actually unionized positions at the Broadway level, falling under the union of the International Alliance of Theatrical Stage Employees' (IATSE) Local 306. In an article published by Zachary Pincus-Roth on Playbill.com, the process of becoming a unionized usher is described as a simple system, similar to any other application procedure in which a

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<sup>28</sup> See Appendix II

<sup>29</sup> *Ibid.*

resume and cover letter is submitted to one of the three major companies that control Broadway theatres, followed by a standard interview.<sup>30</sup> Ushers working at a Broadway theatre begin as substitutes until they eventually become full-time ushers. According to Pincus-Roth, “no matter what kind of usher you are — sub or full-time — after 30 performances, you have to join the union.”<sup>31</sup> If the same exact position, including job title and responsibilities, must be unionized and paid in one subset of the industry, what sets this position apart in the not-for-profit sector? The nature of not-for-profit involvement allows for a certain level of liberty to be taken when it comes to volunteer positions, but if called into question, it is unclear how the DOL would respond to such an inquiry. Unpaid volunteer positions are appropriate for those “tasks traditionally reserved for volunteers,” which, as discussed above, commonly includes volunteer ushers in not-for-profit theatres as a means to allow volunteers to see performances for free, in exchange for their ushering capabilities. However, Theatre H in the \$3 million range specifies that, in the case of sold out shows, ushers sometimes do not get to sit in the theatre. In this case, what is the fair exchange? How would the DOL view this kind of volunteer engagement if contrasted with other industry standards, both commercial and not-for-profit? The lines in the industry are incredibly blurred, making it difficult to identify an industry standard for what constitutes a volunteer, and furthermore, a volunteer intern, or any other kind of intern.

Out of the 50 companies researched, a total of 38 companies offer specific internship positions. These intern positions range from Artistic / Artistic Programming / Literary (the most common internship offered on 27 instances), Development / Fundraising as the second most

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<sup>30</sup> The three major companies that control Broadway theatres are Shubert Organization, Nederlander and Jujameyn.

<sup>31</sup> Pincus-Roth, Zachary. "ASK PLAYBILL.COM: Ushers." *Playbill.com*. Playbill, 10 July 2008. Web. 18 Apr. 2015.

common with 24 internships, and the third most common is Marketing with 23 internships, followed closely by General Management at 21 internships. Other common internships are Production Management / Technical Direction with fifteen internships, Business / Finance / Administration at thirteen internships, and Education with nine internships. There are also eight companies with budget sizes between \$1-2 million that offer general internships that are not focused within specific departments.<sup>32</sup> Of the 38 companies with internships, 26 have defined hourly requirements (ranging from seven hours per week to full-time positions), thirteen companies pay a financial stipend of some sort, and out of those thirteen, only two and a half<sup>33</sup> meet the minimum wage requirements.

Referring again to the NYS DOL's definition of volunteers as a guide, all 28 companies that have both volunteer ushers as well as internship programs are at risk of violating the second criterion, which states that volunteers can only complete tasks traditionally reserved for volunteers. This implies that any work outside of the traditional volunteer responsibilities, which, as exhibited above, is most often ushering, must be reserved for non-volunteers. Therefore, companies that have volunteers and interns must acknowledge that their interns cannot also be considered volunteers. Since they already have volunteers completing the standard volunteer tasks recognized by the industry, their interns, by default, must be classified as something else. Furthermore, the administrative work completed by many interns is not considered to be a traditional volunteer task, and in fact, is at risk of violating the first criterion that states that volunteers cannot replace or augment paid staff to do the work of paid staff. This criterion will

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<sup>32</sup> See Appendix III

<sup>33</sup> A \$1 million dollar company, Theatre I, pays the General Management, Development and Marketing interns minimum wage, funded through a specific one-year grant, but did not receive funding to pay the Artistic interns this year. I have counted this company as meeting the minimum wage requirements halfway.

be explored in more detail in Chapter Two. The companies that have set forth explicit work hours for their interns are violating the third criteria that states that no volunteer can be required to work certain hours, and the companies that do offer a stipend of some kind are in violation of the final point that states that volunteers cannot be paid for their services. According to Perlin, “An organization’s nonprofit status, often little more than a tax distinction, is thought by many to guarantee the right to bring on anyone, in any capacity, as a volunteer – this is a myth.”<sup>34</sup> He explains that not-for-profit companies that take on unpaid interns and treat them as regular employees are subject to the same criteria as for-profit organizations. In fact, employment lawyers Karen Gieselman and Wendy Smith add, “Since the motivation for an internship is ordinarily to learn and be exposed to information that may further the intern’s education or career, it is unlikely most interns will qualify as volunteers.”<sup>35</sup>

There are two major exceptions that may protect theatres from being in violation of the aforementioned volunteer-employee distinction when working with unpaid interns. Firstly, the NYS DOL specifies that, while there is no Labor Law that exempts “interns” at not-for-profit organizations from the minimum wage requirements, students working in a not-for-profit organization are exempt from the State Minimum Wage Act so long as:

- The organization is organized and operated exclusively for these purposes:
  - Charitable
  - Educational
  - Religious
- They attend an institution of learning with courses leading to a degree, certificate or diploma

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<sup>34</sup> Perlin 118.

<sup>35</sup> Perlin 118-119.

- They are completing residence requirements for a degree such as those required of medical and pharmaceutical students.<sup>36</sup>

Furthermore, the NYS DOL states that the work experience does not need to fulfill a curriculum requirement, or even relate to the student's field of study. Students continue to be exempt during the periods when school is not in session (i.e., during the summer) if they:

- Were students during the preceding semester
- Have not yet graduated or completed the educational requirements of the program.<sup>37</sup>

Recent high school graduates are still considered to be students during the summer following graduation or if they are enrolled in a college or university program in the following semester.<sup>38</sup>

Out of the 50 companies studied, 24 specify that college credit is available (Theatre T at around \$1.5 million even states that credit can be given in lieu of a stipend) and only Theatre B, one of the largest companies, requires student status to even be eligible for an internship. The summer is the busiest time for student internships, since most students do not have classes and their schedules open up, allowing for various work and internship opportunities. During the school year there is a greater assortment of recent graduates, non-students, and students who are able to take on part-time internships. Those companies that require a full time commitment (an impossibility for most students whose time is dedicated to classes during regular working business hours) and those that are hosting non-students as interns must abide by the Federal and

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<sup>36</sup> United States. New York State Department of Labor. *Wage Requirements for Interns in Not-For-Profit Businesses*, New York State: P726. 2011.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

State DOL's criteria for what constitutes minimum wage exempt internships (outlined in the following chapter), or are required to pay the wages specified in the DOL's Minimum Wage Act.

Although many theatre companies believe that admitting only student interns will protect the company from legal scrutiny, the second exception given by the NYS DOL is actually more pertinent to the industry and can be used by education-oriented internship programs to validate the involvement of any intern, regardless of their student status. The NYS DOL offers a minimum wage exception for "trainees and learners" taking part in "a bona fide training program operated by a not-for-profit organization or institution" that operates exclusively for charitable, educational or religious purposes.<sup>39</sup> The training must involve "formal instruction" and "on-the-job training."<sup>40</sup> Furthermore, during the training program the learner must "have limited responsibility" and "be under supervision or guidance," and that guidance provided must:

- "Be sufficiently direct and specialized;
- Maintain an appropriate ratio of trainers to trainees and learners;
- Last from 2-10 weeks."<sup>41</sup>

For those well-structured internship programs with a focus on education, this exception can be called upon to legitimize the program. Chapter Three will evaluate the education and training methods of various theatre internship programs, and will outline the complications that may arise. While the definition of a "bona fide training program" is unclear, there are a number of internship programs that focus on training and mentorship that would likely be considered bona fide. However, even those considered to be the best internship programs would often still fall short of the final stipulation that the trainee or learner can only be in the program for two to ten

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<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

weeks. Most programs follow a semester schedule and usually last between three to four months (12-16 weeks),<sup>42</sup> and some programs expect interns to stay on for a full year or season.<sup>43</sup>

This chapter has explored the history of internships, including the various titles that emerged throughout the internship boom, and a number of statistics outlining the current landscape of theatre internships in the not-for-profit theatre, among those that are \$1 million or larger in budget size. This chapter also summarized the NYS DOL's wage exemption criteria applicable to volunteers, students and interns in the not-for-profit sector. Using this as a base to build upon, the next chapter will focus on the legal framework of internships that do not qualify for the wage exemption discussed in this chapter for any number of reasons, such as those that admit non-students and would not qualify as bona fide training programs, or those that extend beyond the limitations of the two to ten week timeline. This legal overview of non-exempt programs is in preparation for Chapter Three, which will evaluate theatre internships in their current and most common form to highlight how the legal policies at play may be interpreted.

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<sup>42</sup> Most commonly, the yearly timing of internships breaks down to September – December, January – April, and May – August.

<sup>43</sup> For example, on its website, Theatre F (at around \$3 million in size) advertises that internships “can be as short as four months but can also last a full season.”



Chapter Two:  
An Overview of the Labor Laws

The laws surrounding internships, both paid and unpaid, have historically ranged from nonexistent to quite unclear. Over the past five years, the laws have become somewhat more defined, in part due to the recent surge in lawsuits raised by groups of interns in the publishing and entertainment industries; nevertheless, the laws are still interpreted in a wildly inconsistent manner in ongoing legal cases, as well as by companies across various industries. Therefore, there is no known universally accepted standard for what constitutes a legal internship. In speaking with many leaders in the not-for-profit theatre over the past year, it has become evident that the laws put in place to govern internship programs in the not-for-profit sector are equally unknown or misunderstood. This chapter will clarify misconceptions, misunderstandings and often-misinterpreted regulations by outlining the legal history of intern disputes and the regulations released by the Federal and State DOL. Chapter Three will investigate how the laws might be applied to our field through a number of anonymous examples of existing internships in not-for-profit theatres.

Finding the appropriate DOL Fact Sheets, Opinion Letters, Orders, Codes, Rules and Regulations is by no means an easy task. The stipulations are hard to uncover and are often hidden within a maze of documents and websites, including a plethora of unofficial websites that attempt to explain the laws surrounding internships (and that often provide conflicting information). Reading through the documents also requires additional clarification, as there are separate sets of rules given by the Federal DOL and the NYS DOL, and there have been further sets of criteria and clarifications that have only been released in the last five years, particularly in response to not-for-profits that have found themselves in dispute with certain rulings and then

sought out explanations. The information provided in this chapter has been taken directly from official DOL sources, and is a curated selection of what I believe to be the most relevant rulings.<sup>44</sup>

In 1938, the Fair Labor Standards Act (FLSA) was instituted, which technically outlawed unpaid internships with laws that govern workers' rights to fair compensation, such as minimum wage and time-and-a-half in overtime wages. Under the FLSA, whether an intern qualifies as an employee is determined by a six-point test developed by the Wage and Hour Division (WHD) of the DOL.<sup>45</sup> According to the Economic Policy Institute, "Though these guidelines do not carry the same weight as law or court rulings, they are rooted in a 1947 Supreme Court ruling regarding exemptions from FLSA for workplace training programs."<sup>46</sup> The points in this test have also been the focus of contention in the legal cases surrounding unpaid internships. Jane Smith, an anonymous HR professional who has worked with various New York theatres<sup>47</sup> explained that there was "no legal construct for the longest time. Everyone did *whatever* with unpaid or stipended internships and they were always okay." Smith said that the older and larger theatre companies (such as Theatre B, C, E, G and Q, all budgeted over \$20 million) were being fairly progressive by including educational components in their internships (including

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<sup>44</sup> The information provided has been corroborated by a set of lawyers, law professors, legal students and Human Resources professionals who have assisted me in finding my way through the maze, including but not limited to: Michael Naumann (TDF), Darren Robertson (Actors Fund), Victoria Bailey (TDF), and Karen Kowgios (CPA).

<sup>45</sup> Edwards, Kathryn Anne, and Alexander Hertel-Fernandez. "Not-So-Equal Protection-Reforming the Regulation of Student Internships." *Economic Policy Institute*. Economic Policy Institute, 9 Apr. 2010. Web. 12 May 2014.

<sup>46</sup> *Ibid.*

<sup>47</sup> Jane Smith has worked with Theatre C, budgeted at over \$20 million; Theatre D at nearly \$5 million; Theatre G with over \$60 million; and Theatre M, a smaller company budgeted at about \$1.5 million, to name a few.

information sessions with staff members, etc.), and giving interns responsibilities that were more challenging than simply filing, as well as a stipend.

Meanwhile, in the commercial sector, a timeline for the internship lawsuit explosion was forming. Despite the laws in place under the FLSA, it was not until 1997 that the first major lawsuit, *O'Connor v. Davis*, was filed, in which a female unpaid intern was sexually harassed by her male supervisor, and was not protected by anti-sexual harassment laws because she was not, technically, an employee.<sup>48</sup> Following this case, there were a string of lawsuits from 1997 – 2008 that concluded that unpaid interns were not considered employees and were, therefore, not eligible for workplace protection.<sup>49</sup> In 2010, the Economic Policy Institute did a study on unpaid internships and proposed changes to the law. Among other relevant changes, some suggestions were to adopt a new test for determining whether or not interns must be compensated like employees, and to apply this test to both non-profits and for-profit firms.<sup>50</sup> 2012 brought the *Wang v The Hearst Corporation* case, No. 12 Civ. 0793 (S.D.N.Y) in the U.S. District Court, Southern District of New York. “Outten & Golden LLP filed a class action lawsuit in federal court against the Hearst Corporation on behalf of a former Harper’s Bazaar intern, Xuedan Wang. Ms. Wang regularly worked more than 40 hours per week, and sometimes as many as 55 hours per week, without compensation as an intern on the staff of Harper’s Bazaar in 2011.”<sup>51</sup> The outcome of this case is pending, but the law firm seeks to “have the lawsuit certified as a class action to recover unpaid wages, overtime pay, liquidated damages, interest and attorneys’

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<sup>48</sup> O’CONNOR v. Davis, 126 F. 3d 112. Court of Appeals, 2nd Circuit 1997. 19 Sept. 1997. Web. 12 May 2014.

<sup>49</sup> Edwards, Kathryn Anne, and Alexander Hertel-Fernandez. "Not-So-Equal Protection-Reforming the Regulation of Student Internship." *Economic Policy Institute* (April 2010): 3. *Policy Memorandum 160*. Web.

<sup>50</sup> *Ibid.*

<sup>51</sup> "Hearst Corporation." *Outten & Golden*. Outten & Golden LLP, 1 Feb. 2012. Web. 27 Feb. 2015.

fees for unpaid interns who worked for Hearst between February 1, 2006 and the date of a final judgment.”<sup>52</sup>

2013 was a significant year in terms of internship legal cases. In May 2013, eight former magazine interns sued Hearst Corporation, the publishing company, but the case was dismissed because the judge denied its class action status. The interns subsequently requested an appeal.<sup>53</sup> This was followed by a rise in internship cases: On June 11, the first major entertainment-related plaintiffs came out of the woodwork, when two production interns sued Fox Searchlight Productions for their work on the 2010 film *Black Swan*, which caused a number of interns to seek relief. On June 13, a former intern of *W* magazine and former intern from the *New Yorker* filed lawsuits against Condé Nast, another major publishing company. On June 17, a former Atlantic Records intern filed a lawsuit against Warner Music Group.<sup>54</sup> These cases led to a 2014 bill, which the New York City Council passed, protecting unpaid interns from sexual harassment and workplace discrimination by rejecting pay as a determinant of employment, which means that unpaid interns could be considered employees for the purpose of gaining workplace protections. Employee status does not exempt interns from the Minimum Wage Act unless the internship complies with the criteria laid out by the DOL for what constitutes a legal unpaid internship. The inconsistent application of these criteria, which has been the plinth on which many legal cases have stood, will be outlined later in this chapter. As a result of these lawsuits, many New York based companies and universities began to take a stand against unpaid internships. The New York Times instituted pay for its interns, New York University formed

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<sup>52</sup> *Ibid.*

<sup>53</sup> Spitznagel, Eric. "Unpaid-Intern Lawsuits Explained." *Bloomberg Business Week*. Bloomberg, 27 June 2013. Web. 12 May 2014.

<sup>54</sup> Spitznagel, Eric. "Unpaid-Intern Lawsuits Explained." *Bloomberg Business Week*. Bloomberg, 27 June 2013. Web. 12 May 2014.

stringent approval processes for student internships, and Columbia University stopped giving undergraduate credit for internships as a means of pressuring employers to pay their interns.<sup>55</sup>

Jane Smith reasons that, during the economic crash of 2008, the government needed to find other sources of income, and so began enforcing existing laws. As a result, the entertainment industry became a primary target. The government sought out incorrectly classified employees, such as interns, independent contractors and those who were misclassified as exempt from overtime wages. This led to an explosion of audits and legal cases, such as those outlined earlier in this chapter, which came to the forefront in the for-profit world for large companies where the government and legal firms believed there was a hefty sum of money to be made. Companies that were under investigation or subject to legal action were required to disclose records on all interns that were paid less than minimum wage. The companies were sued for back pay, not only in unpaid hourly wages, but also overtime and damages. In New York, in particular, Jane Smith explained that the notion that the NYS DOL was particularly interested in the “entertainment industry” began to spread throughout the theatre industry, particularly because of television and film companies, which Smith noted are notorious for “not paying people and treating them like crap in exchange for future prestige or a job.” The difference between those companies and theatres is that they have sufficient financial support in their budgets to handle such investigations, and can survive despite paying large sums of money in back pay to former interns. Based on the settlement of the Condé Nast class action lawsuit No. 13 Civ. 4036 (HP), Condé Nast must pay a total of \$5,850,000, compensating each intern on record between 2007-2014 an estimated amount between \$700-\$1,900 (depending on what type of internship they had), plus \$650,000 to cover attorney fees, lawsuit costs of \$10,000, and an additional \$10,000 to

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<sup>55</sup> Hickman, Blair. "Interns Are Now Protected Against Sexual Harassment in NYC." *Journalism in the Public Interest*. ProPublica, 28 Mar. 2014. Web. 12 May 2014.

each named plaintiff.<sup>56</sup> Comcast Corp's NBCUniversal department settled a similar case for \$6.4 million, and as recently as March 2015, Viacom Inc. settled another class-action lawsuit for \$7.21 million.<sup>57</sup>

Jane Smith explained that there has been little clarification on the matter of unpaid or stipended internships from the government, leaving not-for-profits with the legal choice to either pay interns minimum wage or eliminate intern programs completely. In reality, what resulted after the economy crashed was that most theatre companies reduced the number of interns they took on and jettisoned stipends. Paying a stipend became far riskier since that acknowledges some sort of employee status. In addition, paying a stipend that is lower than Minimum Wage Act standards engenders further misclassification, depending on how the stipend is documented. Smith explained that even if an intern signs a waiver that states that she or he is not an employee, once that person is compensated in any way for their services, he or she could be considered to be an employee subject to minimum wage standards, including overtime pay.

In light of the recent lawsuits, it is crucial that for-profit and not-for-profit companies alike become familiar with the DOL's test for what constitutes an appropriate unpaid internship, since virtually all intern programs are subject to its criteria. The following are the six points offered by the DOL, and must be applied when determining whether an intern qualifies for an unpaid internship:

1. "The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;

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<sup>56</sup> *Ballinger v. Advance Magazine Publishers, Inc.* No. 13 Civ. 4036 (HP). Nov 13, 2014.

<sup>57</sup> Stempel, Jonathan. "Viacom to Pay \$7.21 Mln to End Wage Lawsuit by Thousands of Interns." *CNBC*. CNBC, 12 Mar. 2015. Web. 11 May 2015.

2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.<sup>58</sup>

The aforementioned six criteria are what are oft thought of when considering unpaid internship programs. In 2010, however, the NYS DOL released an Opinion Letter in response to a not-for-profit company (the company's anonymity is maintained in the letter) that requested clarification on a ruling that its Education interns were, in fact, subject to the Minimum Wage Act. While the company is not a theatre company, its charitable purpose is clear from the letter's description of its mission. The company:

...serves 18 to 24 year-olds in primarily underserved communities who have not progressed in their education beyond receiving a GED or high school diploma. The program includes an 11-month intensive educational and training curriculum designed to: provide young adults with technical skills in information technology; develop professional skills for working in an office environment; provide a support network of social workers, instructors, and mentors; instill the importance of lifelong learning through career development tools; and assist participants with applying to college.<sup>59</sup>

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<sup>58</sup> United States. U.S. Department of Labor Wage and Hour Division. *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, Washington. 2010.

<sup>59</sup> Paglialonga, Michael. "Request for Opinion: Educational Internship Program." Opinion Letter. 21 Dec. 2010. New York State Department of Labor. New York.

Below are the five additional criteria that the NYS DOL released in this Opinion Letter to help evaluate the existence of an employment relationship. The Opinion Letter states: “Under this test, an employment relationship will *not* be deemed to exist for the purposes of the New York State Minimum Wage Act and Orders only if all of the following exclusionary criteria are met:

7. Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.
8. The trainees or students do not receive employee benefits.
9. The training is general, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer offering the program.
10. The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.
11. Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.”<sup>60</sup>

Unless the intern qualifies as a volunteer, is a student, or is a learner or trainee for fewer than 10 weeks (as outlined in Chapter One), these are the criteria used to determine whether unpaid internships, in both commercial and not-for-profit companies, are deemed to be legitimate internship programs, exempt from the Minimum Wage Act’s requirements.

Focusing for a moment on the *why*, this exploration raises a set of important questions:

*Why should theatres care? Why is it important that we, as an industry, start making change?*

Putting aside the ethical or moral implications of unpaid internships and focusing instead on

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<sup>60</sup> *Ibid.* N.B. Although the five points given by the NYS DOL are completely separate from the DOL’s six points, the rule numbering in this thesis will be consecutive in order to more easily reference the two sets of criteria throughout the paper.



purely legal factors, companies that employ unpaid interns must be wary of what I now dub “Lawsuit Hunters,” specific law firms that are hunting internship cases, building off of and igniting the attention that internship labor cases have stirred in the past several years. A leader among them is Outten & Golden LLP, which has created a website called “Unpaid Interns Lawsuit Website,” through which interns are encouraged to contact the firm about unpaid internships.<sup>61</sup> The home page includes the following solicitation: “If you have held an unpaid internship during the past six years, even if you received school credit for the internship, we would like to talk to you.”<sup>62</sup> The tagline for the website is: “Entry-level jobs are disappearing. Fight back against unpaid internships.”<sup>63</sup> The website outlines many of the laws discussed in this thesis, but rather than taking the perspective of the companies (many of which are attempting to provide an educational experience but may lack the resources to do so), the lawyers are, of course, pushing interns to take a stand against their employers. On the website it is written:

Unpaid interns are becoming the modern-day equivalent of entry-level employees, except that employers are not paying them for the many hours they work. The practice of classifying employees as “interns” to avoid paying wages runs afoul of federal and state wage and hour laws, which require employers to pay all workers whom they “suffer or permit” the minimum wage and overtime. Employers’ failure to compensate interns for their work, and the prevalence of the practice nationwide, curtails opportunities for employment, fosters class divisions between those who can afford to work for no wage and those who cannot, and indirectly contributes to rising unemployment.<sup>64</sup>

Listed on this website are the settled cases discussed above, including those against Condé Nast and NBCUniversal, as well as ongoing cases, with such defendants as Fox Searchlight and The

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<sup>61</sup> “Unpaid Interns Lawsuit Website.” *Unpaid Interns Lawsuits Website*. Outten & Golden LLP, Web. 27 Feb. 2015.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*

Hearst Corporation. Also listed among the companies is ICM (International Creative Management), a large talent and literary agency that represents many theatre professionals. The issue of unpaid internships is coming to the surface as companies like Outten & Golden actively search for more labor cases. With a slogan that reads: "Fight back against unpaid internships" it would be ignorant for theatre companies to turn a blind eye to the signs that change is underway.

This year has already seen recent developments for two ongoing internship cases. In February 2015, the US Court of Appeals (Second Circuit) heard oral arguments set forth by Fox Searchlight Pictures and The Hearst Corporation's attorney. Three federal appellate judges discussed whether adopting a fresh test to determine if unpaid interns must be paid as employees under the Fair Labor Standards Act (FLSA) is necessary.<sup>65</sup> Dissatisfied with a 67-year old test, Judges Dennis Jacobs, Richard Wesley and John Walker explored the issue with a representative of the DOL and an Outten & Golden partner attorney. Rachel Bien of Outten & Golden argued that the beneficiary test (the test that determines whether the intern or the employer receives greater benefit) has been inconsistently applied, pulling from a 1947 Supreme Court case: *Walling v. Portland Terminal CO.*, 330 U.S. 148. Maria Van Buren, a senior attorney representing the DOL defended the test, which was ultimately found to be inconsistent by Judge Walker. The first argument was that Fox interns displaced regular employees, and that therefore Fox derived more benefit from the relationship. The second argument was that Hearst cut expenses in 2008 and directed staff to use interns rather than paid managers. Bien argued that the court "needs to set out some specific criteria employers can look at to make decisions" since, as

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<sup>65</sup> Hamblett, Mark. "Judges Grapple With Test Under FLSA for Interns." *New York Law Journal*, 2 Feb. 2015. Web. 27 Feb. 2015.

it stands, the criteria are "so open ended, so broad."<sup>66</sup> When asked to explain why so many interns are working without wages, Bien explained that it is "because people are really desperate to get their feet in the door," especially during difficult economic times. "These are students who are saddled with a tremendous amount of debt," she continued, "They are willing to do whatever they can."<sup>67</sup>

Flaws within the eleven-point test have come to light through the Court of Appeals exploration. Rather than clarifying the eleven-point test, the February court hearing raised further questions about the test's meaning, rigidity and intention. The argument seems to lie firmly in which party receives greater benefit, the intern or the company. What is unclear is whether the company can gain any benefit at all, and whether there are any meaningful learning experiences that can be achieved without also resulting in benefits to the company. In its current form, it is unclear whether the criteria can be met realistically without compromising either the intern's experience or the laws themselves. Chapter Three of this thesis will expand upon the test's applicability to theatre internships, and will examine how the DOL may interpret the test in relation to the not-for-profit theatre industry if and when the question arises. The U.S. Chamber of Commerce also argues against the test's severity, and seeks to destabilize its enforcement altogether. The Chamber objects to the criterion that prohibits organizations from deriving any immediate advantage from the work of unpaid interns, since that eliminates virtually all proper training. In support of Fox Searchlight, the Chamber's advisor said, "Prohibiting interns from performing any productive work is antithetical to a meaningful internship... If unpaid interns are confined solely to unproductive tasks such as shadowing senior employees and participating in

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

training, the benefits of the internship may be significantly diminished.”<sup>68</sup> It was unclear at the closing of the discussion whether the court will eventually discontinue or amend this seemingly outdated test.<sup>69</sup>

Given the recent outcomes that have followed internship lawsuits, many businesses are faced with the payment of large settlements and some have shut down their internship programs altogether. Prior to Condé Nast’s settlement, the publisher had already shut down its internship program.<sup>70</sup> Other companies have simply begun to pay for intern labor, including Fox Searchlight and NBCUniversal. While large commercial entertainment corporations can afford upwards of \$5 million in settlement money, small theatre companies that often find themselves at odds with the eleven-point test would not be able to withstand such financial turmoil. Proportionally, a financial hit of approximately \$250,000 at a million dollar company would cause tremendous damage.<sup>71</sup> While it is possible that the February court hearing will push forward a decision to amend the test, it is also possible that the argument will result in the abolishment of unpaid internships altogether. In either scenario, the theatre industry should be knowledgeable and prepared, as the outcomes will certainly impact the future of internship programs in the field. In the following chapter, I will apply the DOL’s eleven criteria outlined in this chapter to various internships in the theatre industry, and will provide examples of potential

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<sup>68</sup> LeVine, Marianne. "Unpaid Interns: An Endangered Species?" *POLITICO*, 1 Feb. 2015. Web. 24 Feb. 2015.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> This number is based off of an estimate of \$1,400 in damages paid to seven interns per semester over seven years (\$205,800), plus a rate of 11.11% in attorney costs (\$22,864), \$10,000 in legal fees, as well as \$10,000 to each plaintiff, as per the Condé Nast settlement. \$1,400 was the amount paid to Condé Nast’s summer interns pursuant to an allocation formula developed specifically for the settlement.

DOL interpretations in order to highlight areas that may need restructuring in the theatre industry.

Chapter Three:  
Viewing Internships Through the Legal Lens

In the following paragraphs, I will examine a selection of theatre internships through the lens of the eleven criteria outlined in Chapter Two. First, I will use two common departmental internships found in the industry to highlight the nature of hands-on learning in theatre, and to elucidate how difficult it is for theatre internships to fit within the DOL's internship mold without compromising that practical education. Next, I will delve deeper into the eleven criteria to pull out factors that are often overlooked in the industry, including benefits to interns and common violations that appear on intern solicitations and postings.

To begin, the two main internships that will be explored in this chapter are Development internships and Artistic / Literary internships. I have chosen these two specifically as they mark opposing ends on the popularity spectrum. Interviews have shown that Development internships are the hardest positions to fill, since most applicants have never heard of Development, or are more interested in the more creative administrative internships offered in the theatre (Marketing internships falling somewhere in the middle of the spectrum, and Management landing closer to the Development end). Artistic / Literary internships, on the other hand, are seen as the most creative and are highly competitive, sought out by undergraduate and graduate students, young adults with administrative interests and also directors, dramaturgs, and artists hoping to get close to the artistic leaders of today. Using Literary internships as an example, I aim to highlight the complicated nature of the work, where it becomes difficult to separate the act of learning a task and that of performing the task. It is this distinction, or lack thereof, which lands the internship in a grey area when examined within the framework of the DOL's eleven criteria.

What is a Literary internship? Pulling from a few of the descriptions available on the websites of the 50 companies, below are some listed responsibilities:

Literary Interns work closely with the Literary Associate to identify work that is of interest to the theatre and engage in dramaturgical conversation.

Responsibilities include reading and evaluating scripts, attend readings and productions, scouting for emerging writers, and writing coverage reports; researching and providing dramaturgical support for current and upcoming seasons; maintaining the script database, managing and corresponding with readers' groups, and occasionally corresponding with artists and agents.  
(Theatre V, under \$6 million)

The Literary department reviews over 1,200 scripts annually to program a season of productions. Interns are involved with all aspects of departmental activities, including script evaluation, season programming, and production coverage. Duties include clerical support, database upkeep, and attendance at in-house and out-of-house readings.  
(Theatre C, over \$20 million)

Literary responsibilities include reading new play submissions and writing coverage, assisting with the preparation and execution of play readings, and drafting literary correspondence.  
(Theatre Q, over \$20 million)

Alongside the Literary department, the Literary intern will learn about season planning, production dramaturgy, and supplemental programming. Interns will gain exposure to play and production coverage, playwright selection process, dramaturgical research, talkbacks, panel discussions, and more. The intern will also interact directly with playwrights and artists.  
(Theatre G, over \$20 million)

The Literary intern works under the Associate Artistic Director and Literary Manager and is involved with reading and evaluating plays, researching the current theatrical landscape, maintaining the script database, assisting with readings, archiving, and other administrative tasks.  
(Theatre L, nearly \$8 million)

Interns work with the literary manager and literary associate and help with the countless submissions received each season. Responsibilities include maintaining literary databases, correspondence with playwrights, correspondence with volunteer readers, and of course reading and evaluating script submissions.  
(Theatre Z, under \$3 million)

Literary interns act as readers for the Literary department. Interns are responsible for reading and writing evaluations of scripts submitted for consideration for production. Additionally, literary interns are expected to assist in coordination and execution of the annual reading series, including program printing, tracking attendance, assisting in reception set-up, participating in front of house and receptions.

(Theatre F, in the \$3 million range)

Intern works with the Associate Artistic Director on the reading and evaluation of new scripts; dramaturgical research; assisting with directing fellowships; attending rehearsals; and providing administrative support for various literary projects.

(Theatre A, nearly \$8 million)

The Literary intern will assist the Literary Manager. Key responsibilities include reading play submissions and composing reports for consideration. He/she will also assist in organizing and running events and readings and will manage online book orders.

(Theatre J, under \$1.5 million)

All literary interns learn from the Associate Artistic Director. Candidates should have some experience working with new plays in an academic context, or professionally. Responsibilities include: evaluating scripts, corresponding with playwrights and agents, and supporting new play development.

(Theatre P, at around \$2 million)

It is noteworthy that only two of the descriptions above refer to the experience as “learning” whereas the rest use terms such as “work,” “assist,” and “responsible for.” While a language shift is advisable in order to better promote education among internship descriptions, this semantic distinction offers a sense of the priorities of many internship programs, and the value given to interns who accomplish work while at their internships. This language is commonly used to advertise internships to the public, marketing the internship as though it will provide meaningful work experience. However, this industry-wide flaw is precisely the problematic language that could result in legal trouble if examined by the DOL.

The most prominent responsibilities found in Literary internships are script reading and evaluation, writing coverage on shows, maintaining literary databases and assisting with events



and readings. In speaking with department heads, it is clear that these Literary internship tasks are virtually the exact same responsibilities for most assistant or entry-level positions. Naturally, there is an expectation of mentorship that comes along with an internship position (rather than an entry-level position), but the work itself is essentially the same. When speaking to one of the artistic leaders of Theatre A, he confirmed that reading scripts and covering shows is a job that those working in Literary departments are paid for. As a manager of interns, however, he qualified that he does not go through script reports with entry-level employees like he would with an intern. With his interns he prioritizes mentorship, and will sit down to explain “how to tease out the style of the play or how to talk about structural content and landmarks of dramatic art.” He explained that, most often, the interns are reading a script that has already been read and written about by someone on staff. The goal is to allow interns to read a handful of scripts in order to be trained, developed and given the vocabulary to be able to do the work independently. While this approach marks a significant benefit to interns, it is likely that entry-level employees would not require such a deep level of mentorship, since they have probably already been through one or more internships before being hired. When asked to describe the difference between an entry-level position and an internship, the representative of Theatre A expressed that entry-level positions should shoulder some responsibility with a risk of failing. In his opinion, interns should never be put in a position where their individual responsibilities could result in failure for themselves or the company, and that theatres should never expect an intern to be able to do everything autonomously from beginning to end. However, he added the caveat that the best interns do eventually take individual control. The grey area in the case of Literary interns is that, despite being mentored and given room to fail, the intern’s responsibilities are the same as those within paid positions, and interns that excel are able to take on those responsibilities with

independence. In such cases, where interns are able to work more freely, it is the interns' own skill and talents that cause them to transition into employee status. What results is an industry-wide practice of training young professionals, without pay, to do the work of theatre administrators prior to their first official employment position. To recall the words of Outten & Golden, "Unpaid interns are becoming the modern-day equivalent of entry-level employees, except that employers are not paying them for the many hours they work."<sup>72</sup>

In some organizations with larger departments, the interns' work is supplemental to the other associates. When there are paid staff members completing all responsibilities within the literary department, the argument posed by the leader of Theatre A sounds reasonable: the work being completed by the intern is work that has already been completed by a staff member. The work, therefore, is used as a means of schooling and mentoring, and, rather than a direct benefit to the company, is ancillary to the work already being completed. In the case of smaller companies, however, that do not have literary departments but only one Literary Manager or a literary-focused employee, the interns make up what functions as the entire department, taking the place of any associate or entry-level positions. In a department of one (common in small theatres), where the manager is unable to complete all of the work alone, talented unpaid interns who are able to accomplish work independently ultimately complete labor that would otherwise need to be paid for. This puts the company at risk of being in breach of the third criterion in the eleven-point test: "The intern does not displace regular employees, but works under close supervision of existing staff."<sup>73</sup>

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<sup>72</sup> "Unpaid Interns Lawsuit Website." *Unpaid Interns Lawsuits Website*. Outten & Golden LLP, Web. 27 Feb. 2015.

<sup>73</sup> This point is also similar to the first point in the volunteer test: Unpaid volunteers may not replace or augment paid staff to do the work of paid staff.

To introduce a counter argument that complicates the issue further: *what else could Literary interns do?* According to the DOL, the specific definition of work considered to displace regular employment is as follows:

If an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods, these interns should be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek. If the employer would have hired additional employees or required existing staff to work additional hours had the interns not performed the work, then the interns will be viewed as employees and entitled compensation under the FLSA. Conversely, if the employer is providing job shadowing opportunities that allow an intern to learn certain functions under the close and constant supervision of regular employees, but the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience. On the other hand, if the intern receives the same level of supervision as the employer's regular workforce, this would suggest an employment relationship, rather than training.<sup>74</sup>

According to this definition, Literary interns would be limited to shadowing, and would lose the hands-on opportunity to learn-by-doing. In order to properly learn the tasks involved with literary management, it makes sense to do the tasks themselves. However, doing the task is also performing a job, potentially displacing paid employees who would have to do it otherwise. If the company did not appoint interns to fulfill these tasks, on the other hand, the work would ultimately be redistributed to the paid employees already on staff, or would inevitably go undone, decreasing the functions of the company. This calls the fourth point, one of the most problematic in the test, into question: *The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded.* Although this point is vague, and the test to determine which party derives greater benefit is difficult to apply, it seems clear that in order to attempt compliance with this

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<sup>74</sup> United States. U.S. Department of Labor Wage and Hour Division. *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, Washington. 2010.

rule, interns should not be allowed to complete the work that a paid employee would complete otherwise, nor should they complete work that raises a company's functionality and efficiency. Without the literary tasks outlined in the descriptions above, literary interns would likely be left to do basic administrative work (filing, scheduling, answering phones, etc.) that are common of internships in any industry. Yet, one could argue that performing such administrative tasks also displaces an employee who would occupy an administrative assistant position. The issue, it seems, is with what the DOL would consider to be work displacing regular employment that limits interns from properly learning a task in a hands-on manner.

Sliding to the other end of the internship popularity spectrum, the following paragraphs will explore the nature of Development internships through the lens of the DOL's eleven criteria. The clearest violation is with the third point on employee displacement (the main criteria identified in the Literary internship analysis), which draws out issues with engaging Development interns during high fundraising season since it is considered displacement "if an employer uses interns as substitutes for regular workers or to augment its existing workforce during specific time periods."<sup>75</sup> Such is the case at Theatre D, with a budget size around \$5 million, which only brings on interns in the spring to assist with its Gala event and major fundraising efforts. However, the focus of this exploration will continue with the fourth criterion in the test that addresses a company's immediate advantage by way of intern positions. Below are several descriptions of common Development internship responsibilities that are problematic in their descriptions:

Projects may include but are not limited to assisting with archive maintenance, inputting and editing website content, assisting with the creation of marketing

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<sup>75</sup> United States. U.S. Department of Labor Wage and Hour Division. *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act*, Washington. 2010.

assets, managing gift acknowledgment letters, coordinating direct appeals, donor research, and special events planning.  
(Theatre Y, under \$2 million)

Interns assist in the planning and execution of events including opening and closing nights, patron dinners, and the spring gala.  
(Theatre L, nearly \$8 million)

Interns work with Executive Director and Development Associate on fundraising. Responsibilities include researching potential funders, maintaining up to date correspondence with donors, general mailing and filing, processing donations and acknowledgements on database, helping at events, and keeping all records on database up to date.  
(Theatre Z, between \$2 and \$3 million)

Fundraising Interns will assist the Development Director. Responsibilities will include funder management and relations, generating donation receipts and funder communications, implementing individual donor campaigns, assisting with special events, and, for the right candidate, grant writing and reporting.  
(Theatre X, under \$5 million)

Any intern working on a Gala, communicating directly with donors with the intention of receiving pledges or donations, planning solicitations, etc. could be considered to be working for the immediate advantage of the employer by raising funds for its operation. Unfortunately, the DOL has not provided a sufficient definition of what constitutes “immediate advantage.” Upon scouring the DOL’s archived documents, the closest definition found that could *perhaps* be considered as immediate advantage is in an Opinion Letter from 2004 in regards to a Marketing internship, in which the DOL writes:

You have not provided sufficient information for us to determine whether the internship program satisfies the third and fourth criteria [...]. We also do not know whether the employer may derive an immediate benefit from the activities of the students, who analyze trends on campus and develop marketing information in a number of areas, including a list of contacts for a large number of area businesses, data on the “guerilla marketing” of the company’s product on the internet, a detailed analysis of the population of the campus and the city, and a

prediction of local and national trends.<sup>76</sup>

In the case of the example above, the Marketing internship clearly fulfilled the other four requirements, hiring college students who worked for 7-10 flexible hours per week on their own campuses and for college credit. However, the marketing activities of collecting data and engaging in analysis were questionable enough for the DOL official, Barbara R. Relerford, to conclude: “On the basis of the information that you have provided and the application of the Department of Labor’s six criteria, we cannot say definitely whether an employment relationship exists under the FLSA between the company and the student interns. However, we hope that you are able to use this information to review the program in light of the relevant criteria.”<sup>77</sup> It is noteworthy that even though the interns were also students, the DOL held the internship program to the same standards of its six-point test (the NYS DOL’s additional five points had not been created yet), since the nature of the student interns’ work was disputable. Evidently, the appointment of students alone is insufficient in order to comply with the DOL’s regulations. The DOL explains this point in the Opinion Letter as follows:

Whether student interns are employees under the FLSA will depend upon all the circumstances surrounding their activities. For example, where certain work activities are performed by students that are simply an extension of their academic programs, we often would not assert that an employer-employee relationship exists for purposes of the FLSA. Thus, provided the six criteria listed below are met, 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, it is our position that the students will not be considered employees of the firm to which they are assigned.<sup>78</sup>

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<sup>76</sup> Relerford, Barbara R. “FLSA Status of Student Interns.” Opinion Letter. 14 May. 2004. U.S. Department of Labor. Washington.

<sup>77</sup> *Ibid.*

<sup>78</sup> *Ibid.*

According to this definition, if the work is an extension of a student's academic program, the DOL will not consider that to be an employer-employee relationship, which exempts the firm from paying minimum wage. However, if the nature of the work is called into question (such as the employee-displacing work described earlier in this chapter), the fact that the intern is a student will not be enough to protect the internship program, or the company from potential back pay.

In the case of one of the interns interviewed at Theatre F, the intern showed talent in Development and was quickly given great responsibility within her internship. During her one-and-a-half-year stay in the internship, both of her supervisors left their positions at the company, resulting in an incredible increase of responsibilities for the intern. She described being made responsible for major Gala planning during her time without supervision, and was very proud of her accomplishments. In that period, she functioned as one half of the Development department, working alongside a newly hired assistant (another former intern who had recently been hired), without a Development supervisor and in an unpaid position. Her internship was most certainly in breach of points #3 and #4, discussed in this chapter, as well as point #7: "Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed" – the term "clinical" in this case is used to signify hands-on experience.<sup>79</sup> In the case of Theatre F, this intern was operating for months without appropriate supervision, and perhaps none at all. She was also working during an imperative Gala planning period, with a great set of responsibilities. With a relatively high turnover rate of middle management in Development and Marketing departments, it is not uncommon for interns

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<sup>79</sup> Paglialonga, Michael. "Request for Opinion: Educational Internship Program." Opinion Letter. 21 Dec. 2010. New York State Department of Labor. New York.

to find themselves without direct supervisors during changeover periods, and with former interns as supervisors who transitioned into employee positions. For example, at Theatre J, a small company with a budget under \$1.5 million and a small staff of five, the company's current Development Manager is responsible for managing two interns. This particular Development Manager was an intern at the same company only one year ago, and is now managing interns who are the same age (or older) than her, with a similar range of experience. She described the experience as strange, and said that she tries to treat her interns like partners, rather than interns. When defining criterion #7, the DOL explains that it "will deem an individual to have 'sufficient' experience and knowledge in the industry if he or she is proficient in the area and in all activities to be performed by the trainee, and has adequate background, education, and experience to fulfill the educational goals and requirements of the training program. Furthermore, the individual must be sufficiently competent in providing training in such areas as demonstrated by previous experience training employees or students."<sup>80</sup> Unfortunately, Theatre J's Development Manager, who has never managed employees in the past (let alone mentored interns) does not meet this definition, and cannot provide adequate mentorship to interns whom she feels are akin to her peers. In a company that has a staff of five, it is arguably more important to apportion the paid employees' time and resources into managing the company, rather than allocating coveted resources to an internship program that cannot sufficiently mentor its interns, or comply by DOL regulations. With the internship lawsuit trend still at play, the industry is approaching the point when each company should take a step back to re-evaluate current practices and the worth of the present-day internship model, primarily for the benefit of interns, but also for the companies. Relying on old broken practices is ill advised, especially when there

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<sup>80</sup> *Ibid.*



are small to mid-sized theatre companies in the New York industry that function efficiently without the support of unpaid intern labor, such as Theatre R in the \$3 million range, and Theatre K, ranging from \$1-2 million. Internship programs should not exist to augment employment, but rather, should aim to train future managers and leaders. If appropriate training is not a realistic capability for an organization, then such organizations should rethink their commitment to the internship culture, both in terms of its current structure as well as its existence altogether.

At Theatre K, the four-person staff has consciously chosen not to take on interns because running a legitimate program is too much work to manage. In an interview, a representative of the company expressed that the staff does not have the adequate resources to properly teach and mentor at this time. The staff members take on all work among themselves and manage to produce without the assistance of interns, paid or unpaid. Theatre K is not the only company that chooses not to take on interns. Theatre D, which generates a full season of up to seven shows (a blend of produced and presented works, with a budget size of nearly \$5 million), also chooses not to have an internship program. When speaking with the Executive Director, he explained that the decision is “a real estate issue” because the company literally does not have room for interns in the office. He also explained that the company does not have the capacity for teaching in the way he believes an internship program should. None of the current managers have assistants, and they all do their own scheduling, filing etc. The company does, however, take on Development interns in the spring when there is more work available for the interns to do. The interns mostly focus on Gala planning at that time, which, as we have seen, carries its own set of complications and potentially violates point #3 in the DOL’s criteria. Many theatre internship structures pose threats analogous to a double-edged sword through the lens of the DOL, since it is difficult to attain the necessary skills without partaking in hands-on assignments, leading many talented

interns to take on more responsibilities that benefit the company and potentially displace paid employment.

Looking at the issue from the DOL's perspective, one can only assume that the DOL is attempting to protect interns from exploitation. For example, Theatre G's internship program, at one of the largest theatre companies in New York, was initially created to develop positions that supported the company's various departments. At first, like in most growing theatre companies, the interns served as essential functionaries in the department, working alongside one other staff member or department head. As the company grew and expanded, the internships expanded as well. For example, the marketing internship split into one general Marketing intern and one Digital intern, specifically involved with social media. Intern positions were created based on the needs of the company. A representative of the theatre explained that the company could not afford to add staff positions in its earlier years, and instead added interns on an as-needed basis. For example, if the company was about to enter into a capital campaign period, it would create a Special Events intern to work on that campaign. Since there was no room in the budget for increased paid work, the position was filled with an intern, rather than a hired staff member. In recent years, this company has had to restructure its internship program, especially in light of the current internship landscape and a sharper government eye on misclassification and unfair labor practices. Now, the company has instituted a more unified experience for interns, a holistic approach in which all departmental interns in that season are one "class" of interns, attending seminars together, and learning more about the overall running of a theatre company, rather than the sole perspectives of their own departments or independent projects. The internship program

has far more structure in its current form, and has had to shift to fall in line with government rulings.<sup>81</sup>

Another perspective surrounding this issue is the industry's flawed assumption that the learning that should take place in order to acquire necessary skills in the field must be done for free. In many, if not most, other industries (medical, legal, financial, etc.), a new employee's training period still falls under paid employment.<sup>82</sup> However, such industries are more financially stable than the theatre industry. The financial constraints that every not-for-profit theatre company faces, small and large, to break even each year are concrete. The assumption for theatres, and not-for-profits in general, is that any additional expense, such as the institution of paid internships, would significantly increase this struggle to make ends meet. In his book, Perlin takes a unique stance on the issue of minimum wage for employees in not-for-profits: "Enforcing or reinforcing interns' right to minimum wage would have no more catastrophic effect than any minimum wage legislation has ever had – and bring internships in line with other forms of work."<sup>83</sup> He continues to cite economist Greg Kaplan, who explains that an internship is "essentially a way of getting around a minimum wage for a firm. Firms want to drive wages down as far as the market's going to let them do it."<sup>84</sup> Kaplan notes that minimum wage theories often become idealized, when in reality, minimum wage laws around the world have had minimal dramatic effects, "aside from the intended one of guaranteeing workers a wage floor."<sup>85</sup> Moreover, Perlin writes, "With even the most vulnerable employees basically unaffected,

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<sup>81</sup> This shift is rumored to have occurred due to exposure to the DOL, which took issue with the former internship programs' practices. This reason for the company's shift has not been confirmed by the company itself, but has been corroborated by various former employees and interns.

<sup>82</sup> Trainee work is sometimes paid at a lower pay rate, but it is paid nonetheless.

<sup>83</sup> Perlin 141.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

suffering neither in terms of layoffs nor reduced hours; with prices showing little appreciable rise; and with no apparent rash of business bankruptcies, an increasing load of evidence indicates that employers have simply been able to absorb these relatively minor costs.”<sup>86</sup> In fact, Perlin continues to outline benefits of increased wages, including an increase in spending of workers, efficiency, and level of talent.<sup>87</sup>

The remainder of this chapter will look at three points given in the NYS DOL’s additional five criteria: (8) The trainees or students do not receive employee benefits; (10) The screening process for the internship program is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program; and (11) Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.<sup>88</sup>

The eighth criterion, forbidding interns to receive “employee benefits” is complicated when applied to the theatre. The definition provided by the NYS DOL in the 2010 Opinion Letter determines that employee benefits are as follows: “Examples of such benefits include, but are not limited to, health and dental insurance, pension or retirement credit, employer sponsored trips or parties, and discounted or free employer provided goods and services.”<sup>89</sup> Generally, interns in the theatre are not eligible for medical insurance of any kind, nor pension or retirement credits. For the most part, interns in the theatre do not partake in sponsored trips, although I imagine that some interns have benefitted from company-wide retreats. The complication begins with the final part of the definition: employer sponsored parties, and discounted or free employer

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<sup>86</sup> Perlin 142.

<sup>87</sup> Perlin 142-143.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

provided goods and services. The goods provided in a theatrical organization are theatrical events and performances, including shows that are produced or presented, as well as Opening Night parties and Galas, etc. A selling point for many companies' internship programs is the access points provided to interns, who are able to meet artists, celebrities and revered industry figures through these events. Out of all the criteria provided by the DOL, this point is bewildering. If a company is unable to pay minimum wage or an adequate salary, common sense maintains that a gesture or token of appreciation could be shown through other small employee benefits (excluding medical insurance and pension-type benefits), such as free tickets and access to events. According to Perlin, "Legally speaking, complete exploitation is a more sound way to go – the position of the courts has apparently nipped in the bud the more generous impulses of some employers, hitting interns hard as a result."<sup>90</sup> What the NYS DOL is striving to promote with the instigation of this additional criterion is a clear demarcation between what constitutes an employee-employer relationship. For example, in the retail industry, employees are granted discounts on merchandise as a benefit of their employment, which may not be granted to an intern who does not hold employee status. In the theatre, these lines are blurred, especially since all work on the administrative side is propelled by a mandate that is integrated with the artistic side through performances and theatrical productions. Without having access to a company's season, how can an intern truly understand the theatre? That being said, a similar argument can be made that an intern working in a retail industry cannot fully understand the company without also wearing the clothes. This is one instance where the NYS DOL has created a criterion that is nearly impossible to follow, and deprives companies of the opportunity to give back to interns in whatever way they can.

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<sup>90</sup> Perlin 119.

The tenth criterion involves the screening process, and is described in the 2010 Opinion Letter as “criteria relevant for admission to an independent educational program.” The purpose of this point, as stated by the NYS DOL is to ensure “that employers do not co-mingle their recruitment of employees and trainees, and that such are run independently from each other.”<sup>91</sup> There are several assumptions underlying this criterion that complicate matters in the theatre: (1) that the company has an internship “program” and not just a series of independent interns, (2) that this program falls under an independent educational program, and (3) that the recruitment is separate and different than that of employment hiring. Perlin defines an appropriate intern “program” as one where “an organization, or one of its departments, is demonstrably working to shape a standard experience for all its interns.”<sup>92</sup> Additionally, the NYS DOL exemplifies a process where “the admissions applications paperwork is similar to that of an application to an educational program, not an application for employment” as an appropriate way to satisfy this criterion.<sup>93</sup> Out of the 50 companies researched for this thesis, 30 companies request the standard résumé and cover letter (most also asking for reference contact information), while six ask for an additional writing sample. Out of the companies that do offer internship opportunities, fifteen could be considered to have an “internship program” and of those fifteen, only six have their internship programs listed under education departments on their websites. The rest are listed under a “Work With Us” page or similar employment opportunities pages. Ironically, there is no cross over between companies that have internship programs under their education departments and those that request writing samples as part of the application process. Evidently, most theatre

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<sup>91</sup> Paglialonga, Michael. “Request for Opinion: Educational Internship Program.” Opinion Letter. 21 Dec. 2010. New York State Department of Labor. New York.

<sup>92</sup> Perlin 211.

<sup>93</sup> Paglialonga, Michael. “Request for Opinion: Educational Internship Program.” Opinion Letter. 21 Dec. 2010. New York State Department of Labor. New York.

companies recruit interns in the same way that they do employees, requesting a résumé, cover letter and references and listing the opportunities amongst other employment openings.

Furthermore, interviews showed that only a select few companies employ a staff member whose responsibility it is to manage the intern program, usually in conjunction with other job responsibilities, and such positions have shifted over the years, depending on economic climate. Theatre N, another company in the \$8 million range, has an internship coordinator, whose position doubles as the assistant to the Artistic Director and Managing Director. She manages the day-to-day responsibilities of the internship program, and serves as a gateway for the entire application process. Applicants send applications directly to her, and she is responsible for selecting semi-finalists to forward to specific departments. Once each department has selected finalists, the intern coordinator sits in on the interview process alongside the department heads. When interns have been hired, she is in charge of managing their travel stipends, sick days, personal days, and other benefits. She acts as the main liaison between the organization and the interns to ensure a positive experience for both parties. This description sounds more along the lines of what the NYS DOL intends for the tenth criterion. This criterion marks an important distinction between those who have interns on a needs-basis, and those who have structured programs designed to standardize and coordinate the interns' experiences. The NYS DOL is pushing towards strengthened educational structure in programming for internships, and this is one way that theatres can restructure in order to better comply. This criterion serves to improve intern experiences. It is a good marker for whether companies truly prioritize mentorship and have the adequate resources to dedicate to structuring appropriate intern education.

Finally, I would like to investigate criterion eleven, surrounding internship advertisements and postings. Without citing specific internship postings (in order to maintain

anonymity), I will return to the descriptions of Literary and Development internships listed earlier in this chapter. The NYS DOL's main goal in specifying that intern solicitations be "couched clearly in terms of education and training, rather than employment" is to be transparent that interns are "not entitled to wages for the training."<sup>94</sup> One issue faced by many companies is a lack of transparency in their advertisements. All solicitations should clearly state that they are unpaid opportunities in order to comply by this ruling. Since paid opportunities below minimum wage are risky, many companies avoid specifying payment circumstances on their postings. However, this also draws further inquiry and suspicion as it violates criterion eleven. The following chapter features an overview of IRS stipulations and ways in which some internship programs have found methods of offering some form of *de minimis* stipends to cover intern transportation and expenses. Furthermore, the fact that only 20% of the Literary internship descriptions mentioned above use the term "to learn," as opposed to terms such as "to work," is evidence that most companies are not taking the necessary measures to highlight learning and education in their postings. All accounts of internship duties should clearly state educational priority as a primary component of the internship, both for the benefit of the interns and to protect the company's program.

The leader of Theatre I, operating on a budget of around \$1 million, said that without interns the company would be a "desolate waste land," and that the company would be in real trouble. This theatre manager explained that interns have allowed the company to expand in capacity. Smaller organizations like Theatre I are able to stretch resources in order to "make a lot happen out of a little" and are naturally very grateful for interns who donate their time. While gratitude should not be uncommon among not-for-profit theatres in New York, this kind of

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<sup>94</sup> Paglialonga, Michael. "Request for Opinion: Educational Internship Program." Opinion Letter. 21 Dec. 2010. New York State Department of Labor. New York.



reliance on intern labor poses a serious threat to these organizations. Phrases like, “We couldn’t survive without our interns” are likely overstatements used to make interns feel needed and appreciated. However, this way of talking about interns is similar to the advertising language discussed above, and can cause the same damage as those sale pitches that market intern experience as “real work.” Regardless of whether the company could not survive without interns, the implications of such a statement are negative: either the company is relying too heavily on interns, benefitting from unpaid labor, or its employers are selling an experience that misrepresents the intention and realities of the intern positions. Furthermore, for companies where interns are actually an integral part of the running of the organization, interns become more of a liability if looked at through the scope of the DOL’s principles. While openly acknowledging this reliance is honorable, it is ultimately reckless.

As we have seen throughout this chapter, the largest issue at play is that theatre internships, by nature, do not fit easily within the DOL’s expressed parameters, making it difficult to find internship structures that are appropriate. In order to protect the stability of theatre companies, and to further promote the positive impacts of well-structured internship programs, the industry is responsible for searching for best practices, and adjusting to the DOL’s model in whatever ways we can (without compromising the hands-on learning experiences of internships). While some internship programs would be faced with company-wide changes in the way employees interact with interns, specifically in relation to mentorship and education, other companies could make simple changes such as clearer advertisements and postings. Following an analysis of IRS stipulations surrounding stipends in Chapter Four, Chapter Five of this thesis will delve further into the ways in which theatres can improve upon existing internship models

and structures in order to protect companies, while continuing to provide beneficial learning opportunities for emerging managers, theatre-makers and artists in the field.

## Chapter Four: The IRS

While the gesture behind paying internship stipends is commendable, the legality of paying anything less than minimum wage complicates matters tremendously. The following chapter will outline the rules according to the IRS regarding stipends, wages and employee classification. Similar to the DOL's criteria, theatre internships fall into a grey area because of the nature of the work. This has been the case for many years with regards to independent contractors versus employee status, which includes the question of how to classify interns. In the past, some not-for-profits have classified them as independent contractors, providing 1099 Miscellaneous Income forms for tax filing purposes. This chapter will examine the pitfalls and dangers of classifying interns in this way, and will provide an overview of safer practices and ways that accountants have managed to work within the grey area.

According to the IRS, a "stipend" is defined as "a fixed sum of money paid periodically for services or to defray expenses. The fact that remuneration is termed a 'fee' or 'stipend' rather than salary or wages is immaterial. Wages are generally subject to employment taxes and should be reported on Form W-2, *Wage and Tax Statement*."<sup>95</sup> Wages subject to federal employment taxes are defined as "all pay you give to an employee for services performed. The pay may be in cash or in other forms. It includes salaries, vacation allowances, bonuses, commissions, and fringe benefits. It does not matter how you measure or make the payments."<sup>96</sup> According to the IRS definition of "wages," a "stipend" is still considered a wage that is subject to employment

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<sup>95</sup> "Is the Income from a Stipend Reported And, If So, How Is It Reported?" Internal Revenue Service, 21 Jan. 2015. Web. 27 Feb. 2015.

<sup>96</sup> United States. Internal Revenue Service. (*Circular E*), *Employer's Tax Guide*. Dec 2014. Publication 15. 14. Print.

taxes, regardless of what it is called. A stipend (or wage) is not to be confused with an employee business expense reimbursement, which is defined as follows:

A reimbursement or allowance arrangement is a system by which you pay the advances, reimbursements, and charges for your employees' business expenses. How you report a reimbursement or allowance amount depends on whether you have an accountable or a nonaccountable plan. If a single payment includes both wages and an expense reimbursement, you must specify the amount of the reimbursement.<sup>97</sup>

Reimbursements typically coincide with receipts or proof of some kind that explains the business expense being reimbursed. The “accountable plan” referred to above denotes the reimbursement methods, which must meet all three of the following rules:

1. “They must have paid or incurred deductible expenses while performing services as your employees. The reimbursement or advance must be payment for the expenses and must not be an amount that would have otherwise been paid to the employee as wages.
2. They must substantiate these expenses to you within a reasonable period of time.
3. They must return any amounts in excess of substantiated expenses within a reasonable period of time.”<sup>98</sup>

These rules stipulate that the expense must have been incurred during the performance of services under employment within a reasonable time frame and are not otherwise paid as wages. In other words, they are separate from any wages made while providing service during one’s employment. In line with criteria #8 of the NYS DOL’s internship stipulations, the IRS also considers wages not paid as monetary allocations (such as in kind donations or goods, services and lodging) to be wages subject to deductions. The IRS defines this as follows:

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<sup>97</sup> United States. Internal Revenue Service. (*Circular E*), *Employer's Tax Guide*. Dec 2014. Publication 15. 15. Print.

<sup>98</sup> *Ibid.*

If in the course of your trade or business you pay your employees in a medium that is neither cash nor a readily negotiable instrument, such as a check, you are said to pay them “in kind.” Payments in kind may be in the form of goods, lodging, food, clothing, or services. Generally, the fair market value of such payments at the time they are provided is subject to federal income tax withholding and social security, Medicare, and FUTA taxes.<sup>99</sup>

For this reason, interns are prohibited from receiving employee benefits (such as those discussed in Chapter Three), as those benefits would be considered wages in the eyes of the IRS, and in turn the DOL. A strong case may be made that receiving complimentary tickets to a theatre’s season does not constitute an employee benefit, since partaking in a company’s season should be a requirement of the intern’s educational experience. Other common benefits include Unlimited Metro cards, as well as travel and food stipends, and in these cases theatre companies should be very careful about how they define and report these benefits. Later on in this chapter, I will discuss the ways in which theatres have classified such benefits and forms of compensation, after working with their accountants to comply with IRS stipulations.

While this thesis will not focus on regional theatres, summer stock seasons or tours, it is important to note that the IRS has investigated a number of regional theatres that have housed interns at their own expense. The IRS deemed those interns to be employees earning wages that should have been subject to the appropriate deductions due to the lodging they received. One exception to this rule can be made if the lodging is “furnished for the employer’s convenience, on the employer’s premises, and as a condition of employment,”<sup>100</sup> rather than an off-premise location for the benefit of the employee (such as the case for most interns at regional theatres). By that same logic, meals are not taxable “if the meals are furnished for the employer’s

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<sup>99</sup> *Ibid.*

<sup>100</sup> United States. Internal Revenue Service. (*Circular E*), *Employer's Tax Guide*. Dec 2014. Publication 15. 16. Print.

convenience and on the employer's premises,"<sup>101</sup> such as meals provided at the theatre to allow companies to have shorter break periods. While the IRS does not specifically mention interns in Publication 15, in the list of Special Rules for Various Types of Services and Payments within Publication 15-B, the *Employer's Tax Guide* does stipulate that a "full-time student performing service for academic credit, combining instruction with work experience as an integral part of the program" should have income tax withheld, as well as Social Security and Medicare deductions.<sup>102</sup> This definition seems to encompass interns according to the IRS.

It is possible to provide certain remuneration, whether in the form of meals, reimbursements or the coverage of *de minimis* expenses. It is important for theatres to become familiar with these rules and to speak with an accountant, who can advise best practices based on the specific needs and intricacies of the company. *De Minimis* (which means "minimal") benefits can be provided, according to the IRS. What this means is that a company can exclude the value of a *de minimis* benefit it provides to an employee from the employee's wages. The IRS explains, "A *de minimis* benefit is any property or service you provide to an employee that has so little value (taking into account how frequently you provide similar benefits to your employees) that accounting for it would be unreasonable or administratively impracticable."<sup>103</sup> The IRS is clear that cash or a cash equivalent (such as a gift card, charge card, or credit card), no matter how little, are never considered to be a *de minimis* benefit, with the exception of money given for

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<sup>101</sup> *Ibid.*

<sup>102</sup> United States. Internal Revenue Service. (*Circular E*), *Employer's Tax Guide*. Dec 2014. Publication 15. 41. Print.

<sup>103</sup> United States. Internal Revenue Service. *Employer's Tax Guide to Fringe Benefits*. Dec 2014. Publication 15-B. 8. Print.

overtime meals or for transportation fare.<sup>104</sup> Examples of *de minimis* benefits given by the IRS include the following:

- “Personal use of an employer-provided cell phone provided primarily for noncompensatory business purposes.
- Occasional personal use of a company copying machine if you sufficiently control its use so that at least 85% of its use is for business purposes.
- Holiday gifts, other than cash, with a low fair market value.
- Group-term life insurance payable on the death of an employee's spouse or dependent if the face amount is not more than \$2,000.
- Meals
- Occasional parties or picnics for employees and their guests.
- Occasional tickets for theater or sporting events.”<sup>105</sup>

The last stipulation on this list is quite ironic, and certainly carves out a legal case for providing complimentary tickets to interns as a *de minimis* benefit. The only complication is that the IRS offers this definition of a *de minimis* benefits as that which can be provided to “an employee from the employee’s wages.”<sup>106</sup> This distinction raises uncertainty since the status of interns as employees is often disputed.

In speaking with Karen Kowgios, CPA and consultant for many not-for-profit theatre companies in New York, she explained that the issues surrounding internship stipends and classification are not black and white. Those companies that can afford to hire a lawyer or accountant are at least protecting themselves by having representation build a case for them.<sup>107</sup>

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<sup>104</sup> *Ibid.*

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> Kowgios, Karen. Personal interview. 12 Feb. 2015.

Karen clarified that the problem for most theatre companies is that they do not have a knowledgeable consultant for legal matters in relationship to the theatre industry. In her experience, most often companies receive advice from a Board Member, the majority of whom come from other industries and do not fully understand the specifics of theatre.<sup>108</sup> To further complicate the issue, if the IRS audits the company, then an additional person who doesn't know or understand the industry serves as the auditor, playing the role of a company's judge. For this reason, Karen explained the importance of setting up a strong case, especially to someone who does not have a deep understanding of the industry.

In an interview with Michael Naumann, current Managing Director of Theatre Development Fund (TDF) and former Director of Finance at both Manhattan Theatre Club and Frankel Green Theatrical Management, he elaborated on the concept of audits and stipend reporting with regards to interns. Michael explained that when the NYS DOL audits companies to collect unemployment taxes, the first things the auditor will look at are the 1099s,<sup>109</sup> which is a huge issue if interns are being paid as independent contractors. Companies have been known to use 1099s in order to offer internship stipends below minimum wage, and to avoid paying overtime hourly wages. He explained that interns do not fit as independent contractors. If interns are working under the company's supervision, with company materials, and in company space, Michael is certain that there is absolutely nothing independent about that type of professional relationship.<sup>110</sup> The IRS defines an independent contractor as the following:

People such as doctors, dentists, veterinarians, lawyers, accountants, contractors, subcontractors, public stenographers, or auctioneers who are in an independent trade, business, or profession in which they offer their services to the general

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<sup>108</sup> *Ibid.*

<sup>109</sup> Naumann, Michael. Personal Interview. 30 Jan. 2015.

<sup>110</sup> *Ibid.*



public are generally independent contractors. However, whether these people are independent contractors or employees depends on the facts in each case. The general rule is that an individual is an independent contractor if the payer has the right to control or direct only the result of the work and not what will be done and how it will be done. The earnings of a person who is working as an independent contractor are subject to Self-Employment Tax.<sup>111</sup>

On the other hand, the definition of an “employee” reads as follows: “anyone who performs services for you is your employee *if you can control what will be done and how it will be done*. This is so even when you give the employee freedom of action. What matters is that you have the right to control the details of how the services are performed.”<sup>112</sup> Comparing the two definitions, it is clear that interns fall directly in the category of an employee, rather than in independent contractor since the employer has direct control of the work in terms of how, when and what will be done. Like Karen, Michael explained that the best way to structure a stipend is to ensure that it covers intern expenses (either as a reimbursement or *de minimis* benefit).

In the theatre industry, specifically, the independent contractor-employee debate has become more significant over the past few years, especially following Broadway’s *Spider-Man* lawsuit between director, Julie Taymor, and producers, Michael Cohl and Jeremiah J. Harris. The producers alleged that Taymor was an independent contractor, as opposed to an employee, and therefore, “the SDC’s attempt to ‘represent’ Taymor with respect to her work on [Spiderman] is nothing more than [an] unlawful conspiracy among independent contractors.”<sup>113</sup> Since Taymor was paid as an independent contractor, who is responsible for her own Self-Employment Tax, the producers claimed that the Stage Directors and Choreographers Society could not defend her

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<sup>111</sup> "Independent Contractor Defined." Internal Revenue Service, 2 Oct. 2014. Web. 24 Feb. 2015.

<sup>112</sup> "Employee." Internal Revenue Service, 18 Dec. 2014. Web. 27 Feb. 2015.

<sup>113</sup> Carrubba, Philip. *Producers of “SPIDER-MAN TOTD” Defend Lawsuit Brought By Julie Taymor Over Musical’s Book*, O&M Co. Rick Miramontez, 17 Jan. 2012. Web. 27 Feb. 2015.

legally. According to Karen, this issue is not specific to designers and directors, although that is where the issue is most commonly seen, but moves across the field. Karen specified that even musicians should be regarded as employees according to the IRS, but they are generally paid as independent contractors by practice.<sup>114</sup> The reference to musicians is sourced from a Private Letter Ruling, and states:

A musician was hired on a concert-by-concert basis by a nonprofit organization. The organization does not train the musician, but instructs and supervises through its orchestra director. The organization requires the musician to be present at rehearsals and concerts on time, and has first call on his services. The musician provides his own instrument and concert attire, and is free to compete and advertise for similar engagements. The IRS ruled that the organization exercises the degree of control indicative of an employer-employee relationship.<sup>115</sup>

Julie Taymor's case has slowly pushed the industry towards paying creative team members as employees, as opposed to independent contractors. However, similar to paid internships, this process of change is a slow one, especially for an industry that is accustomed to the independent contractor culture. With regard to internships, the definition is quite clear. In addition to the straightforward categories outlined under what constitutes an employee-employer relationship, such as behavioral controls (how, when or where to do the work) or financial controls (such as eligibility for reimbursed expenses), which clearly place interns under the category of employees, the IRS also considers a person to be an employee if they have undergone training provided by the business and if the person has received employee benefits.<sup>116</sup>

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<sup>114</sup> Kowgios, Karen. Personal interview. 12 Feb. 2015.

<sup>115</sup> "IRS Rulings on Independent Contractor Determination." *University of Nevada, Reno*: 6. Dec. 2011. Web. 27 Feb. 2015.

<sup>116</sup> United States. Internal Revenue Service. *Independent Contractor or Employee*. Print. Publication 1779.

The common theatre internship fits unmistakably under the employee definition, and cannot realistically be justified as independent contracting.

When putting cases together for appropriate internship programs, Karen speaks highly about the benefits of working with students. In Karen's opinion, the first rule that should be put in place for legally sound internships is that programs should partner with accredited institutions (meaning that all internships programs would only employ students). Karen explained that companies that work with students have better qualifications for providing tax-free apprenticeships or internships, due to the IRS's grey area.<sup>117</sup> She explained that it is much easier to win a case if the intern is still in school, but once out of school, it becomes more difficult to prove that the position they are filling is not actually an entry-level job. As discussed in Chapter Three, maintaining interns with student status is not enough to fulfill the DOL's internship requirements, but Karen's point is that it makes the argument stronger when putting a case together in the company's defense. In Perlin's book, he asserts that employers working with unpaid interns are hiding behind an "urban legend" by requiring interns to be enrolled in school or to submit proof of academic credit in order to participate.<sup>118</sup> Perlin explains that if the internship is properly structured, "such that a faculty member would gladly serve as an advisor on the academic end, then that employer has simply met the minimum conditions necessary to not pay their interns."<sup>119</sup> Standing alone, the satisfaction of this minimum condition is not enough, "what counts in terms of legality is the day-to-day reality, not the way a position is marketed," explains Perlin.<sup>120</sup> Perlin supports his case with back up from employment lawyer, Donald T. O'Connor, who states that a student "still has the right to sue under the FLSA even if

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<sup>117</sup> Kowgios, Karen. Personal interview. 12 Feb. 2015.

<sup>118</sup> Perlin 84.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

academic credit is being awarded” as well as Deanne Amaden, a spokeswoman for the DOL, who confirmed that “academic credit alone does not guarantee that the employer is in compliance with the six criteria of the Fair Labor Standards Act.”<sup>121</sup>

While working with students (or recent graduates) is a step in the right direction for internship programs, there remains a massive pitfall with this resolution: students are often paying tuition to earn credits for their internships. In other words, students are paying to work and undertake training at theatre companies that are in no way accredited to teach when they are required to receive credit for their internships. Perlin paints a grim portrait of the academic landscape surrounding internships-for-credit in the United States. Drawing on Gina Neff, a professor at the University of Washington, he quotes: “‘It’s a dirty little secret’ that internships represent ‘a very cheap way to provide credits...’”<sup>122</sup> as well as Phil Gardner from Michigan State who says, “There’s much more money coming from these internships credits than [there is] going into sustained internship programs for these people.”<sup>123</sup> Gardner continues to describe examples of the internships his students have taken on for credit and says, “Here the students pay good money – paying for four or five credits a quarter to work... - and they’re being told to stuff envelopes or pass out flyers on the street. It’s lawbreaking – it’s not what an internship’s supposed to be – and unfortunately there are a lot of those out there.”<sup>124</sup> One intern interviewed described a battle she undertook with her New York undergraduate institution, which mandated that students took on an internship to fulfill one of their credited requirements. She was left with no choice but to argue with her school because she could not afford to pay tuition and work for free, especially at the same time. She asked the school to apply a summer internship she had

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<sup>121</sup> *Ibid.*

<sup>122</sup> Perlin 85.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*

completed as a credit towards the fall semester so that she would not have to pay tuition for that experience in the summer and could still use the internship to fulfill the requirement. After much debate and chagrin, the university recognized her summer internship as a credit completed in the fall, which allowed her to take on a paying job in the fall to assist with tuition. For most others in her program, students were paying tuition to complete unpaid internships as part of their studies. This means that those students had access to fewer in-class education hours, and paid their institutions the same amount of tuition to work for an independent organization (essentially completing the same work they would be doing as a paid employee).

In Columbia University's MFA theatre program, students are required to take on one to three internships, depending on their concentration. However, none of these internships fulfill a credit requirement. Rather, the internships are in addition to academic training. In an attempt to push students towards paid opportunities, the internship requirement is also underwritten by the Shubert Foundation, which pays a stipend to students based on paid internship experiences:

The Shubert Foundation predicates its contribution on the stipulation that funding to student interns is to be paid in part by the host organization or artist. Some form of compensation **must** be received in the form of a salary or stipend, travel or meal reimbursement, complimentary tickets to productions, etc. The Theatre Program reserves the right to disallow any internship for which the host organization cannot or will not contribute to the student's stipend.<sup>125</sup>

While this stipulation pushes students to find paid internships, it once again promulgates the stipend culture in the industry, which, as we have seen in previous chapters, is a grey area according to the IRS and a violation of the criteria specified by the DOL.

It is important for companies to become familiar with the IRS and DOL's regulations surrounding internships, stipends, benefits, etc. Working closely with a lawyer or accountant can

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<sup>125</sup> *Columbia Internship Information 14-15*. New York: Columbia University, PDF.

help companies that are trying to structure their internships programs in line with these rules. However, the only way for a company to absolve itself from all risk is to abide by the Minimum Wage Act and pay for all labor, including internships. Working with students and carefully documenting stipends can help build a strong case for an internship program, which is important to protect the company from potential lawsuits or audits, but it does not eradicate all risk. More important are the structures in place, the educational component of the internships, and ensuring that interns do not displace paid employment. Even if internships eventually become a career stage designed for students alone, when looking at the issue from another perspective, limiting internships to student participants would eliminate a large portion of interns who have graduated, are seeking to switch their career paths, or have decided later in life that they want to learn about theatre administration. The only complete solution would be to pay minimum wage, legalizing the internships entirely and opening the experience to anyone who is interested, regardless of academic, class or social status. The following chapters will further outline potential changes, both realistic (like increasing educational factors) and idealistic (such as paying minimum wage for all internships), and will explore the benefits that would arise from such changes.

Chapter Five:  
Getting Ahead of the Issue

What can be done to help theatre companies protect themselves? What can be done to ensure positive and educational experiences for theatre interns? The following chapter will attempt to answer these questions. As we have seen, until only a few years ago internships had largely gone unnoticed and unscrutinized by the government, but times are changing. Internships are slowly taking on more standardization and structure with pressures coming down from the DOL and IRS, as well as Lawsuit Hunters, such as Outten & Golden LLP. While the issues have been faced largely by commercial organizations, it is only a matter of time before this becomes an issue in the not-for-profit theatre industry, like it has been for several New York and regional companies that have already been audited by the IRS for the way they pay intern stipends and how they classify their employees.<sup>126</sup> It would be far better to get ahead of these issues by restructuring our internship programs, in order to begin implementing changes slowly, rather than waiting for the internship bubble to burst. The following chapter will outline some such gradual changes that aim to provide potential solutions for this industry-wide concern, including title codification, new mentorship approaches and third-party support systems.

Many of the small blunders, such as inconsistent advertising or improper payment documentation, which have already been discussed in previous chapters, are easy missteps to amend. Larger issues, however, such as inconsistent internship titles and responsibilities, as well as unsuitable mentorship, are more challenging to reshape, since those are structural issues that

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<sup>126</sup> Since this thesis is focused on not-for-profits in New York alone, regional theatres will not be covered in this chapter. However, anecdotal evidence from my interviews revealed that there are many regional and summerstock theatres that have had to face penalties and back pay for misclassifying interns as independent contractors, and for not including stipends and housing benefits as taxable income.

have become engrained in internship practices over decades. In order to begin the process of systematization, the industry could begin by collectively agreeing on what the various internship names refer to in terms of level of responsibility, pay rates and expectation of skill and experience. One challenge with industry-wide standardization is to find a mechanism that can disseminate this information to the industry as a whole. This challenge will be discussed later in this chapter, illustrating the power of third-party organizations that can assist in developing support systems for existing programs. A poll of some of the current leaders' understandings of these terms led me to create the following definitions:

**Volunteers** – Volunteers have no set weekly hours, with narrow responsibilities usually involving ushering in exchange for the ability to see a production, or menial assistance with an event in exchange for a chance to attend the event (i.e. envelope stuffers).

**Interns** – Interns are heavily supervised and mentored, with no prior experience necessary. Interns could be high school students or undergraduates, with very flexible hours and limited responsibilities (including shadowing opportunities). The purpose of an internship is to be able to test out and explore the industry, rather than gain the skills necessary to work in the industry.

**Apprentices** – Apprentices are given a greater degree of responsibilities, and are included as part of the staff. These positions are more independent and rigorous, having to handle more responsibilities. While prior experience is not necessary, it is preferred. A focus on access to artists and information, as well as education and mentorship is still valued. The positions are meant for more experienced applicants, such as recent college graduates or graduate students, with the purpose of gaining skills to work in the field as a whole, with specific focus on the company where they are employed. With an apprenticeship, there is some potential that the apprentice can be hired upon successful completion of the apprenticeship, if a position is available or once it becomes available. These positions are paid and can be part time or full time.

**Entry-level Employees / Assistants** – Entry-level positions focus on a concentrated set of independent responsibilities. There is no longer a direct



mentorship component.<sup>127</sup> Such positions are paid minimum wage or greater, and are eligible for benefits. These positions are full time, with set weekly hours (usually 40 hours per week).

Historically, these titles have not been clearly delineated throughout the industry, and are often used interchangeably. For example, the terms “Resident” and “Fellow” are frequently undifferentiated, and are used commonly to denote artistic trainee positions for playwrights, directors, designers and stage managers. Notwithstanding, administrative internship positions have also been called “Residencies” and “Fellowships.” The breakdown above, while by no means perfect, begins to set a clear trajectory of skill level, responsibilities, hourly commitments and pay expectations, focusing on the natural development rates of students and young professionals without repurposing extraneous or superfluous titles. This breakdown operates under the assumption that students who have been accepted to graduate school have met a certain standard of education and experience that prepares them for a higher level of responsibility in the workplace. This may or may not indicate that a graduate student is ready for employment, but it does assume that a graduate level student has more experience or knowledge than an undergraduate student, which they may have attained from a former internship, work experience, or prior academic education.

When discussing titles, it is significant to note the implication attached to the term “Apprentice.” According to the DOL’s Minimum Wage Order for Miscellaneous Industries and Occupations, the given definition is as follows: “The term *apprentice* means a person in a nonprofitmaking institution whose work at an institution (a) is in an apprenticeable trade or occupation, and (b) is part of a bona fide training program leading to qualification as a

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<sup>127</sup> While there is no longer a direct mentorship component in entry-level employment, it is my assumption that a strong manager should still aim to teach and mentor his or her employees to maximize employee effectiveness.

journeyman in the trade or occupation.”<sup>128</sup> The NYS DOL has a registered list of apprentice programs, ranging from electrical work, plumbing, contracting and manufacturing.

Approximately a quarter of a million Americans of all ages are enrolled in an apprentice program in one of approximately 30,000 registered programs in over 1,000 trades.<sup>129</sup> Similar to the title breakdown provided above, Dan Jacoby, a historian of apprenticeships, differentiates between an internship and apprenticeship by qualifying that internships are “a chance to look at an environment rather than as a chance to learn the job.”<sup>130</sup> For an official modern apprenticeship to exist, the following steps must be taken: “an individual employer, employer association, or labor-management organization (in unionized industries) decides to take on apprentices, devises a training program, and registers it with a state or federal apprenticeship office, whose staff often lend their own expertise in setting up the program.”<sup>131</sup> Later in this chapter, I will outline a case study on The Lark Play Development Center’s new Apprentice program, which falls in line with the typical definitions associated with apprentice programs, but is not currently registered under the NYS DOL’s Apprenticeship Sponsor List.<sup>132</sup>

While it may seem like a minor issue to some, job titles provide a crucial service to other employers in the industry in order to convey the range of skills and responsibilities that any individual, employee or intern alike, has learned. In the current landscape, one intern might be filing and answering phones, while another is learning how to manage artist travel and hospitality, perform reconciliations and use valuable database software programs, like Tessitura

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<sup>128</sup> "Minimum Wage Order for Miscellaneous Industries and Occupations." *New York State Department of Labor*, Part 142: 21. 4 July 2009. Web. 27 Feb. 2015.

<sup>129</sup> Perlin 45.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> "Apprenticeship Sponsor List." New York State Department of Labor, 25 Feb. 2015. Web. 27 Feb. 2015.

or Raiser's Edge. Both interns will walk away with the same title, which does not accurately represent their level of experience. The purpose of job titles, such as Company Manager, Literary Manager, etc., is to delineate roles and responsibilities that are accepted industry-wide. While no two Company Managers are exactly alike in personality or working style, it is reasonable to expect that all Company Managers should be equipped to manage a set of given responsibilities, including but not limited to: travel and housing arrangements, artist hospitality, payroll and expense reconciliations, etc. Understandably, theatre companies are notorious for inventing titles for new positions to suit the skills and needs of staff members. For the more ambiguous positions, like Communications Associate, Associate Artistic Director, etc., a staff member can negotiate the title that fits best as a benefit of employment. Consequently, a title is developed to express something about the range of work that the staff member is responsible for. In contrast, the general term "intern" is used to refer to any number of roles, jobs, and responsibilities, in which the line is often blurred with actual employee responsibilities.

When asked what the difference between an internship and an entry-level position is, almost all industry professionals expressed that internships are for learning and mentorship. The analogy of a teaching hospital was often used in this description. In medicine, some hospitals are designated teaching hospitals where they provide clinical training for medical students in addition to functioning as a place for medical practice and patient care. Some teaching hospitals are also associated with universities or academic institutions. In the theatre, it seems that every organization calls itself a teaching hospital, or rather, a "teaching theatre" with interns to mentor. However, not all companies are suited for teaching, nor do they have the resources and capacity for such instruction. Another step towards change would be to separate out the teaching theatres

from the theatres that function solely to create art – an honorable and difficult mission in and of itself.

Although it may come as a shock to managers or department heads who feel that they depend on their interns to function, the likelihood that the company would crumble without intern support is unrealistic. Those companies that do rely heavily on intern labor are precisely the ones that should reevaluate their intern programs. Since companies should be wary of internships that provide greater benefit to the company than the intern, any intern work should be strictly supplementary to the functions of the company in order to extinguish all risk of violating this stipulation. Therefore, it is logical to say that if a company were to eliminate those positions completely, it should technically cause no harm to that company's programs, activities and business functions. Internship culture has become deeply engrained in not-for-profit theatre administration, where many companies have grown accustomed to the additional support. The reality, however, is that many companies would likely survive using the support of their staffs alone by redistributing labor among paid staff members and reprioritizing the work being done. For those that would suffer a discernible loss without interns, that level of damage in itself is an indicator that the company relies too heavily on those positions. With the risk of lawsuits or shifting regulations teetering on the horizon, these companies would find greater benefit in utilizing their paid staff efficiently, without diluting time, space and resources into an internship program that does not serve to mentor interns, squanders existing resources by constantly retraining new interns every semester, and puts the company at risk. Furthermore, it may be worth it to hire one or two intern-like employees who would be trained and mentored, but could stay on staff for a year to truly dedicate time to learning and completing significant work for the

company at minimum wage (a gross cost of about \$25,000.00<sup>133</sup> per year, including taxes, per employee). Arguably, paying minimum wage for one or two true “entry-level” support positions could be more effective than a team of six interns, with inconsistent hours, limited responsibilities and a high turnover rate. For those theatres that do not rely on interns to function, but do still engage in unpaid internship programs, the focus on improvement should rest in mentorship and the educational impacts that the programs have in order to satisfy the other DOL requirements.

If the paid entry-level model described above were to replace the current form of internships in theatre organizations, there would certainly be a ripple effect of both positive and negative consequences. There would likely be fewer opportunities for inexperienced theatre hopefuls to enter the field, and the available positions would be quite competitive. However, many of the companies I researched for this paper described a high turnover rate for entry-level positions in arts administration, most of which are held for one to two years before the employee moves up or moves on to another company. In Theatre C, for example, the company saw fifteen permanent full-time positions turn over in the last year. Establishing fewer intern or entry-level positions that are paid minimum wage would ensure that the most talented and promising candidates are employed, utilized effectively and trained to move the future of the field forward. Furthermore, instituting minimum wage requirements would begin to address the issue of diversity by providing fair economic opportunities, and would allow those who cannot afford to offer their services for free an opportunity to join the race. I am aware that paying minimum wage is not a sweeping remedy to the complex issue of diversity in the field. Minimum wage is

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<sup>133</sup> At present, the New York State minimum wage is \$8.75 per hour. Rounding this figure to \$10.00 per hour and multiplying it by 40 hours per week for a full year results in \$20,800.00. Factoring a high estimate of 20% for taxes leaves a total of \$24,960.00.

not enough to provide appropriate support for underprivileged young professionals hoping to enter the field, but it is a start. It is a step towards addressing a larger, structural issue. A United Kingdom report on “fair access to the professions” led by policymaker Alan Milburn says that “Internships are accessible only to some when they should be open to all who have aptitude. Currently employers are missing out on talented people – and talented people are missing opportunities to progress... A radical change is needed.”<sup>134</sup> Legislating minimum wage pay rates would at least begin to give opportunities to those with a high aptitude for theatre administration and without the means to offer their time and services without compensation.

This kind of “Trial Entry-Level” internship model would serve as a sampling period for both the employer and the interns, giving interns time to learn, while employers maintain the opportunity to work with different young professionals without the obligation to hire them on as permanent staff. Interns could develop greater responsibilities if they were capable, and the internships would remain consistent with DOL and IRS stipulations. If an intern is not the right fit for the company, it would still be the employer’s responsibility to give her or him as much of a learning experience as possible, but the employer ultimately would not be obligated to continue the relationship once the internship concluded. Theatre E, one of the larger companies in the city, has already begun the process of implementing a similar model. The company is moving away from stipended interns towards paid entry-level-like positions. In preparation for this transition, a member of the finance department met with each department and asked for a task-oriented list of what work the interns completed during their internships. From this analysis, the company instated certain paid positions based on the former interns’ responsibilities, and was able to completely eliminate other positions that were not sustained with enough work or educational

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<sup>134</sup> Perlin 163.

merit. The struggle that Theatre E is facing is finding a balance between DOL and IRS rules while it slowly begins to fund more and more former intern positions. It is a slow process, but the company is working on budgeting minimum wage salaries into these new entry-level positions over time. The company is also working on a diversity initiative, and paid positions are one step in that direction. Aside from the ever-present diversity issue, the harshest critique that unpaid internships face is that intern positions have replaced entry-level employment. Thus, a trial entry-level system would be the closest marriage between internships and entry-level work, maintaining the benefits of both models. While there would be fewer positions and opportunities, the ones that become available would be equitable, paid positions that preserve education and mentorship as a value.

While paying minimum wage is the ideal, it is currently an improbability for many theatre companies who have not budgeted for such labor. For those theatres that do qualify as “teaching hospitals” and have adequate educational internship programs, the value placed on mentorship should be re-evaluated on a continuous basis, based on each individual’s needs. From an ethical perspective, mentorship and education is the basis for the continued success and growth of the industry. From a business and practical perspective, mentorship takes time and resources to execute effectively, yet can greatly increase productivity and positive performance. While mentorship is a taxing effort for some, there are those who are natural teachers and consistently mentor junior employees because it is in their nature. Throughout the interview process, one name came up regularly as a guide for many theatre professionals that are now leaders in the field, and that is Barry Grove, Executive Director of Manhattan Theatre Club (MTC). Out of over two-dozen interviews, nearly half of the people met with have worked with MTC in some capacity, many of whom worked closely with Barry at one point or another. One

former MTC employee, who is now running a different not-for-profit theatre company, coined the mentorship domino effect as consequences of the “School of Grove” and another not-for-profit leader qualified that her own mentorship style developed as a result of the mentors she had who prioritized passing down education and best practices to rising generations. When meeting with Barry, he explained that he has been a teacher since he was 21 years old.<sup>135</sup> He has been on the faculty at the University of Rhode Island, taught at Marymount Manhattan College, guest lectured at Brooklyn College and NYU, and now teaches courses at Columbia and Yale Universities.<sup>136</sup> Beyond formalized mentorship at MTC (which includes weekly seminars for interns), Barry believes in making sure that the youngest person in the room is not only at the table, but also has the opportunity to ask questions afterwards. Barry spoke about taking junior staff members to see Broadway theatre, and treating them to dinner beforehand.<sup>137</sup> While these are informal methods of mentorship, Barry has passed down a value throughout his generations of teaching that has seeped into the psyches of many not-for-profit leaders. However, not all theatre professionals are meant to be teachers. In fact, not all theatre professionals are talented supervisors. Nonetheless, in a designated internship program that values education, mentorship and supervision are crucial components for both the intern’s benefit, as well as for the preservation of the internship program’s legal status.

Another, more idealized, adjustment to the current internship model would be to lean heavily on third-party organizations for support. Of course, this would require financial and operative support from a service organization or umbrella company, but it could provide small companies with the means to support interns in appropriate and meaningful ways. For example,

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<sup>135</sup> Grove, Barry. Personal interview. 19 Feb. 2015.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*



one such company already exists for undergraduate students. The Americans for the Arts organization has formed a summer internship program that includes ten weeks of paid work, contributed from both the host theatre as well as Americans for the Arts, plus an unlimited monthly MetroCard. The program, called the Multicultural Arts Management Internship Program, is specifically looking for diverse undergraduate student candidates to provide hands-on experience in arts management. The interns are placed in an organization to work full time for ten weeks, and are also invited to attend an opening orientation, go on site visits to all participating arts organizations, participate in social gatherings and workshops, and attend a closing ceremony.<sup>138</sup> The umbrella program provides support, funding and mentorship, while the host organization provides hands-on learning experience, part of the intern's funding, as well as in-house mentorship. If a third-party theatrical service organization such as A.R.T./New York (a company that already plans an Internship Fair for interns and theatre companies to find each other), Theatre Communications Group (TCG) or The Field founded an internship support program, one company could help the entire industry with program structuring, legal aid, mentorship, application processes, diversity initiatives, etc. Furthermore, partnering with a third-party organization would allow theatre companies to have internship certification, a sort of "seal of approval" that is a sign to the general public (and the government) that the internship program is structured, consistent and legal. When speaking to Michael Naumann at TDF about this program, he described the satisfactions of working at a service organization, and estimated that the cost to build a pilot internship support program would be between \$70,000 – 100,000, which

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<sup>138</sup> "Americans for the Arts." *Multicultural Arts Management Internship Program*. Americans for the Arts, n.d. Web. 21 Apr. 2015.

would cover one full-time employee as well as program operational support.<sup>139</sup> In its first year, the program could start with five companies, meeting with them to get to know their specific needs, strengths and weakness, and would help create appropriate internship programs focused on education. The program could also provide overall mentorship for interns, bringing interns together from the five companies to create a greater intern community across the industry, including mingle events and seminars. In addition to intern support, the program could serve theatre staffs to educate them on supervision and mentorship. Most importantly, the program could provide an opportunity to focus on diversifying industry-wide staff and interns by providing additional resources to theatre companies and developing diversity initiatives. Essentially, the resources that it takes to run an internship program would be reallocated to the overhead organization, and would eliminate some strain from the theatre companies. In the future, this umbrella internship program could serve as a support system for the majority of teaching theatres, and could grow to include grant writing support to find specific funding for internships, as well as legal support to ensure that companies comply with the DOL and IRS labor laws. Ideally, this program would become the expert in this small subsection of theatre workers and could provide all around support to ensure equality and diversity. While this suggestion is rather idealistic, it appears to be a potential solution to a greater, industry-wide issue. Since producing organizations are usually struggling to make budgetary goals and produce a consistent season year after year, this type of support could go a very long way for the future of the field.

In a perfect world, one with unlimited time and resources, theatre supervisors and internship advisors could also be mandated to undergo mentorship training by the third-party

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<sup>139</sup> Naumann, Michael. Personal interview. 30 Jan. 2015.

organization, which would ensure that those teaching at the teaching theatres are qualified to do so. If this were a stipulation of running an internship program, it would certainly separate out the companies that are willing to dedicate time to learning how to educate properly from those that do not hold this as a priority. In an industry that is already teeming with overworked and underpaid employees, it is unquestionably difficult to find the time to halt theatre operations and instruct staff members on how to supervise, educate and mentor. However, these are important priorities for those who truly claim to be educational institutions, or “teaching theatres” that are training young professionals to be arts managers in the field. Without implementing staff-wide conferences or learning sessions, another way to ensure that interns have the opportunity to take part in educational benefits is to initiate structured mentorship within internship programs. Some best practices that I have collected from various companies throughout my research are listed below:

- Master Classes and Workshops;
- Intern “Happy Hours” and mixers with staff members from various departments;
- Intern “Staff Meetings” where interns meet and give each other updates from within their individual departments;
- Creative assignment sessions where interns are given a different task every session and must work together to complete it. Examples of assignment are creating new and ambitious programs, discussing scripts, and learning to produce a show from start to finish, etc.;
- Weekly seminars with staff members and department heads in order to give all departmental interns access to other areas outside of their specialties;
- Guest artist sessions with invited professionals from around the industry;

- Observership opportunities (including rehearsals and tech weeks, as well as arts management shadowing);
- Pairing up interns with mentors outside of their department in order to broaden an intern's exposure to the various departments and career paths in the industry, as well as providing an opportunity to be mentored by someone proficient and experienced, rather than their own department head, who may or may not be interested in mentorship;
- Hiring an intern manager that is responsible for running the program and is an outside resource to the interns, separate from their direct supervisors;
- Goal-setting sessions and constructive feedback lunches.

These are some ways in which existing unpaid internship programs can restructure to focus on education in order to further comply with internship regulations. For younger and newer companies that are growing amidst this period of flux, it is important to begin to budget for paid labor directly from onset. Theatre O, a small theatre just entering the \$1 million budget size, pays its interns a flat \$500.00 stipend per semester (a *de minimis* fee that contributes to transportation and meals), for part-time flexible work. The Managing Director explained that the interns are “general practitioners” without a specialty in any one department, and are typically students working on project-based tasks (the theatre tries to cater these projects to each individual intern's interests). Like most small theatre companies, Theatre O is unable to pay minimum wage at this time, but the company has made sure to account for some level of wages for all labor in order to gradually build salaries into the budget. With the rapidly changing landscape of internships and labor laws, and the risks that unsuitable internship programs present, it would be penny-wise and pound-foolish to subscribe to the current unpaid culture.

To explore the ways in which organizations can positively impact internship programs, considering the time and resources they have available to dedicate to education, the following paragraphs will outline a case study on The Lark Play Development Center's recent shift from its former internship model to its current Apprentice program. Founded in 1994, The Lark's mission is to provide transformative support for playwrights. In an interview with Anna Kull, The Lark's Director of Community Relationships, and the manager of the program, she provided an overview of the history of The Lark's former Internship program, which led to its latest innovation, the Apprentice program. Anna has been with the Lark since 2005, when she was the Marketing intern. Following her internship, she worked as the Executive Assistant until she moved into her current position. Anna described her internship experience, which took place nearly ten years ago, as a "traditional internship" in a program that existed long before she arrived at the company.<sup>140</sup> At that time, the internship paid a \$50 weekly stipend, although that was discontinued after conferring with a lawyer who advised against it. When asked to describe the reasons for the recent shift to the new Apprentice program, Anna explained:

We were all dissatisfied with the internship model in the field, both for non-effectiveness (there are amazing, smart, emerging leaders out there and many of them are caught in unpaid internships without getting to entry level positions) and also for us. We weren't providing deep enough support, an educational bridge, or a bridge from where they are to where they want to go.<sup>141</sup>

Anna continued to describe other issues with the old internship model, such as the limited amount of time interns held their positions. She explained that when interns were only at The Lark for three to four months, the trend they saw was that The Lark was spending dedicated time

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<sup>140</sup> Kull, Anna. Personal interview. 3 Feb. 2015.

<sup>141</sup> *Ibid.*

training interns who would just begin to have ownership when it was time to depart.<sup>142</sup>

Sometimes interns would stay on for an extra semester, but that was an economic barrier for many who could not afford to take on unpaid work for longer than a semester. The Lark is a non-producing organization that dedicates its resources to playwright development, workshops, readings, etc. Since The Lark does not produce public programming, the company decided to focus its resources on supporting this new program.<sup>143</sup>

When conceptualizing the program, The Lark's staff members put their heads together and came up with an ideal version. They imagined it, originally, as a set of yearlong full-time positions, paid at minimum wage, using an apprenticeship program structure that could provide overall capacity through the organization. The apprentices would have real responsibilities, ownership, and an immersive staff experience, rather than one supervisor in one department. Anna described the initial brainstorming that took place as an ambitious dream, which was then strategized and placed on a five-year timeline.<sup>144</sup> The company started slowly, and applied for funding for the pilot program. Unfortunately, the program was not awarded funding, but the staff felt so strongly about it, and the company had already consulted with current and past interns who provided helpful feedback on the potential benefits of such a program.<sup>145</sup> The new program seemed to be a better fit, more in line with what the staff wanted, and so The Lark moved forward with the plan with whatever financial resources it could find. Instead of one-year positions, the apprenticeships started as nine months stints, and included a \$500 monthly stipend. The Lark also capped apprentice hours at 30 hours per week, speaking with auditors and accountants about how to stay within legal parameters. At 30 hours per week, the goal was to

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.*

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*

offer flexibility for those who needed to supplement their income with other jobs during their apprenticeship. Karen Kowgios explained that \$500 per month breaks down to a modest daily travel and meal stipend, which is considered to be *de minimis*.<sup>146</sup>

The pilot program was put in place two seasons ago, and included Communications, Development, On-Site Artistic Programming and Off-Site Artistic Programming & Partnerships apprentices. The transition was challenging for The Lark because it had always had a General Management intern and was operating without one for the first time.<sup>147</sup> Anna explained that some interns could not afford to transition into a nine-month position, and so the transitional year into the program saw a mixed group of interns and apprentices. This season, the second year of the Apprentice program, marks the first time in more than twelve years that The Lark has had no interns at all. In the program's current form, the stipend has increased to \$600 per month and apprenticeships have increased to ten months in length so that apprentices can stay on through the full season. The company has also added a fifth position, a joint General Management and Dramaturgy apprentice. In regards to the apprentices' responsibilities, Anna learned through feedback from former interns and apprentices that the most valued work was project-oriented, where the apprentices felt like they could *own* their work.<sup>148</sup> While the program is still not paying minimum wage, Anna has set the program on a long-term timeline and hopes to be able to increase pay gradually.

This program was chosen as a case study for this thesis because it showcases transitional change, and is by no means perfect. While the program is working towards paying minimum wage, it is still subject to the same regulations and terms set out by the DOL, and in turn the

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<sup>146</sup> Kowgios, Karen. Personal interview. 12 Feb. 2015.

<sup>147</sup> Kull, Anna. Personal interview. 3 Feb. 2015.

<sup>148</sup> *Ibid.*

same risks that other organizations face by not being able to match Minimum Wage Act requirements. The Apprentice program also assumes some heightened level of experience, and requires a larger time commitment than most internships in the field. When asked to qualify the differences between internships, entry-level positions and the Apprentice program, Anna explained that internships are more for exploration to test out a field where you may have no prior experience and are not expected to already possess necessary skills. In an entry-level position there is some expectation that one has acquired the skills already, which have potentially been learned through an internship. The Apprentice program seems to act as a middle ground between these two levels of experience. The assumption implies that those who have interned in the past have not yet reached a stage of preparedness for employment, and require another phase, an apprenticeship, to continue learning and developing their skills. If the program develops into a minimum wage paid position, it does sound like it will serve as an appropriate bridge towards finding long-term work in the not-for-profit theatre, by allowing young industry members to have a longer period of paid training. However, if these funds cannot be secured, The Lark is running the risk of falling back into the same traps, and legal risks, as other internship programs. Anna also described some struggles that have arisen throughout this transition:

The Lark kicked out the Internship program because we were dissatisfied, and we're really proud of that. We didn't want to do unpaid internships anymore. The model isn't working for either party anymore. However, we had mixed emotions when we gave it up last summer because we also want to make sure that we keep bridges open between undergraduates and those not ready for apprenticeships quite yet. We're still working on that, but we're done with the Internship program for now.<sup>149</sup>

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<sup>149</sup> *Ibid.*



Other benefits that The Lark provides to apprentices are Round Tables, where apprentices bring in excerpts of their written work. For example, those who are playwrights can bring in excerpts of a play, or students can bring in a sample of a thesis, in order to take part in a three-hour session where the entire staff sits in and reads their work, gives constructive feedback and provides dramaturgical support (similar to the work the staff members do with their professional and emerging playwrights); the Artist Hour, curated by the Communications apprentice, in which The Lark buys lunch for the apprentices and a series of invited guests (established playwrights, directors, actors, managers, etc.); and goal-setting sessions with John Clinton Eisner (The Lark's Artistic Director), through which John meets with each apprentice within the first two weeks of their involvement in the program, and again later to re-evaluate their goals.<sup>150</sup>

Finally, an excellent practice that The Lark takes pride in through the Apprentice program is its focus on mentorship. As Anna describes, “We do a lot of work on access, inclusion and equity, which ties into mentorship very heavily. When you talk about equity, the way people are treated and heard in internships or apprenticeships, there's great disparity there.”<sup>151</sup> The Lark prioritizes staff discussions and skill-based training to inform them of mentorship techniques, and staff members meet twice a year for check-ins where they give each other feedback on challenges and successes. The staff also undergoes midterm assessments with each apprentice through weekly meetings that open a dialogue for feedback. It is clear that mentorship is a valued staff-wide goal, which sets The Lark apart from many other theatre companies, where no specific action is taken towards preparing staff for managing interns (or managing assistants and associates in general).

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<sup>150</sup> *Ibid.*

<sup>151</sup> *Ibid.*

After interviewing many current and former interns, of those who are frustrated, there were two main grievances expressed. There are those who said, “I’m not learning anything or doing anything real” and felt that their time was being wasted, such as Intern X who felt like the theatres he interned at did not want him to be innovative and creative, or to think “outside-of-the-box.” In his opinion, “They want you to be mediocre so that you do the job exactly how they tell you, no more, no less.” Then there are those who said, “I’m doing real work and am not getting compensated fairly.” The Lark Play Development Center has taken steps in the right direction of defining a program that attempts to rectify these two frustrations. Among those interns interviewed, the positive perspectives and the frustrations shared were not mutually exclusive. One intern, Intern Y, was adamant in expressing her positive outlook on internships, owing her current employment position at a New York-based not-for-profit theatre company to the internships she has undergone. However, this intern, like many others, is of a social and economic class that allowed her to dedicate several years to unpaid internships at various theatre companies. With a total of seven internships under her belt before finding full-time permanent employment in the theatre, it cannot be disputed that Intern Y’s perspective reflects the conditions shared by a small demographic, which, unfortunately, makes up a large majority of theatre interns. The Lark’s program aims to create positive experiences by mentoring novice theatre professionals, providing them with project-based responsibilities and goal-oriented support, while also moving towards a paid model that could begin to support participants from a wider demographic. While The Lark has chosen “Apprentice” as the name for its new program, it is the values behind this shift that are more important. In fact, The Lark’s Apprentice program appears to be an ideal version of what theatre internship programs were intended to be, with the

addition of a longer training period and an expectation for greater skill and potential responsibility.

The Lark's Apprentice program is one of the strongest programs encountered in researching internships in the not-for-profit theatre, among others, including: Playwrights Horizons' Residency Program, which also offers artistic positions such as the Directing, Costumes and Properties Residents; and Roundabout Theatre Company's paid year-long Apprentice program. Of course, each theatre's internship program provides a unique look into the running of that specific not-for-profit theatre company, bestowing its own set of benefits and teachings. This thesis does not aim to measure the value of internships solely by their adherence to legal guidelines or by the compensation offered to their participants. Rather, it serves as a sweeping look at the various opportunities available, and ways in which those opportunities can be improved to benefit both interns and theatre companies.

## Conclusion

After examining internships through the lens of the law, including DOL and IRS rulings, it would be naïve for not-for-profit theatre companies to continue unpaid internship programs without reevaluating the benefits of their programs to the interns they serve, including stipends and wages, as well as educational and experiential outcomes. With the ever-changing labor landscape, and with stricter laws surrounding unpaid internships, now is the time to restructure. Waiting for the intern bubble to burst would result in far stricter penalties, as most, if not all, theatre companies would not withstand the financial ramifications of a legal dispute. After reviewing the laws, the internship culture as it presently stands, and the perspectives of current and former interns, what remains are two important questions: *What would it take to make real change? And whose responsibility is it?*

When asked what not-for-profit leaders think it would take for large-scale change to take place, the answers ranged from “someone will have to get arrested” to “interns will have to form a union.” The General Manager of Theatre L (a company of nearly \$8 million) predicted that the major not-for-profits and regional theatres around the country would need to make a collective decision to pay minimum wage, in conjunction with massive support from advocacy groups (such as TCG, A.R.T./New York, Arts & Business Council of NY and Americans for the Arts) that believe in the cause, as well as a strategic plan for gradual change over a five to ten-year period. It would also potentially require the support of major funders, who would have to help companies overcome budgetary hurdles in the transitional years. There are already foundations and private funders that are interested in paying for internship or training programs, such as the Kaplan Foundation, which underwrites Manhattan Theatre Club’s internship stipends, as well as the Tiger Baron Foundation, which supports a stage management training program at Atlantic

Theatre Company. The main takeaway following the conversation with the General Manager of Theater L was that change must come from a collective, industry-wide effort. Without taking drastic measures (such as an intern strike, or the creation of an intern or apprentice union), those with the power to make change are left with a moral, ethical and legal obligation to move the industry forward, specifically towards paid labor. Victoria Bailey, the Executive Director at Theatre Development Fund, explained that the intern issue raises questions about professional versus amateur theatre. She explained, “The ideal 50 years ago, when the not-for-profit movement began, was to pay professionals to make theatre. That’s what it means to work at a professional theatre company. We can’t pick and choose who gets a paycheck and who doesn’t, otherwise we can all stop paying and call ourselves amateur.”<sup>152</sup> If a not-for-profit, small or large, considers itself to be a *professional* theatre company, then that company should be prepared to support those who work for it by adequately compensating them for their time and skill, including any interns who serve a crucial role in the daily functions of the theatre. Despite the potential desire that exists in the field to pay for all labor, another important question remains: *Whose responsibility is it, really?* The issue of unpaid labor extends beyond the individual theatre companies themselves. The issue is a structural and foundational concern that stems from a lack of funding attention, pressure to complete internships for credit at the college level, and a simple supply and demand equation where there are far more young theatre hopefuls than there are positions available, causing interns to be willing to work for free just to be able to work at all. The process of change has begun with a governmental investigation, but true change will only occur when the industry as a whole makes a unified decision that the time for unpaid labor practices has come to a close.

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<sup>152</sup> Bailey, Victoria. Personal interview. 23 Feb. 2015.

Our industry is not the first to face major change with regards to internship culture and paid labor. In his book, Perlin outlines an industry-wide shift in wage practices in the architecture industry, where he claims, “The sky didn’t fall in when the field of architecture did precisely that in the mid-1990s, taking a powerful and effective stance against the mistreatment of unpaid, overworked interns.”<sup>153</sup> Depicting a cycle of exploitation that was passed down through generations, the book paints a portrait of the architecture landscape that was fraught with misunderstandings about labor laws, noncompliance with wage and hour stipulations, and an entire industry built on violations of the law.<sup>154</sup> Kevin Fitzgerald of the American Institute of Architects (AIA) explained that interns would be working for free, or very little, and would also be subject to intense hourly commitments.<sup>155</sup> Fitzgerald expressed the underlying issue that architectural firms were not properly budgeting for the projects they were taking on, and were not willing to pay for the full expense of what an employee would cost.<sup>156</sup> This practice came to a head in the 1990s when professional associations such as the AIA began to manage internship standards, and the American Institute of Architecture Students (AIAS) began representing students and interns at industry conferences, in journals and newsletters, and finally passed a resolution in 1993 that condemned unpaid internships altogether.<sup>157</sup> The policy states that “employers must properly compensate all employees,” and “denounces those firms, organizations, and individuals that do not properly compensate their employees.”<sup>158</sup> The AIAS also supports the efforts of interns who refuse to work for such firms, and any intern, student or architect who wishes to participate in AIAS “must sign a statement that they are neither engaging

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<sup>153</sup> Perlin 212.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> Perlin 213.

<sup>158</sup> Perlin 214.

in nor making use of unpaid work.”<sup>159</sup> This movement led professional architecture organizations to endorse the policy and ostracize those who did not begin to fairly compensate interns, including educational institutions that began to be more critical of postings for unpaid positions.<sup>160</sup> The AIA’s attitude towards the issue is that unpaid internships are harmful to students, and taint the reputation of the profession. This position led to the real possibility that architects who did not adhere to the policy could lose their membership to professional organizations or, in more severe cases, their license to practice architecture.<sup>161</sup> As the industry shifted to paid labor, such drastic measures were not ultimately necessary.

One of the major differences between the architecture industry and the theatre industry is the way that architecture firms acquire the funds to pay employees. Since architecture firms collect earnings from clients who pay for the work of each architect active on their case, the industry decision to pay for all labor collectively raised fees for all clients, regardless of which firm they chose to work with. In the theatre industry, on the other hand, each individual company would be required to raise the funds necessary to pay for the labor that is currently unpaid, if such an industry-wide shift took place. Inevitably, some companies would be able to raise funds to pay for labor, while others would not, relying heavily on the various funding opportunities available to them. Using the architecture industry as an example of the impetus or beginnings of change, it is clear that it takes a variety of factors to institute industry-wide adjustments, including the support of service organizations and educational institutions, as well as strong positions taken on behalf of both interns and employers. What sets the theatre industry apart from the architecture industry is a need for support from external funders in order to help

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<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

underwrite the additional costs of labor, which would pose a challenge to theatre companies and is outside of their control. However, with recent pressures coming down from the DOL and the IRS, and with the string of internship legal cases building each year, the wheel has already been set in motion within the entertainment industry. Before the issue becomes a crippling financial loss for not-for-profit theatres, a more responsible and wise plan of action would be to instigate gradual change towards paid models using the financial resources available to not-for-profits for support. What would happen if the theatre industry had to suddenly pay minimum wage? What would that do to organizations that rely on unpaid interns? Some internship programs would simply not exist anymore, and the shift would inevitably separate out the companies that prioritize teaching and mentorship from those that need additional labor support. Some institutions would be recognized as true “teaching theatres” with valuable training programs, while other internship programs would filter out of existence.

Similar to the reasons that the AIAS outlined for the architecture industry, unpaid labor devalues the nature of theatrical work and does not account for the true cost of what it takes to produce professional theatre. In a field where many employees feel underpaid and overworked, structural change begins with valued work at the entry-level, currently named “internships” and paid next to nothing. If the industry refuses to build from the bottom up, budgeting appropriate wages for interns, the industry as a whole will continue to face issues of underpaid employment, resulting in burned out staff members and inefficiently high turnover. If protecting the longevity of not-for-profit theatres on a financial level by safeguarding them from legal backlash is not reason enough, the industry should at least be conscious of diversifying the field in terms of social, economic and racial classes, which begins by creating fair and equitable job opportunities. While it is understandable that a shift to paid wages is a gradual process, there are other ways in



which internship programs can make structural changes to benefit interns, educationally and experientially. Finally, the heated legal landscape in the entertainment industry is providing an impetus for change, shining a light on inconsistent practices, which have led to costly consequences in related fields. It would behoove the theatre industry to get ahead of these issues by restructuring internship programs to better fit with existing legal principles, while also working towards paid internship models for future generations.

Appendix I: Theatre A – Z Index

Theatre A: \$7.9 million

Theatre B: \$141 million

Theatre C: \$19.5 - \$22 million

Theatre D: \$4.9 million

Theatre E: \$26 million

Theatre F: \$3.0 - \$3.4 million

Theatre G: \$61.5 million

Theatre H: \$3.6 million

Theatre I: \$1 million

Theatre J: \$1.3 - \$1.4 million

Theatre K: \$1.9 million

Theatre L: \$7.7 million

Theatre M: \$1.2 - \$1.3 million

Theatre N: \$8.3 million

Theatre O: \$1 million

Theatre P: \$2 million

Theatre Q: \$64 million

Theatre R: \$3 - \$3.25 million

Theatre S: \$1.5 - \$1.9 million

Theatre T: \$1 - \$1.5 million

Theatre U: \$2.1 - \$2.2 million

Theatre V: \$3.3 - \$6 million

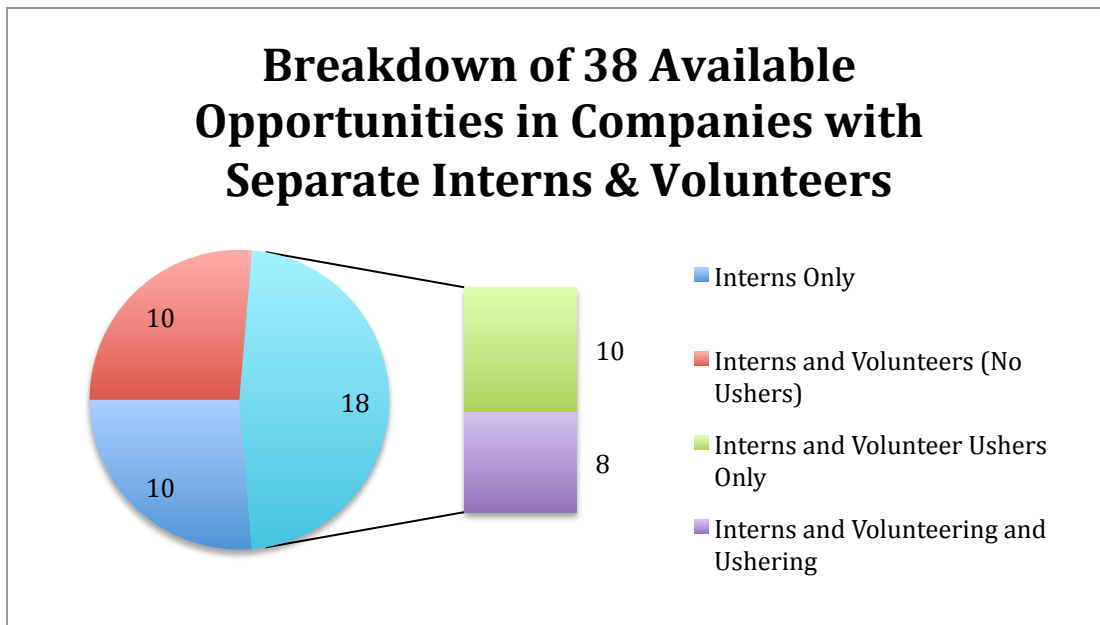
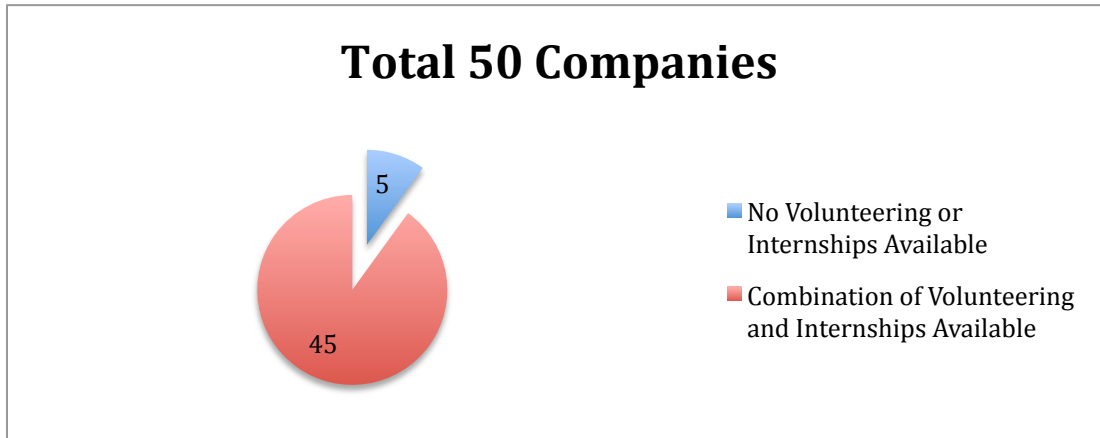
Theatre W: \$7 million

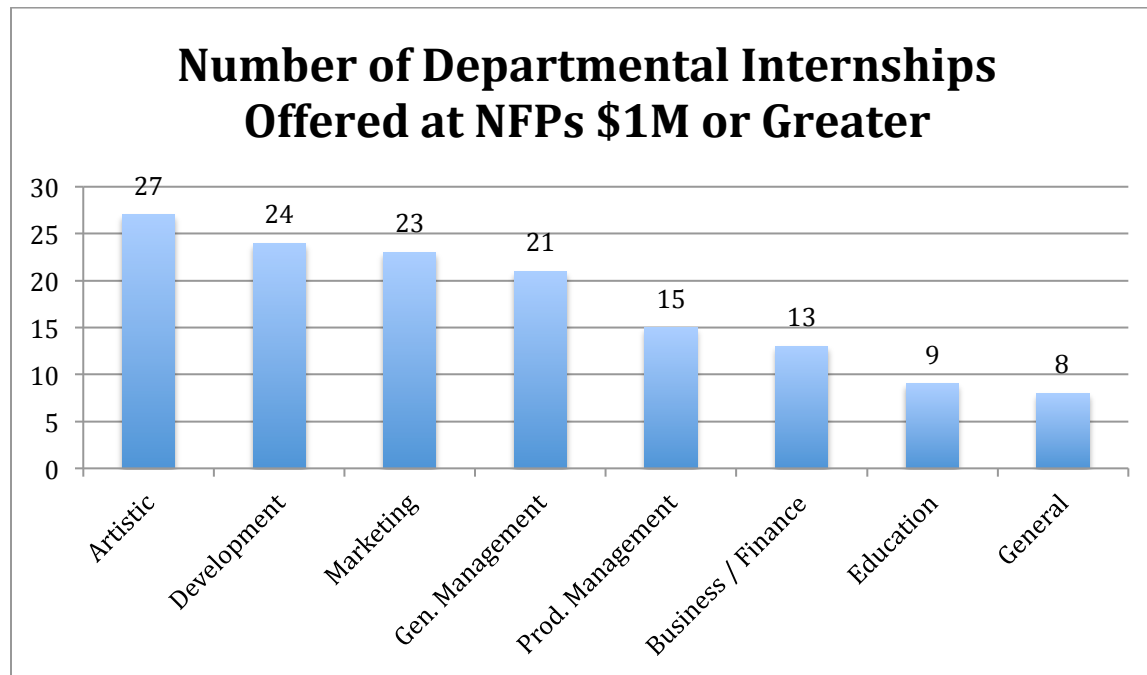
Theatre X: \$5 million

Theatre Y: \$1.5 - \$1.7 million

Theatre Z: \$2.5 - \$2.8 million

Appendix II: Internship and Volunteer Comparisons



Appendix III: Breakdown of Departmental Internships Offered

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