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## Looking a Gift Horse in the Mouth: Working Students Under the Fair Labor Standards Act

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# Looking a Gift Horse in the Mouth: Working Students Under the Fair Labor Standards Act

Lara Morris\*

## *Abstract*

*Internships have skyrocketed in popularity as they become the new entry-level position for professional careers across the country. Despite their popularity, the legality of internships falls in a gray area created by a vague statute and a flexible, factor-based judicial test. The Fair Labor Standards Act (FLSA), which regulates employment relationships and importantly mandates a minimum wage and hour requirements, was written long before internships became commonplace and provides little direction for how to regulate these positions. In this void, both the Department of Labor and federal courts have developed guidance, the ultimate culmination of which is the modern primary beneficiary test.*

*The equestrian industry's attempt at internships is a position known as a "working student." These positions did not*

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\* Recipient, Roy L. Steinheimer Law Review Award; J.D. Candidate, Washington & Lee University School of Law; B.A., University of Virginia. Thank you to Lucy, who provided the inspiration for this piece and shared her stories while ceaselessly sticking with me throughout our friendship; to the tribe of equestrians who have helped me gain my horse sense; and to Anne and Gary, Morgan, my parents, and all others who championed my efforts in the last few years. Much gratitude and credit to Professors Susan Carle and Todd Peppers for their unending support as Note Advisors and for opening my mind to the potential of this topic; to Professor Mona Houck for teaching me to write a topic sentence after thirty years of struggles; and to Professor Franklin Runge, who has been my guiding light and sounding board. Finally, the most thanks to Shae, without whom this project would not exist and who has given me a lifetime of memories on horseback.

arise in the same Petrie dish or era as many other internships. Instead, this type of internship is an ages-old derivative of the barter economy and apprenticeships. In short, a young, developing equestrian exchanges her labor for benefits such as training and housing—but, notably, not FLSA-complaint wages—with a professional equestrian. This position is seen both as a rite of passage into a career as an equestrian but also as an opportunity to test the waters of the industry. Working students work long hours, take on physically intensive tasks, and are often fully immersed in the industry and their positions.

*Do these positions pass the modern primary beneficiary test? This Note applies the factors of the test to the facts of the working student position and asserts that, for many working students, the answer is ‘no.’ This analysis is largely based on an extensive survey and interviews with working students, which were compiled by the Author and further explained within. Finally, this Note suggests solutions that will preserve the significant benefits of the working student position while bringing the equestrian industry into compliance.*

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## INTRODUCTION

*All equestrians, if they last long enough, learn that riding in whatever form is a lifelong sport and art, an endeavor that is both familiar and new every time you take the horse out of his stall or pasture.*

Jane Smiley<sup>1</sup>

Internships have skyrocketed in popularity as they become the new entry-level position for professional careers across the country. While the position may trace its origins back to apprenticeships in the Middle Ages, its prevalence in the U.S. economy did not take hold until the rise in college attendance created a surplus in the workforce.<sup>2</sup> Many careers now begin with such positions, trading labor for benefits like experience and academic credit instead of wages.<sup>3</sup> This practice, however, falls in a gray area created by a vague statute and a flexible, factor-based judicial test.

When the Fair Labor Standards Act of 1938<sup>4</sup> (FLSA) was originally enacted, legislators could not have anticipated the rise in popularity and prevalence of internships in our modern-day economy.<sup>5</sup> As internships developed, both the judiciary and the Department of Labor (DOL) were tasked with interpreting and enforcing the law, and both took steps to recognize an internship exception to minimum wage and overtime requirements.<sup>6</sup> Courts acknowledged that this exception should be narrowly crafted to protect interns from abuse but not be so rigid as to rob students of opportunities to gain experience and hands-on learning.<sup>7</sup> To achieve this goal, circuit courts and the DOL developed a series of criteria culminating in the seven-factor modern primary beneficiary

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1. Jane Smiley, *Everything I Need to Know I Learned from a Horse*, OPRAH.COM, <https://perma.cc/DF77-LZCB>.

2. See Olivia B. Waxman, *How Internships Replaced the Entry-Level Job*, TIME (July 25, 2018, 4:00 PM), <https://perma.cc/33A5-X4DH>.

3. *Id.*

4. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219.

5. See Allen Smith, *Will DOL's New Intern Test Revive Unpaid Internships?*, SOC'Y HUM. RES. MGMT. (Jan. 9, 2018), <https://perma.cc/Q5SY-PM5T> (“[U]npaid internships arose following the Great Recession, when employers were cutting wages and benefits to survive.”).

6. See *infra* Part I.B.

7. See *infra* Part I.B.

test.<sup>8</sup> The final result was both intentionally limited to avoid opening the floodgates to unpaid labor and flexible so as to fully consider the benefits of hands-on training and experience.<sup>9</sup> Internships must, before all else, make the *student* the primary beneficiary through gained experience and knowledge, rather than the *employer* through the intern's free labor in order to pass this test.<sup>10</sup>

The equestrian industry's working student position has developed independently of the rise in internships and FLSA guidance. These positions exist, like much of the industry, on an understanding of a barter economy well known in agricultural industries.<sup>11</sup> A working student is an equestrian taking her first step towards working in the industry and willing to exchange her labor for opportunities and various benefits.<sup>12</sup> Participating in a working student program is seen as a necessary rite of passage both for providing foundational skills and for exposing the student to the realities of working in a difficult industry.<sup>13</sup> These positions are, however, known for intense work and long hours, and professionals seeking a low-cost workforce often take advantage of working students.<sup>14</sup>

While working students crop up in all levels and all disciplines of the equestrian industry, the majority are found in English riding disciplines.<sup>15</sup> This Note will address working students as they relate to these disciplines. The analysis will,

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8. See *infra* Part I.B.

9. See WAGE & HOUR DIV., DOL, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2018) [hereinafter FACT SHEET #71], <https://perma.cc/K7GR-RVJP>.

10. See *id.*

11. See Leslie Mintz, *Working Students: Tradition or Trouble?*, U.S. EVENTING ASS'N (Feb. 12, 2019), <https://perma.cc/AZL3-DHLS>.

12. *Id.*

13. *Id.*

14. See generally Tilly Berendt, *Education or Exploitation? The Alarming Financial Realities of Grooms and Working Students*, NOELLE FLOYD (Jan. 12, 2020), <https://perma.cc/BU34-5SL5>.

15. See *Working Student Horse Jobs in the U.S.A.*, YARD & GROOM, <https://perma.cc/2SHN-EUH8>. English and Western riding styles are differentiated by their foundational purpose, equipment, and styles of competition. Ani Petrak, *Difference Between English and Western Riding Styles*, EQUINCTION (Apr. 17, 2020), <https://perma.cc/K9AL-6VJU>.

however, reach programs at varying levels, from entry-level to top professionals.

Though the DOL has not yet sought to enforce the FLSA against the equestrian industry, that may change at any moment.<sup>16</sup> This Note seeks to preemptively apply the modern primary beneficiary test to the working student position and assess the position's legality. Specifically, this Note demonstrates that the typical working student position likely fails to satisfy the modern primary beneficiary test. By applying this analysis before the equestrian industry is subject to judicial review, this Note prompts implementation of necessary changes in these programs to allow the working student position to exist in compliance with the law without upending the equestrian industry.<sup>17</sup>

To support this conclusion, the Note begins by tracing the development of the modern primary beneficiary test in Part I. The test has evolved substantially over time. As a result, in order to better understand the modern test and the rationale underpinning both it and the internship exception, Part I discusses the statutory history of the FLSA, the initial DOL guidance, and ultimately the judicial tests that came to govern. Each form of guidance is discussed chronologically to explain the development of the internship exception and the themes that remain constant in each form of guidance. Part II explains the working student position, examining both the commonalities present in many programs and its meaning to the equestrian industry as a whole. Part III applies the modern primary beneficiary test to the working student position and suggests how courts are likely to analyze the position under each factor. Finally, Part IV presents two paths to compliance and suggests a solution to preserve the best aspects of the working student position.

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16. See Mike LaSusa, *Intern Advocates Urge Biden to Crack Down on Unpaid Work*, PAY OUR INTERNS (Feb. 8, 2021), <https://perma.cc/KX7T-6SA3>.

17. The equestrian industry is slow to change and, when changes are mandated, the community often rejects them, making pre-enforcement adjustments all the more favorable. See Pat Raia, *At Issue: Equestrians Split Over SafeSport*, HORSE ILLUSTRATED (Oct. 3, 2020), <https://perma.cc/95WV-KZ7A> (detailing the equestrian industry's adoption of SafeSport guidance which, notably, included pushback for not understanding foundational aspects of the industry that make it considerably different than other sports covered by SafeSport).

## I. THE FLSA AND THE MODERN PRIMARY BENEFICIARY TEST

*Riding a horse is not a gentle hobby, to be picked up and laid down like a game of solitaire. It is a grand passion. It seizes a person whole and once it has done so, he will have to accept that his life will be radically changed.*

Ralph Waldo Emerson<sup>18</sup>

Congress passed the FLSA to regulate conditions in the workplace that were “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”<sup>19</sup> Legislators sought to remedy such conditions by mandating a minimum wage<sup>20</sup> and overtime requirements.<sup>21</sup> With this enactment, Congress created the Wage and Hour Division (WHD) within the DOL, which would be “responsible for the administration and enforcement” of a variety of employment laws.<sup>22</sup> Though the law was subject to intense scrutiny from both the legislature and the courts,<sup>23</sup> by 1941 the Supreme Court had upheld the constitutionality of the FLSA and its general principles have been left unquestioned since that decision.<sup>24</sup>

A. *Statutory Definition of the Employment Relationship*

While the minimum wage and overtime provisions of the FLSA may seem clear, the statute is less coherent when defining to whom its requirements apply. An “‘employer’ includes any

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18. Kate Boggan, *A Grand Passion*, EVENTING NATION (July 18, 2018), <https://perma.cc/2SSQ-AFV9>.

19. 29 U.S.C. § 202.

20. *See id.* § 206 (mandating a “\$7.25 an hour” minimum wage as of the most recent 2007 amendments).

21. *See id.* § 207(a)

[N]o employer shall employ any of his employees . . . for a workweek longer than forty hours unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

22. *See History*, DOL: WAGE & HOUR DIV., <https://perma.cc/ZR8S-S8AR>.

23. *See* Johnathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, DOL: WAGE & HOUR DIV., <https://perma.cc/DS8G-LZGG>.

24. *See* United States v. Darby, 312 U.S. 100, 125–26 (1941) (“The Act is sufficiently definite to meet constitutional demands.”).



person acting directly or indirectly in the interest of an employer in relation to an employee,”<sup>25</sup> while “the term ‘employee’ means any individual employed by an employer.”<sup>26</sup> These circular explanations are only somewhat clarified by defining ‘employ’ as including “to suffer or permit to work.”<sup>27</sup>

The FLSA has come under fire for its vague definitions of the employment relationship.<sup>28</sup> Critics have pointed out that the law fails to address the variety of employees in the modern U.S. workforce, citing “independent contractors, leased employees, temporary employees, on-call workers, and more” as potential problems.<sup>29</sup> In 2022, an estimated 58 million U.S. workers took part in an alternative arrangement for their primary employment.<sup>30</sup> Beyond these arrangements, students and interns may or may not qualify as employees and fall under the protection of the statute because of vague FLSA definitions.<sup>31</sup>

Whether Congress intended for the statute to remain nebulous either to allow for flexibility or because they too struggled to determine the specifications of a fluid concept, the result is the same. In present society, where alternative employment relationships come in many forms, the FLSA does not clearly dictate its application to interns.

### B. *The Creation of the Modern Primary Beneficiary Test*

The FLSA itself does not provide for an internship exception. Instead, the exception arose from the gray areas of

25. 29 U.S.C. § 203(d).

26. *Id.* § 203(e)(1).

27. *Id.* § 203(g).

28. See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 521 (6th Cir. 2011) (“[T]he definitions are exceedingly broad and generally unhelpful.”); *Henthorn v. Dep’t of Navy*, 29 F.3d 682, 683 (D.C. Cir. 1994) (“The Act provides generally unhelpful definitions of its critical terms.”); *Hollins v. Regency Corp.*, 867 F.3d 830, 834–35 (7th Cir. 2017) (noting that, while the court would like to rely on the statutory definitions, the law is “of little use”).

29. CHARLES J. MUHL, *WHAT IS AN EMPLOYEE? THE ANSWER DEPENDS ON THE FEDERAL LAW 1* (2002), <https://perma.cc/UM6V-F2BK> (PDF).

30. André Dua et al., *Freelance, Side Hustles, and Gigs: Many More Americans Have Become Independent Workers*, MCKINSEY & CO., <https://perma.cc/XPG2-ZF5V>. Importantly, this statistic did not include those with traditional primary jobs who also undertook in alternative work as secondary employment. *Id.*

31. See FACT SHEET #71, *supra* note 9, at 1.

the statute and is the product of judicial and administrative interpretation.<sup>32</sup> Like all such statutory interpretation, the resulting tests and guidance are subject to Congress writing express clarifications into the law.<sup>33</sup> Congress has, however, left the issue to the other branches and, after some back-and-forth between courts and the DOL, as discussed below, both have come to agree on the use of a flexible seven-factor inquiry known as the modern primary beneficiary test to answer the overarching beneficiary question.<sup>34</sup>

### 1. Early Judicial Interpretation of the Employment Relationship

The Supreme Court first addressed the issue of who is considered an employee under the FLSA in *Walling v. Portland Terminal Co.*<sup>35</sup> In that case, the Court considered whether prospective brakemen participating in a week-long practical training course at a railroad yard should be deemed to be employees and thus entitled to a minimum wage for the hours spent in the program.<sup>36</sup> Refusing to follow common law categorizations and the definitions in other statutes,<sup>37</sup> the Court chose to limit the application of the FLSA to those whose work provides an “immediate advantage” to the employer.<sup>38</sup> The Court narrowed the expansive statutory definitions by emphasizing that “the Act’s purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”<sup>39</sup> Ultimately, the prospective brakemen were not found to have provided any significant benefit to the company and the Court refused to

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32. See LaSusa, *supra* note 16.

33. See *id.* (suggesting that Congress *should* write specific rules into the FLSA to prevent further confusion and split interpretations).

34. See FACT SHEET #71, *supra* note 9, at 1.

35. 330 U.S. 148 (1947); see *id.* at 151–52 (noting that the FLSA considerably changed the employer-employee relationship and thus could not be interpreted based on prior standards).

36. *Id.* at 149.

37. See *id.* at 150.

38. *Id.* at 152–53.

39. *Id.* at 152.

interpret the FLSA to make “a person whose work serves only his own interest an employee of another person who gives him aid and instruction.”<sup>40</sup>

## 2. Original DOL Guidance for Interns

In 2010, as a response to the growth of internships and student workers, the WHD promulgated a six-prong test (the “DOL Test”) to determine if a position was a bona fide internship.<sup>41</sup> This test memorialized the long-standing guidance initially provided by the WHD in 1967 to determine the nature of trainees’ employment relationships.<sup>42</sup> The WHD based the factors on the Supreme Court’s analysis in *Portland Terminal*.<sup>43</sup> The test asked (i) if the internship was similar to training given in an educational environment, (ii) if the experience benefited the intern, (iii) if the intern displaced paid employees, (iv) if the employer derived any immediate advantage, (v) if the intern was entitled to a job at the end of the internship, and (vi) if the employer and intern understood that there was no entitlement to wages.<sup>44</sup> Each factor had to weigh in favor of finding a bona fide internship.<sup>45</sup> If a position failed on even one factor, the intern was considered an employee and was entitled to both a minimum wage and overtime pay.<sup>46</sup> This guidance was, however, meant as informal, educational material and courts questioned its precedential value.<sup>47</sup>

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40. *Id.* at 152–53.

41. WAGE & HOUR DIV., DOL, FIELD OPERATIONS HANDBOOK ¶ 10b11 (2016) [hereinafter FIELD OPERATIONS HANDBOOK], <https://perma.cc/MR5F-F7LC> (PDF).

42. *Id.*; see *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993) (“The six criteria in the Secretary’s test . . . have appeared in Wage and Hour Administrator opinions since at least 1967.”); *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 382 (2d Cir. 2015).

43. FIELD OPERATIONS HANDBOOK, *supra* note 41, ¶ 10b11; see *Reich*, 992 F.2d at 1026.

44. FIELD OPERATIONS HANDBOOK, *supra* note 41, ¶ 10b11.

45. *Id.*

46. *Id.*

47. See *id.* ¶ 10a00; *infra* Part I.B.3.

### 3. Responses from the Judiciary

The Supreme Court has not reviewed the application of the DOL Test nor addressed the question of defining the employment relationship for unpaid interns.<sup>48</sup> However, every federal appellate court that considered the issue of unpaid interns rejected the DOL Test because of its rigidity.<sup>49</sup> The First and Third Circuits have not spoken on the issue or given any indication of their strategy in defining bona fide internships under the FLSA.<sup>50</sup> One Fifth Circuit case, though not directly on point, suggested that the court would have followed guidance provided by the WHD.<sup>51</sup>

The Fifth Circuit, in *Atkins v. General Motors Corp.*,<sup>52</sup> considered training programs that General Motors (G.M.) required Louisiana to develop in exchange for G.M. building a plant in the state.<sup>53</sup> In deciding the nature of the relationship between the trainees and G.M., the court expressed “substantial deference” to the WHD and followed its recommended test for trainees.<sup>54</sup> While these training programs were not construed by either side as an internship relationship,<sup>55</sup> the Fifth Circuit’s approach to the question is illustrative of its approach to defining employment relationships under the FLSA. Due to this deference, it is likely that, if the Fifth Circuit had addressed the issue of unpaid interns, it would have followed DOL guidance.<sup>56</sup>

Beyond the Fifth Circuit, other jurisdictions routinely ignored WHD guidance in defining employment relationships

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48. See *Glatt*, 811 F.3d at 536 (noting the lack of Supreme Court guidance on the “difference between unpaid interns and paid employees under the FLSA”); *Benjamin v. B & H Educ.*, No. 15-17147 (9th Cir. 2015) (failing to petition the Supreme Court for certiorari).

49. See WAGE & HOUR DIV., DOL, FIELD ASSISTANCE BULLETIN 1 (2018) [hereinafter FIELD ASSISTANCE BULLETIN], <https://perma.cc/2UEB-L6R4> (PDF).

50. See *id.*

51. See generally *Atkins v. General Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983).

52. 701 F.2d 1124 (5th Cir. 1983).

53. *Id.* at 1126.

54. *Id.* at 1127–28.

55. See generally *id.*

56. See *id.* at 1128 (discussing the degree of deference given to the WHD Administrator’s interpretations and guidance).

under the FLSA. For instance, in *McLaughlin v. Ensley*,<sup>57</sup> the Fourth Circuit questioned “whether certain workers[] who performed duties for an employer during a weeklong orientation period” were owed FLSA protections.<sup>58</sup> Focusing entirely on Supreme Court holdings in *Portland Terminal* and its progeny, the Fourth Circuit found that “the proper legal inquiry in this case [was] whether Ensley or the new workers principally benefitted from the weeklong orientation arrangement.”<sup>59</sup> The most important factors to the analysis centered on “the nature of the training experience.”<sup>60</sup> The decision made no note of the WHD or DOL and made no effort to follow their guidance or interpretations of the statute.<sup>61</sup>

Likewise, the Tenth Circuit disposed of the all-or-nothing instruction in the WHD guidance in *Reich v. Parker Fire Protection District*.<sup>62</sup> On appeal, the court considered whether to follow the rigid nature of the DOL Test when defining the positions of firefighter trainees seeking compensation for their time in the training program.<sup>63</sup> After a thorough discussion of the application of the WHD guidance in other situations and other courtrooms,<sup>64</sup> the Tenth Circuit was “satisfied that the six criteria [were] relevant but not conclusive” and that their rigid application was “unreasonable.”<sup>65</sup> Instead, the court addressed each factor and developed a balancing approach to find that, despite failing on one factor, “the totality of the circumstances” indicated that the trainees were not owed wages.<sup>66</sup> While not entirely ignoring the DOL Test, the court clearly believed the administrative guidance was not mandatory or controlling.

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57. 877 F.2d 1207 (4th Cir. 1989).

58. *Id.* at 1208.

59. *Id.* at 1209.

60. *Id.* at 1210.

61. *See id.* at 1209–10 (noting that “the proper legal inquiry” was ascertaining who “principally benefitted from the weeklong orientation agreement” based on prior jurisprudence but not mentioning administrative interpretations or factors).

62. 992 F.2d 1023 (10th Cir. 1993).

63. *Id.* at 1025.

64. *See id.* at 1026–27.

65. *Id.* at 1027.

66. *Id.* at 1029.

In *Blair v. Wills*,<sup>67</sup> the Eighth Circuit decided whether students who took part in chores at a boarding school were employees without mentioning the DOL Test or deference to WHD guidance.<sup>68</sup> The court addressed the “economic reality of the arrangement” instead.<sup>69</sup> This approach found that, while the chores would certainly reduce costs for the school, the “totality of economic circumstances” offered no evidence of an employment relationship.<sup>70</sup> Overall, the court refused to interpret the chores as “work” because they were “an integral part of the educational curriculum” at the school and were meant to benefit the person accomplishing them rather than the program.<sup>71</sup>

In the face of these various circuit court interpretations, the Sixth Circuit took up the issue in *Solis v. Laurelbrook Sanitarium & School, Inc.*<sup>72</sup> Hilda Solis, the Secretary of Labor, sued a boarding school that included both traditional classroom courses and practical, internship-like training in its Certified Nursing Assistant program for violations of the FLSA.<sup>73</sup> At the start of its analysis, the court noted that “there [was] no settled test for determining whether a student is an employee for purposes of the FLSA.”<sup>74</sup> The district court had considered which party received greater benefits of the work performed by the students but the Secretary of Labor appealed and encouraged the use of the DOL Test.<sup>75</sup>

The Sixth Circuit noted that economic factors should be central to the decision but found this premise “no more helpful” than the statute itself<sup>76</sup> and instead debated between the parties’ proposed tests.<sup>77</sup> Like other circuits, the court dispensed

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67. 420 F.3d 823 (8th Cir. 2005).

68. *Id.* at 829.

69. *Id.*; see *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (explaining the use of the economic realities test for FLSA questions).

70. *Blair*, 420 F.3d at 829.

71. *Id.*

72. 642 F.3d 518 (6th Cir. 2011).

73. *Id.* at 520.

74. *Id.* at 521.

75. *See id.*

76. *Id.* at 522.

77. *See id.* at 522–23 (“There must be some ultimate question to answer, factors to balance, or some combination of the two.”).

with the DOL Test by finding it “to be a poor method for determining employee status in a training or educational setting.”<sup>78</sup> The Sixth Circuit approved the lower court’s standard and analyzed the relationship by looking for the primary beneficiary, a test that “provides a helpful framework” and “captures the distinction the FLSA attempts to make between trainees and employees.”<sup>79</sup>

The Sixth Circuit proceeded to delineate factors to elucidate the primary beneficiary. Most importantly, the court asked if “the relationship displaces paid employees and whether there is educational value derived from the relationship.”<sup>80</sup> In addition, the court analyzed factors such as (i) whether the students expected to receive wages, (ii) if students were entitled to or expected jobs upon graduation, and (iii) how the relationship compared to other approved vocational programs.<sup>81</sup> The inquiry included many of the factors from the DOL Test but was neither limited to them nor bound by its rigid application.<sup>82</sup> Ultimately, the court found that while the students provided some benefit to the sanitarium, this value was offset and surpassed by the “tangible and intangible benefits” the students received.<sup>83</sup> The students were the primary beneficiaries of the relationship and were not employees under the FLSA.<sup>84</sup>

In the decades after the promulgation of the DOL Test, courts repeatedly rejected the idea that they had to follow this guidance. Grating against the impractical rigidity of WHD guidance, courts looked elsewhere, creating a circuit split and tension between the branches of government. Instead of deferring to the instructions and factors within the DOL Test, courts crafted their own guidance and favored non-exhaustive factors and balancing approaches.

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78. *Id.* at 525.

79. *Id.* at 526–29.

80. *Id.* at 529.

81. *Id.* at 521.

82. *See id.* at 529.

83. *Id.* at 530–31.

84. *See id.* at 531–32.

#### 4. Creating the Modern Primary Beneficiary Test

By 2015, while many circuit courts had expressed reservations about utilizing the DOL Test, none had yet established a clear alternative standard or fully answered the question of how to analyze the intern-employer relationship. But, in *Glatt v. Fox Searchlight Pictures, Inc.*,<sup>85</sup> the Second Circuit analyzed the positions of unpaid interns in the movie industry and took a leading role in developing an intern-focused FLSA test.<sup>86</sup> After a brief discussion of the FLSA,<sup>87</sup> precedent,<sup>88</sup> and the DOL Test,<sup>89</sup> the court questioned whether the district court had applied the correct legal standard.<sup>90</sup> Internships, the court noted, “can greatly benefit interns” when appropriately and deliberately devised.<sup>91</sup> In these cases, internships can provide a trained and capable workforce.<sup>92</sup> Not all internships are so carefully constructed, however, and “employers can also exploit unpaid interns by using their free labor.”<sup>93</sup>

The Second Circuit refused to use the DOL Test to analyze the position.<sup>94</sup> The court reasoned that the DOL Test was “essentially a distillation of the facts discussed in *Portland Terminal*” and sought to force those individual circumstances on a wide variety of employment relationships in the modern workspace.<sup>95</sup> Ultimately, as the court “d[id] not find it persuasive,” the Second Circuit did not feel bound to defer to the DOL Test and instead proceeded with its own analysis.<sup>96</sup>

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85. 791 F.3d 376 (2d Cir. 2015).

86. *See generally id.*

87. *See id.* at 381 (“The FLSA unhelpfully defines ‘employee’ as an individual employed by an employer.”).

88. *See id.* at 381–82 (noting the lack of Supreme Court precedent on unpaid interns but briefly describing the holdings of *Portland Terminal*).

89. *See id.* at 382.

90. *See id.* (noting that the district court applied the DOL Test but balanced the factors instead of requiring all to be present).

91. *Id.* at 382.

92. *Id.*

93. *Id.* at 382–83.

94. *See id.* at 383 (“We decline DOL’s invitation to defer to the test laid out in the Intern Fact Sheet.”).

95. *Id.*

96. *Id.*; *see id.* at 385 (noting that the DOL factors “were derived from a 68-year old Supreme Court decision that dealt with a single training course



Next, the court discussed the primary beneficiary test. This much more flexible test first asks what the intern receives from the arrangement and then encourages analysis of the economic realities on either side of the employment relationship.<sup>97</sup> The court noted, however, that this test's freedom is also its shortcoming.<sup>98</sup> Such flexibility requires guidance, and the court provided a "non-exhaustive set of considerations" to guide the analysis.<sup>99</sup>

The factors the court laid out were (i) "the extent to which the intern and employer clearly understand that there is no expectation of compensation," (ii) the extent to which the internship training is "similar to that which would be given in an educational environment," (iii) whether "the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit," (iv) whether the internship "accommodates the intern's academic commitments," (v) if the internship's duration only extends as long as the intern receives benefit, (vi) whether the internship complements or displaces paid employees, and (vii) "the extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship."<sup>100</sup> These factors are to be weighed and balanced—"no one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee."<sup>101</sup>

The Second Circuit grounded its seven-factor balancing test both in past precedent and the future of the American workplace. Like in *Portland Terminal*, there was no evidence of rigidity or that "any particular fact was essential."<sup>102</sup> Instead, "the flexible approach" was faithful to the *Portland Terminal* decision and the jurisprudence of other circuits in which

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offered to prospective railroad brakemen" and thus was not particularly relevant to the modern internship).

97. *Id.* at 383–84.

98. *See id.* at 384 ("Although the flexibility of the primary beneficiary test is primarily a virtue, this virtue is not unalloyed.").

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

balancing approaches were favored.<sup>103</sup> Perhaps more importantly, the Second Circuit embraced “a central feature of the modern internship—the relationship between the internship and the intern’s formal education.”<sup>104</sup> The court felt that the DOL Test and earlier precedent were not tailored to the modern American workplace, but that, by addressing “educational aspects of the internship,” the Second Circuit’s application of the modern primary beneficiary test “better reflect[ed] the role of internships in today’s economy.”<sup>105</sup>

### 5. Other Circuits Respond to *Glatt*

In the wake of the Second Circuit’s decision in *Glatt*, other circuits not only began to adopt the general principles of the modern primary beneficiary test but also cited to the opinion directly.<sup>106</sup> This much-needed unity would finally provide some clarity and uniformity in defining the employment relationship of interns and employers across the country.<sup>107</sup> Later the same year, in *Schumann v. Collier Anesthesia, P.A.*,<sup>108</sup> a group of student registered nurse anesthetists attending a master’s degree program that involved a clinical curriculum sued the anesthesia practice where the externship took place.<sup>109</sup> The students believed they were owed wages for the hours they had worked in the clinical setting.<sup>110</sup> The Eleventh Circuit benched

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103. *Id.*; see *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (encouraging a flexible approach addressing the totality of circumstances in the relationship); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1029 (10th Cir. 1993) (rejecting rigid rules and choosing to balance factors).

104. *Glatt v. Fox Searchlight Pictures Inc.*, 791 F.3d 376, 385 (2d Cir. 2015).

105. *Id.*

106. See generally *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015); *Hollins v. Regency Corp.*, 867 F.3d 830 (7th Cir. 2017); *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139 (9th Cir. 2017).

107. See FIELD ASSISTANCE BULLETIN, *supra* note 49, at 3.

108. 803 F.3d 1199 (11th Cir. 2015).

109. See *id.* at 1202.

110. *Id.*

the DOL Test<sup>111</sup> and strict adherence to *Portland Terminal*.<sup>112</sup> Instead, the court adopted the modern primary beneficiary test from *Glatt* and rubber-stamped the Second Circuit's factors.<sup>113</sup> Again, the court focused on finding a test that could readily be applied to internships and the current American workplace instead of relying on guidance from a pre-internship era.<sup>114</sup> In applying the test, the court noted that internship status was not barred simply by the employer receiving some benefit from the relationship.<sup>115</sup>

To assist the district court in further fact-finding when applying this flexible standard, the court offered additional, more detailed guidance.<sup>116</sup> The court noted that when an internship is a cohesive and concurrent part of an academic program, analysis of the fourth factor—accommodating academic scheduling—would require a fact-based inquiry for “whether a legitimate reason exist[ed] for clinical training to occur on days when school [was] out of session.”<sup>117</sup>

In analyzing the duration of the internship, the Eleventh Circuit suggested that a court should first ascertain the “goals of the internship” and then determine what the appropriate duration should be, keeping in mind that “designing an internship is not an exact science.”<sup>118</sup> The court felt that this factor should weigh against internship status only if the duration was “grossly excessive in comparison to the period of beneficial learning.”<sup>119</sup> This more relaxed standard allowed for the anesthesiology program to extend for four semesters regardless of when the student completed the state-mandated

111. *See id.* at 1203 (“But, with all due respect to the Department of Labor, it has no more expertise in construing a Supreme Court case than does the Judiciary.”).

112. *See id.* (“*Portland Terminal* is nearly seven decades old and, in our view, addresses a very different factual situation . . .”).

113. *See id.* at 1210–12.

114. *See id.* (noting that *Portland Terminal* was out of date and did not understand “longer-term, intensive modern internships”).

115. *See id.* at 1211 (“Indeed, there is nothing inherently wrong with an employer’s benefitting from an internship that also plainly benefits the interns.”).

116. *See id.* at 1213.

117. *Id.*

118. *Id.*

119. *Id.* at 1214.

number of cases, so long as the interns were not forced to work “grossly excessive hours” to pass the threshold in less than four semesters.<sup>120</sup> This guidance reads the fifth factor—assessing the duration of an internship—as a check on extreme overscheduling of interns rather than as a critique of the chosen duration of an internship from the outset.<sup>121</sup>

Finally, the court cautioned that analysis of any such employment relationship “may not necessarily be an all-or-nothing determination.”<sup>122</sup> By positing several hypotheticals, the Eleventh Circuit envisioned situations in which the majority of an internship may be above board, but in which an employer could still wrongly take advantage of an intern.<sup>123</sup> In such circumstances, the court expected the intern to be seen as such for the bona fide portions but as an employee for any tasks or hours expended beyond the scope of the internship.<sup>124</sup> The Eleventh Circuit adopted the *Glatt* factors without exception but provided helpful elaboration on the application of several factors in defining the relationship.

The Seventh Circuit joined the cohort of courts applying the modern primary beneficiary test in *Hollins v. Regency Corp.*<sup>125</sup> In that case, the district court had refused to apply the DOL Test, a decision that was affirmed on appeal, and instead turned to the *Glatt* factors.<sup>126</sup> In defining the employment relationship between a cosmetology student and the salon where she worked as part of a practical learning curriculum, the circuit court found that the modern primary beneficiary test (i) appropriately focused on the benefits received by the intern, (ii) gave the court appropriate flexibility to account for the economic realities of each party, and (iii) understood the modern internship and

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120. *Id.*

121. *See id.*

122. *Id.*

123. *See id.* at 1214–15 (providing the example of an employer requiring an intern to paint a house to complete an otherwise bona fide internship even though that task is irrelevant to the scope of the internship).

124. *See id.* at 1215 (noting that the task would need to be “so far beyond the pale of the contemplated internship that it clearly did not serve to further the goals of the internship” to create an employment relationship).

125. 867 F.3d 830 (7th Cir. 2017).

126. *See id.* at 835–36; *see also* *Hollins v. Regency Corp.*, 144 F. Supp. 3d 990, 998 (N.D. Ill. 2015) (turning to the *Glatt* factors “in the absence of Seventh Circuit authority”).

American workplace.<sup>127</sup> Ultimately, the Seventh Circuit approved the use of the test from *Glatt*, leaving the DOL Test in its wake.<sup>128</sup>

The Ninth Circuit's decision in *Benjamin v. B & H Education, Inc.*<sup>129</sup> provides yet another instance of a circuit court adopting the decision in *Glatt* and rejecting the DOL Test. The case featured cosmetology students who challenged their status as interns due to the menial nature of many tasks they were assigned.<sup>130</sup> After detailing *Portland Terminal*,<sup>131</sup> further Supreme Court jurisprudence,<sup>132</sup> and other applications of the FLSA,<sup>133</sup> the court focused on the DOL Test.<sup>134</sup> The court noted that the DOL Test was "informal guidance" derived by an agency that "ha[d] struggled with formulating the appropriate test or guidelines to apply in dealing with issues related to interns/employees."<sup>135</sup> It then turned its analysis to the growing popularity of *Glatt's* modern primary beneficiary test.<sup>136</sup> Citing the "analysis by our sister circuits" as correct interpretation of the Supreme Court's guidance,<sup>137</sup> the Ninth Circuit joined the fold and adopted the same test and factors.<sup>138</sup>

While the various circuit courts had spent decades looking beyond the DOL Test, until 2015 no one voice had promulgated a clear standard that could replace it. In the two years after the

127. See *Hollins*, 867 F.3d at 836.

128. See *id.* at 836–37.

129. 877 F.3d 1139 (9th Cir. 2017).

130. See *id.* at 1141 (noting the plaintiffs' complaint that "much of their time [was] spent in menial and unsupervised work").

131. See *id.* at 1143–44 (directing that any inquiry should begin with *Portland Terminal*, a "seminal case" in defining employment relationships under the FLSA).

132. See *id.* at 1144 (exploring additional Supreme Court cases and their focus on the economic realities of the relationship).

133. See *id.* at 1144–45.

134. See *id.* at 1145.

135. *Id.*

136. See *id.* at 1146.

137. *Id.* at 1147.

138. See *id.* ("We agree with those decisions that the primary beneficiary test best captures the Supreme Court's economic realities test in the student/employee context and that it is therefore the most appropriate test for deciding whether students should be regarded as employees under the FLSA.").

*Glatt* decision, the circuits began to band together, resolving their own circuit split, and chose to follow the modern primary beneficiary test. By the end of 2017, less than two years after the *Glatt* decision, four circuits had chosen to adopt the test, and more were likely to follow.

### C. Changes in DOL Guidance

In January 2018, the WHD decided to “conform to the federal courts of appeals’ determination and use the same court-adopted test to determine whether interns or students are employees under the FLSA.”<sup>139</sup> The WHD rescinded the DOL Test and chose to align its guidance with the modern primary beneficiary test to remove “unnecessary confusion” and allow for the holistic, case-by-case approach favored by the more flexible and applicable modern test.<sup>140</sup> This change came mere weeks after the Ninth Circuit’s decision adopting the modern primary beneficiary test in *Benjamin*.<sup>141</sup> The WHD created a new fact sheet for internship programs that reproduced the *Glatt* factors and embraced the circuit courts’ flexible approach.<sup>142</sup>

While the Supreme Court may have taken on the issue of unpaid interns if the disjunction between the DOL and the courts or the pre-*Glatt* circuit split remained, this disunion no longer existed.<sup>143</sup> Instead, the newfound conformity between the circuits and the DOL coupled with diligent efforts to ground the new test in Supreme Court precedent has likely removed the topic from the Court’s docket. Ultimately, the Court has not truly been asked to opine on the issue as neither the DOL nor unpaid interns are filing petitions for certiorari.<sup>144</sup> While the Court, of course, retains the power to review the modern

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139. FIELD ASSISTANCE BULLETIN, *supra* note 49, at 2.

140. *Id.* at 2–3.

141. *See id.* at 1–2 (announcing the change on January 5, 2018); *Benjamin v. B & H Educ., Inc.* 877 F.3d 1139, 1139 (9th Cir. 2017) (announcing the opinion on December 19, 2017).

142. *See* FACT SHEET #71, *supra* note 9, at 1.

143. *See The Judicial Branch*, WHITE HOUSE, <https://perma.cc/S6XG-C277> (explaining that the Supreme Court takes on cases it views “sufficiently important” such as circuit splits).

144. *See Benjamin v. B & H Educ.*, No. 15-17147 (9th Cir. 2015) (failing to petition the Supreme Court for certiorari); *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4478 (2d Cir. 2015) (same).

primary beneficiary test, it seems that for present and the foreseeable future the test is secure.

## II. THE WORKING STUDENT POSITION

*No hour of life is wasted that is spent in the saddle.*

Winston Churchill<sup>145</sup>

Ask top-level equine professionals where their careers truly began and the majority will mention their time as a working student. In the equestrian industry this unique position is seen as a “rite of passage.”<sup>146</sup> While these positions provide hours of on-job training for young riders, they are generally most respected for revealing the realities of a career as a professional equestrian—long hours, hard work, financial struggles, and successes that are routinely followed by hardship and heartbreak.<sup>147</sup> To the equestrian industry these positions are invaluable and are defended tooth-and-nail as a critical element to both creating successful professionals and helping equestrians identify whether a long-term career in the industry is a tenable goal.<sup>148</sup>

While the positions are often faulted for their lack of clarity and for being hotbeds of abuse,<sup>149</sup> the equestrian industry and

145. Madeleine Silver, *15 of the Greatest Horse Quotes of All Time*, HORSE & HOUND (Oct. 4, 2021), <https://perma.cc/PEV4-4B3V>.

146. Mintz, *supra* note 11.

147. Equestrian careers are marked with great inconsistency—an equestrian may win one show and fall off at the next, a top horse can break her leg playing in the field. *See id.* (discussing how a working student position removes childhood fantasies of what being a professional equestrian looks like and reveals truths of the industry); *Working Students*, DESTINATION EVENTING, <https://perma.cc/VCX3-SY6X>.

148. *See* Mintz, *supra* note 11 (providing several professionals’ opinions that being a working student is an “essential step” and noting that the hard work and long hours often result in young riders with dreams of “going pro” changing their minds and pursuing further education or traditional employment); Telephone Interview with B. Lucy Gordon (Dec. 28, 2021) (noting that many working students change their minds about working in the industry after being exposed to the realities of that career and explaining how working student positions help to whittle down the number of young equestrians who believe they could be professionals).

149. *See* Berendt, *supra* note 14 (“But for every story of success and symbiosis, there are countless more of endless hours, vanishing pay checks, and unclear career progression.”).

former working students routinely defend them.<sup>150</sup> One of the best arguments for maintaining working student programs is the accessibility they provide to a very expensive sport.<sup>151</sup> Without working student programs, which admittedly may not be as accessible as many believe,<sup>152</sup> the equestrian industry could become even more inaccessible to lower-income and first-generation riders for whom these programs are the main point of entry into the industry.<sup>153</sup>

Additionally, working student positions should be understood in the context of the unique industry of which they are but one part. Equine professionals simultaneously compete at the top levels of an Olympic sport and operate coaching businesses to keep afloat.<sup>154</sup> Unlike professional basketball and football players, equestrians do not receive multimillion-dollar

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150. See Mintz, *supra* note 11; *infra* APPENDIX B fig. 32 (indicating that most would recommend the experience).

151. See Nicole Brown et al., *USEA Podcast #297: The Working Student Special*, U.S. EVENTING ASS'N, at 04:08–04:30 (Nov. 22, 2021), <https://perma.cc/2A79-H992> (noting that working student opportunities are often the only opening for equestrians without access to family funding); Telephone Interview with B. Lucy Gordon, *supra* note 148 (explaining how her family did not fully financially support her upper-level competition goals and that she was able to reach those goals by pursuing a working student position); Telephone Interview with Zoe Jones (Jan. 2, 2022) (“Working student positions were how I was able to afford riding consistently at all coming from a family that did not have any horse experience or the funds to fully back my horse habit.”).

152. See Berendt, *supra* note 14 (“But free lessons and discounted saddlery doesn’t pay the rent . . .”); Brown et al., *supra* note 151, at 07:44–07:53 (explaining that working student programs require financial assistance from parents or loans).

153. See Kristen Kovatch, *Equality, Diversity & Opportunity in the Equestrian World*, HORSE NATION (Jan. 21, 2019), <https://perma.cc/53JA-7E6A> (“Imagine now how much untapped rider talent may never get a chance to shine—whether through lack of access, or lack of belief that this world is for them.”); Leslie Wiley, *Where Is the Diversity in Eventing?*, EVENTING NATION (Jan. 15, 2018), <https://perma.cc/F6NP-VLZC> (“That’s where the vestigial socioeconomic barriers come in: not everyone is in a financial position to invest in the training, equipment and competition costs required to participate, much less excel, in certain sports.”).

154. See *Crowdfunding, Day Jobs Help Equestrians Pay High Costs of Competition*, NBC OLYMPICS (Aug. 6, 2021, 4:08 PM), <https://perma.cc/FDW7-4HEZ> (last updated Oct. 8, 2021, 8:05 AM) (referencing various ways Olympic athletes were able to fund their expensive sports as well as trips to high-level competitions).



salaries just for going to the barn and riding their best horses.<sup>155</sup> Instead, professionals often must train young horses and coach riders to make a living.<sup>156</sup> Unlike golf and tennis matches, only the very highest levels of equestrian competition offer prize money and even then the rider cannot make a living off of prize money alone.<sup>157</sup> While this may not be entirely unique among sports, equestrians must have the time and finances to take care of at least two living beings: themselves and their horse(s).<sup>158</sup> Often, this results in equestrians struggling to hold down more traditional jobs to fund their sport and a constant need to seek out financial backers.<sup>159</sup>

All these factors make the equestrian industry unique even among comparable sport industries and help explain why the working student position—seen as a symbiotic barter relationship—has such a strong hold. To analyze the working student position under the FLSA and the modern primary beneficiary test, it is necessary to take a deep dive into the realities of the positions. To gather this data, the Author surveyed and interviewed industry participants as this Part explains.

#### A. *Survey and Interview Methodology*

The first problem with analyzing the stereotypical working student position under the *Glatt* factors was the lack of information on what that position looked like. Data on working students is cryptically hard to find. These positions crop up across the country in multiple equestrian disciplines and

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155. *See id.*

156. *See id.*

157. *See id.* (“Most of the time we don’t recover our expenses just to enter [an] event.”).

158. *See* Brett Knight, *A Puzzle Before the Games: How Equestrian Teams and Their Horses Get to the Olympics*, FORBES (July 23, 2021), <https://perma.cc/3QQX-LK2L> (referencing the high cost of equestrian sports that require care, maintenance, supplies, and travel for both horse and rider).

159. *Crowdfunding, Day Jobs Help Equestrians Pay High Costs of Competition*, *supra* note 154. Equestrians often seek financial support from owners or syndicates that provide cash influxes to purchase horses as well as routine payments for the care and training of the animals. *See 10 Frequently Asked Questions About Horse Syndication*, EVENTING NATION (Feb. 9, 2016, 12:00 PM), <https://perma.cc/DNK5-8UY6>.

routinely exist without paperwork or records.<sup>160</sup> To complete the necessary analysis, the Author developed a two-pronged approach to gather information from industry participants: a survey followed up by individual telephone interviews.

### 1. Survey

The first prong of data collection was a survey. By asking individual respondents a range of background questions about their experiences as working students and the choices they made after their positions ended, the survey gathered the information required to analyze the working student position and equestrian industry and apply the factors of the primary beneficiary test.

#### *a. Format*

The survey consisted of eighty-four questions in six separate parts.<sup>161</sup> Part I sought basic information about the respondent at the time she held the position, Parts II and III focused on the details of the position itself, Part IV focused on the outcomes of being a working student, and Parts V and VI mirrored Parts II and III for those who had held more than one working student position. The majority of the questions were multiple choice, sometimes giving the respondent the ability to choose more than one answer, but some were open-ended short answer questions.<sup>162</sup> Each question was designed to elucidate information that would help explain who a typical working student was, to answer questions posed by the primary beneficiary test, or to compare and contrast with internship-related caselaw.

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160. See Berendt, *supra* note 14 (referencing the lack of “paper trail” and data on working student positions).

161. All information on the format of the survey is taken from APPENDIX A. The survey itself is reproduced within. *Infra* APPENDIX A fig. 1. The survey was approved by the Institutional Review Board of Washington & Lee University on December 6, 2021. *Infra* APPENDIX A fig. 2.

162. Open-ended questions were used to get further information on the type of duties taken on or to further understand the respondent’s response to a yes or no question by asking why they chose that response.

*b. Results*

Overall, 115 respondents completed the survey.<sup>163</sup> Respondents were not required to answer all questions and could skip over any that made them uncomfortable or that they did not feel applied to their circumstances. The survey was hosted on SurveyMonkey and the respondents accessed it through direct internet correspondence.<sup>164</sup> Equestrians frequently run a significant part of their business through social media, making the industry well-suited to this approach.

The survey compiled data through the snowball method, where participants themselves recruit their peers to participate as well.<sup>165</sup> This method serves to reach a high number of participants who have rare characteristics, making it highly effective to get the survey to as many working students as possible as quickly as possible.<sup>166</sup> SurveyMonkey provided breakdowns of the responses for each question. The author then compiled the results into graph form, often combining responses from corresponding questions in different parts of the survey.<sup>167</sup>

*c. Limitations*

The survey, as with most research, was not immune to limitations that may affect its findings. First, the survey had a relatively small sample size. While the return was certainly enough to provide a snapshot of working students, these positions have existed for decades across the country and the number of potential respondents was expansive. The smaller the sample size the less representative it can be.<sup>168</sup> Another common

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163. See *infra* APPENDIX B.

164. While working students have no formal organizational groups, the equestrian industry is a very connected community. The Author was able to spread the survey far beyond those who she knew or had met, both through personal friends on social media and by using Facebook groups.

165. See *Snowball Sampling*, BUS. RSCH. METHODOLOGY, <https://perma.cc/XQQ6-L2K4> (describing this method as a “non-probability sampling method used when characteristics to be possessed by samples are rare and difficult to find”).

166. *Id.*

167. See *generally infra* APPENDIX B.

168. A.E. Simmons, *The Disadvantage of a Small Sample Size*, SCIENCING, <https://perma.cc/2TVQ-4TU2> (last updated May 14, 2018).

issue is voluntary response bias, which occurs when a smaller number of participants become the voice of the whole group because they are the only ones aware of the survey's existence or who are willing to answer.<sup>169</sup> While an ideal survey would have taken place over a longer timeframe and drawn a greater number of responses, the Author combatted this bias through efforts to spread the survey to a wide group and make it accessible to the general public.

Second, the survey was not exhaustive in its questions. As the internship inquiry is incredibly detailed and fact-based, every piece of information about a position can be relevant.<sup>170</sup> This interest had to be balanced with the need to create an accessible survey that respondents would be willing to complete. Due to these concerns, the Author created a survey that asked the most relevant questions and could be completed in under fifteen minutes. The gaps left by this limitation were addressed through the phone interviews described within that provided more detail and background.

Finally, the survey relied on the honesty of its participants and had no formalized gatekeeping. Since the survey was open to all, the sample size could be contaminated by respondents who were not actually working students. To combat this, the survey featured an introductory page that was explicit about who should participate. Additionally, while the survey was shared on social media, it was mostly circulated in private equestrian groups.

## 2. Interviews

While the survey provided a wealth of information, the Author additionally sought out interviews with two industry members who had compelling stories and multi-level views of the working student position. These particular individuals were especially relevant to this Note because of their lengthy experience in the industry as working students but also for the variety of positions each held, the types of programs they interacted with, and their wider experiences with the industry as a whole. These interviews were conducted over the phone and

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169. *Id.*

170. *See* FACT SHEET #71, *supra* note 9.

consisted of asking open-ended questions about their stories as well as more targeted follow-up questions as necessary.

B. Lucy Gordon began riding at a young age and took on her first working student position in her teenage years when she began working at a farm with a long-standing working student program over school breaks.<sup>171</sup> After starting college, Lucy remained involved in the program and eventually took on a supervisory role as well as recruited new students and built up the program. Post-graduation, Lucy returned to the equestrian industry part-time and worked in various roles, both paid and unpaid, at a top-level program to reach her upper-level competition goals. Currently, Lucy has completed nursing school and works full-time in a hospital and, while she remains connected to the equestrian industry, it is no longer her main career. Lucy provided detailed observations of programs at multiple levels and experiences she was aware of from her relationships in the industry and of positions that she felt were positive as well as negative.

Zoe Jones grew up in the Pacific Northwest where she began riding in her teenage years.<sup>172</sup> To fund her riding, Zoe turned immediately to working student positions, which eventually led her across the country via three separate states. Zoe has worked in various positions in the industry, from entry-level working student, to traveling competition groom, to barn manager supervising working students. Recently, Zoe left the equestrian industry but still rides competitively and occasionally works at her local barn. Zoe's experience working in so many different programs helped further identify commonalities, as well as show the progression a working student can expect through the industry.

### B. *Characteristics of the Position*

In any FLSA case, a court would take an individualized and fact-based approach to analyzing an employment relationship;

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171. All facts relating to Lucy and her career are taken from Telephone Interview with B. Lucy Gordon, *supra* note 148.

172. All facts relating to Zoe and her career are taken from Telephone Interview with Zoe Jones, *supra* note 151. Zoe's name has been changed to maintain anonymity.

thus, the failure of one factor would not mean the failure of all.<sup>173</sup> Nonetheless, similarities identified by the survey and interviews can help explain how a legal complaint or answer may present a typical working student position and how the position would fare under the FLSA. This Subpart will outline the basic characteristics of the working student programs in order to predict how a court would analyze the position under the factors of the modern primary beneficiary test.

### 1. Who Are Working Students?

Working students are typically young equestrians in their late teens and early twenties looking for opportunities to further their riding and become part of the equestrian industry.<sup>174</sup> In an even higher percentage than equestrians in general, working students predominantly but not exclusively identify as female.<sup>175</sup> Working student positions can be found across the country everywhere from small local barns all the way up to Olympic-level programs.<sup>176</sup> While the level of experience needed to fulfill a working student position varies based on the program, riders frequently must have a basic familiarity with horse care, be able to handle horses safely, and ride at an intermediate level.<sup>177</sup> As is increasingly true for internships in other industries, experience is encouraged.<sup>178</sup>

Many working students take on the position in order to take a necessary first step on the ladder toward becoming a

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173. See FACT SHEET #71, *supra* note 9 (“[N]o single factor is determinative.”).

174. See Mintz, *supra* note 11 (summarizing the typical working student position); Berendt, *supra* note 14 (explaining the motivation behind taking on a working student position); *infra* APPENDIX B fig. 1 (reporting the age breakdown for working students).

175. Over 96% of respondents identified as female. *Infra* APPENDIX B fig. 2.

176. See *infra* APPENDIX B fig. 37; Telephone Interview with Zoe Jones, *supra* note 151 (relaying experiences as a working student across the country and with professionals at various levels).

177. See Brown et al., *supra* note 151, at 21:28–22:08, 23:09–24:27 (explaining the differences among programs, how to gain experience, and the minimum skill level accepted at an upper-level program); *Working Students*, *supra* note 147 (describing minimum requirements for the position).

178. See Brown et al., *supra* note 151, at 21:28–23:09 (discussing how inexperienced riders are unqualified to take care of top-level horses and that the prerequisite experience can be gained in shorter, lower-level programs).

professional equestrian, as well to experience full immersion in the industry before deciding whether to pursue a career in it.<sup>179</sup> Others, however, may have goals such as improving their riding and achieving competitive success.<sup>180</sup> Other still are seeking a last hurrah with horses before returning to traditional academic or career pursuits.<sup>181</sup> Regardless of their goals, working students often enter their positions much like a new intern—bright-eyed, bushy-tailed, and idealistic about the industry they dream of making their career.<sup>182</sup>

## 2. Stipends, Salaries, and Other Wages

Working students do not receive an hourly wage or salary, meaning they do not fall into the boundaries of a traditional employment relationship. One way that employers help address the economics of this position is to offer stipends.<sup>183</sup> A stipend is typically a weekly or monthly cash allotment that can be used to balance some of the costs of living.<sup>184</sup> Stipends are neither commonplace nor entirely infrequent, and even when offered, bring their own problems.<sup>185</sup> Often, programs will only begin doling out cash once a rider has held the position for several months and has proven her skills and willingness to remain in the program.<sup>186</sup> Even then, working students can face difficulties collecting the stipends.<sup>187</sup>

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179. See Mintz, *supra* note 11.

180. See Telephone Interview with B. Lucy Gordon, *supra* note 148.

181. See *id.*

182. See *id.* (“Everyone starts off loving the industry: excited to work and full of energy.”).

183. See Berendt, *supra* note 14.

184. See Julia Kagan, *Stipend*, INVESTOPEDIA, <https://perma.cc/3BMJ-NKZF> (last updated Sep. 6, 2021) (“A stipend is a nominal sum of money paid to trainees, interns, or students to help cover basic costs while they receive career training.”).

185. Twenty-five respondents were offered a stipend, 120 were not. See *infra* APPENDIX B fig. 19.

186. See Brown et al., *supra* note 151, at 06:35–6:41 (explaining that working students qualify for stipends once they have proven they are doing well and going to stay); Berendt, *supra* note 14 (noting that stipends are often reserved for riders who have already paid their dues to the program).

187. Two respondents reported never receiving promised funds. *Infra* APPENDIX B fig. 38.

Importantly, while the value of these stipends can vary, they are neither commensurate to a minimum wage for hours worked nor meant to fully cover the living expenses of the worker.<sup>188</sup> Professional equestrians are typically fully aware that their programs do not fulfill a working student's financial needs.<sup>189</sup> In response, one professional remarked that she wished she could pay more but that the relationship needed to work for both parties and her business would not support a more robust stipend.<sup>190</sup> Working students are certainly not expected to develop any profit from a stipend. Additionally, no working students reported that their stipends increased or decreased with the hours they worked.<sup>191</sup> When money is exchanged, it is never commensurate to a FLSA-compliant wage nor does it accommodate the concept of a forty-hour workweek.<sup>192</sup>

To meet this gap in financial resources, working students are often encouraged to take on additional tasks in their free time.<sup>193</sup> Almost two-thirds of survey respondents found opportunities to make more money, usually by performing extra barn chores and tasks for paying clients or taking on temporary work for neighboring programs at horse shows.<sup>194</sup> The vast majority of working students, however, must rely on savings, benefactors, or family to make ends meet.<sup>195</sup> As such, working student positions are often financially inaccessible for many of the riders that should be able to gain access to the exclusive industry through an internship.

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188. See Brown et al., *supra* note 151, at 06:54–07:02 (explaining that the stipend is not much but is intended to help cover rent).

189. See Berendt, *supra* note 14.

190. Brown et al., *supra* note 151, at 05:04–05:20.

191. See *infra* APPENDIX B fig. 38 (noting that stipends were not negotiable or dependent on exterior factors).

192. See Berendt, *supra* note 14.

193. More than a third of respondents took on additional tasks to make money. *Infra* APPENDIX B fig. 26; see Brown et al., *supra* note 151, at 07:03–07:40.

194. *Infra* APPENDIX B fig. 26.

195. See Brown et al., *supra* note 151, at 07:44–07:53 (suggesting that the financial difference should be made up by parents or by going into debt).



### 3. Formal Agreements

Working student positions are overwhelmingly found through person-to-person recommendations and social media advertisements.<sup>196</sup> While not independently problematic, this system is likely a contributing factor to the lack of formalized terms or written agreements in these programs.<sup>197</sup> There is an incredible lack of a paper trail among working students and professional equestrians.<sup>198</sup> Without clear, formal agreements on benefits, hours, and duration, working students are often left unsure of what the position will truly entail and what they will actually receive.<sup>199</sup> Frequently this becomes problematic only once a working student and employer are at odds over an issue and neither has concrete proof supporting her understanding of the agreement.<sup>200</sup> This lack of records will create further issues for both sides in the event of any legal or administrative filings as there is nothing but “he-said-she-said” evidence to substantiate their claim with.

### 4. Duration

The duration of the working student position usually ranges from six to twelve months when initially planned, though shorter and longer durations are available.<sup>201</sup> Duration is often based on one of two factors: either the working student’s availability over academic breaks, or the minimum time the employer believes is required for the relationship to be beneficial to both parties.<sup>202</sup> Professional equestrians often look for a more

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196. Participants indicated that recommendation was the most prevalent way to find a position. *Infra* APPENDIX B fig. 4.

197. Less than 7% indicated their positions had written agreements and over 40% responded that their positions had no set terms at all. *Infra* APPENDIX B fig. 5.

198. *Infra* APPENDIX B fig. 5.

199. See Berendt, *supra* note 14.

200. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (“In one position there was a lot of flexibility in the agreement and that lead to serious problems when the relationship became strained.”).

201. While 40% of positions were expected to last between six and twelve months, 24% were set to last over twelve months and 36% were planned for under six months. *Infra* APPENDIX B fig. 15.

202. See *Working Students*, *supra* note 147 (“We ask for a commitment of six months.”).

long-term commitment as it may take a working student several weeks to understand the routine and become beneficial to the program.<sup>203</sup> Frequently, employers also schedule working students around their competition schedules in an effort to avoid turnover at a critical juncture in the season.<sup>204</sup> Other programs accommodate shorter periods and thus less experienced or younger equestrians with options that run over school breaks.<sup>205</sup>

Regardless of the duration of the program, the focus is frequently on the minimum length of time required for an employer to derive benefit from the working student as opposed to how long it takes for a working student to complete objectives or learn set tasks.<sup>206</sup> Professional equestrians are known to bad-mouth and blacklist working students who are unwilling to abide by these minimum durations.<sup>207</sup> Overall, the duration of a position, when not tied to an academic schedule, is overwhelmingly set by the professional and her needs instead of by the working student or hers.

## 5. Working Hours

Though many positions share commonalities, the highest level of uniformity appears in the calculation of a working student's workweek. Over 80% of working students reported working between eight and sixteen hours a day.<sup>208</sup> Similarly, over 84% work at least five days a week with 26% of those

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203. See Telephone Interview with Zoe Jones, *supra* note 151 (noting that the employers often looked for extended commitment because the first months were spent training and becoming a trusted member of the team).

204. See *id.* (explaining that having a working student leave during peak season or before an extended trip out of state is very problematic for a business).

205. See Will Faudree Eventing, FACEBOOK (June 20, 2022), <https://perma.cc/27J5-B47M> (expecting a minimum of three months); Telephone Interview with B. Lucy Gordon, *supra* note 148 (“We worked over the summers and would come to the farm on school breaks, too.”).

206. Telephone Interview with Zoe Jones, *supra* note 151 (“The minimum position length is not because the professional thinks that the working student will learn everything within that time, it’s what suits her business.”).

207. See *id.* (“You’ll see professionals making new ‘help wanted’ listings shaming the previous working student who left early. It’s so commonplace that no one seems to think of it as a bad look.”).

208. *Infra* APPENDIX B fig. 6.

working a full seven-day workweek.<sup>209</sup> Simple math makes it obvious that working students are typically clocking far past what the FLSA considers the overtime threshold and far more than the average internship program.<sup>210</sup>

Beyond these already extensive hours in the average workweek, working students are often caught up in the long days associated with emergency veterinary issues and competitions. During the intensity of competition season the day can start at 4:00 AM and end at 8:00 PM—or longer—Friday to Sunday.<sup>211</sup> Similarly, during foaling season or when veterinary issues arise and horses need round-the-clock supervision, working students are often called up to bat and take on extra hours.<sup>212</sup> One professional willingly acknowledged that, despite her efforts not to overwork her working students, the hours can be “relentless” and “ridiculous.”<sup>213</sup> These long hours are tied to a long history of agricultural labor<sup>214</sup> and are so extensive that working students rarely have time to spend on their personal lives, developing their futures, or enjoying hobbies.<sup>215</sup>

## 6. Duties

While the individual tasks a working student takes on are tailored to the specific program, the overwhelming theme of any such position is horse management. While few working students spent more than a quarter of their time riding, the overwhelming majority spent at least that much on horse care as well as dedicating considerable time to non-horse-related

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209. *Infra* APPENDIX B fig. 7.

210. See *How Many Hours a Week Do Interns Work?*, CAREER EMP., <https://perma.cc/4YLB-HYAA> (last updated Nov. 11, 2021) (predicting that the time commitment for an average internship is ten to twenty hours per week during the school year and tops out at forty hours per week in the summer).

211. Brown et al., *supra* note 151, at 29:07–29:10.

212. See Telephone Interview with B. Lucy Gordan, *supra* note 148 (recalling early mornings and late nights tending to various ailments or watching for foals).

213. Brown et al., *supra* note 151, at 29:05–29:08.

214. See generally Susan D. Carle, *Unpaid Internships and the Rural-Urban Divide*, 80 WASH. & LEE L. REV. 539 (2023).

215. See Telephone Interview with B. Lucy Gordan, *supra* note 148 (noting that when one is embedded in a working student program it is often all horses all the time and there are no hours or energy left to commit to anything else).

activities such as cleaning stalls and stacking hay.<sup>216</sup> Professionals often see the working student position not as an opportunity to further a budding equestrian's riding skills but instead to show her the less glamorous and more day-to-day aspects of the industry.<sup>217</sup> A working student can expect to take on duties like grooming, tacking, bathing, feeding, and providing basic medical care and therapies.<sup>218</sup> Time riding is typically more of a reward than a chore or is limited to the most basic mounted tasks.<sup>219</sup> Though many working students would say they were motivated to take on such positions to become better riders,<sup>220</sup> the programs' emphases are often less on saddle time and more on horse management.<sup>221</sup>

The focus on horse management often means that a working student shares duties with paid employees like grooms and barn managers instead of the professional equestrians. Almost 80% of working students noted that their daily tasks were similar to those of other paid employees at the business.<sup>222</sup> The professionals, on the other hand, often spend closer to 75% of their time riding horses and teaching lessons, and the remaining 25% taking on horse management duties.<sup>223</sup> If a working student position is meant to be an internship that teaches equestrians how to become professionals by giving them a taste of that life, there is clear tension between the alleged

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216. *Infra* APPENDIX B figs. 8–10.

217. *See generally* Brown et al., *supra* note 151; *Working Students*, *supra* note 147.

218. *See* Telephone Interview with B. Lucy Gordon, *supra* note 148; Telephone Interview with Zoe Jones, *supra* note 151.

219. *See* Telephone Interview with B. Lucy Gordon, *supra* note 148 (explaining that riding time was usually saved for after all other chores and often consisted of hacking horses, which is basically taking them on a long walk, or trot sets, which is a fitness building workout, instead of skill-building rides).

220. *See id.* (“I chose to pursue working student programs for the additional ride time and opportunities to get lessons; the horse management, while something I care about deeply, was not the reason I took on the position.”).

221. *See* Telephone Interview with Zoe Jones, *supra* note 151 (noting that her working student positions centered on teaching her horse management skills and how to run a successful equine program).

222. *Infra* APPENDIX B fig. 12.

223. Telephone Interview with Zoe Jones, *supra* note 151.

goals of the position and the daily activities working students undertake.

### 7. Interaction with Academics

No formal certification process or academic program for professional equestrians or barn managers currently exists in the United States.<sup>224</sup> This vacuum is no small part of why the working student position is popular but it also prevents the position from fitting hand-in-glove with an academic program the way that many internships do.<sup>225</sup> While employers typically envision their programs as the equestrian industry's homage to a college education,<sup>226</sup> there is often no resulting diploma or certification. A few working students may succeed in obtaining academic credit for their work, but the vast majority do not.<sup>227</sup>

Undoubtedly, a working student position fills out an equestrian's resume, helping her find a more specialized or high-level working student position, gather clients, or transition into paid work.<sup>228</sup> When leaving the equestrian industry, however, riders will find themselves struggling to convey to a new employer what the position means or if they successfully "passed" the program.<sup>229</sup>

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224. See Berendt, *supra* note 14 (explaining that there is no U.S. equivalent to the British Grooms Association).

225. See Telephone Interview with Zoe Jones, *supra* note 151 ("I would have loved to come out of all those years working with a certification or something to prove what I had learned and what I could do, but that's not how it works.").

226. See Brown et al., *supra* note 151, at 07:44–07:53.

227. Only 6% of respondents were able to convert their working student positions into academic credit. *Infra* APPENDIX B fig. 31.

228. Brown et al., *supra* note 151, at 08:08–08:30; see Telephone Interview with Zoe Jones, *supra* note 151 ("When I went on to paid groom and barn manager jobs employers were very focused on who I had worked for in the industry.").

229. See Telephone Interview with Zoe Jones, *supra* note 151 ("Sometimes it looked like a gap in my resume where I was off playing with horses."); Telephone Interview with B. Lucy Gordon, *supra* note 148 (explaining how she often worked additional "normal jobs" in other fields to keep a more traditional resume).

## 8. Other Benefits

Even in the absence of monetary benefit, working students receive a wide array of other rewards for their hard work. These benefits are often uniquely tailored to the individual position and working student.<sup>230</sup> As previously noted, the terms of a position are rarely ever memorialized in writing, leaving plenty of problems with the quality, quantity, and actual existence of additional benefits.<sup>231</sup> Some additional benefits include housing, lessons, and free boarding of horses.

### a. *Housing*

One traditional benefit that employers pass along to their working students is housing, which can significantly lessen living expenses.<sup>232</sup> This housing may be a single or shared room in a house, a barn apartment, or a typical apartment.<sup>233</sup> Frequently, employers have space on the farm property built or repurposed to house working students to reduce costs and keep them close.<sup>234</sup> However, the quality of the housing is less predictable with almost an equal number of responses reporting conditions ranging from excellent to poor.<sup>235</sup> The most prevalent condition was “average,” described as “safe” and “basic,” which indicates that the monetary value of the housing is likely not so high as to equal what the working student’s paycheck would be if minimum wage and overtime policies were followed.<sup>236</sup>

Even when housing is provided, utilities and other important bills like phone, internet, and gas are usually not

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230. See Telephone Interview with B. Lucy Gordon, *supra* note 148.

231. See *supra* Part II.B.3.

232. Over 60% of respondents received housing. *Infra* APPENDIX B fig. 20.

233. See *infra* APPENDIX B fig. 20.

234. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (describing a working student apartment built directly next to the barn).

235. *Infra* APPENDIX B fig. 21.

236. *Infra* APPENDIX B fig. 20. It can certainly be argued that the current minimum wage does not cover the cost of living and thus a FLSA-compliant wage would not necessarily afford a working student more than “average” housing. See *The \$7.25 Minimum Wage Can’t Pay Bills in Any State*, CNBC (Mar. 2, 2021, 10:54 AM), <https://perma.cc/JS48-22XX> (last updated Mar. 2, 2021, 11:19 AM). Regardless, the value of this housing does not comport with the estimated salary working students would be earning if paid that minimum wage and overtime wage.

included.<sup>237</sup> Access to a cellphone and gas are often necessary for working students to find and accomplish additional jobs to round out their income and can easily be seen as essential expenses in modern times.<sup>238</sup> Similarly, internet access is often necessary to fulfill academic responsibilities, and has also become an ordinary amenity.<sup>239</sup> Regardless of the greater necessity of these utilities, they are clearly necessary for working students who are constantly on call and require them to fulfill their duties.<sup>240</sup> Working students are overwhelmingly expected to pay for and maintain access to these services independently of their employer.<sup>241</sup>

b. *Lessons*

Another add-on benefit many working students receive are riding lessons taught by professional equestrians. Almost 83% of working students surveyed received regular weekly lessons with their employer.<sup>242</sup> These lessons are time for working students to focus on themselves and their goals and progress their riding skills as opposed to the horse management duties that take up the bulk of their time.<sup>243</sup> Programs vary in the number of lessons given, but the majority of working students received at least two per week.<sup>244</sup> Lessons often range in value from \$50 to \$125 per session, and are a significant incentive for taking part in a program.<sup>245</sup>

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237. Almost 87% did not receive assistance with additional bills. *Infra* APPENDIX B fig. 22.

238. Telephone Interview with Zoe Jones, *supra* note 151.

239. Telephone Interview with B. Lucy Gordon, *supra* note 148.

240. *Id.* (noting that most communication from employers happened over text message); *id.* (recalling the story of a working student whose phone broke and felt it made her job difficult if not impossible to do well).

241. *Infra* APPENDIX B fig. 22; *see* Telephone Interview with B. Lucy Gordon, *supra* note 148 (“I don’t know any people who have ever had an employer help with phone or internet costs.”).

242. *Infra* APPENDIX B fig. 24.

243. *See* Telephone Interview with B. Lucy Gordon, *supra* note 148 (noting that while horsemanship is incredibly important, the lessons gave her the opportunity to focus on her own goals).

244. *Infra* APPENDIX B fig. 24.

245. The cost of lessons can vary widely based on geographic area, the skill of the instructor, length of lesson, and whether the lesson is for a group or a private session. *See Lessons & Training*, NEXT LEVEL EVENTING,

Nonetheless, working students often hit roadblocks when trying to cash in on this all-important benefit. Sometimes professionals do not set aside enough time to fulfill the promised number of lessons, lump the working student in with paying clients that may have different skills or receive more attention, or only schedule lessons during inconvenient times.<sup>246</sup> Additionally, as discussed above, long hours leave a working student exhausted such that she either does not ride her best in a lesson or is willing to skip a few in order to catch her breath.<sup>247</sup> While problems may present in many ways, they are prevalent.<sup>248</sup> As professionals often see the position as a horse management—instead of riding—program, their focus may slip from the benefit a working student most expects.<sup>249</sup> The best programs explicitly state the number of lessons given out and also make efforts to personalize the lessons to the horse and rider.<sup>250</sup> Horses and riders require unique attention to grow their skills and when a program can accommodate this need it

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<https://perma.cc/QR9A-UNY8> (recording lessons as \$100); *Services Offered*, DEEP PURPLE EVENTING, <https://perma.cc/6ZCG-VBX4> (noting a 45-minute private lesson costs \$90); *How Much Do Horse Riding Lessons Cost? Price Breakdown*, HORSY PLANET, <https://perma.cc/H9EY-38LN> (recording the average cost of lessons at \$40 to \$100 for lessons of all types and lengths of time).

246. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (“Sometimes lessons would be cancelled, sometimes they were at the worst time of the day, and sometimes I was squeezed in with other riders that weren’t working at the same level.”); Telephone Interview with Zoe Jones, *supra* note 151 (“It seems like however many lessons you are promised, it’s never what you actually get.”).

247. See Telephone Interview with Zoe Jones, *supra* note 151 (“Sometimes she would cancel a lesson because we ran out of daylight and I was honestly relieved to just finish my work and go home.”).

248. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (recalling that every former working student she knows has had these issues in at least one position).

249. See Brown et al., *supra* note 151, at 09:30–10:38 (noting that lessons are “only one slice of the pie” and working students who “want to see the horse management side of it” will be more fulfilled); Telephone Interview with Zoe Jones, *supra* note 151 (“My riding improved nowhere near as much as my horse management.”).

250. See Brown et al., *supra* note 151, at 05:55–06:33 (describing the efforts taken to create an individualized and adjustable program); *Working Students*, *supra* note 147 (promising “daily individual attention” for all working students).



is more likely to have a positive reputation and successful working students.

c. *Board*

Frequently working students travel to their positions with a horse in tow to keep furthering their competition goals and riding skills.<sup>251</sup> The cost of stabling a horse, including its stall, pasture, and feed is referred to as “board.”<sup>252</sup> A majority of working students receive board either at no cost or at a discount along with their position.<sup>253</sup> Board price varies from several hundreds into thousands of dollars monthly, making even discounted board a significant benefit.<sup>254</sup> It is important to note that, much like housing for humans, board does not refer to the full costs of upkeep on a horse.<sup>255</sup> Additional fees like shoeing, veterinary bills, supplements, equipment, and any competition entry fees are not included in this calculation and are not typically included in the working student program.<sup>256</sup> These costs can easily overwhelm the price of board.<sup>257</sup>

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251. More than half of respondents brought a horse with them. *Infra* APPENDIX B fig. 23.

252. Allison G., *Horse Boarding 101 (What It Costs, Types, FAQ)*, HORSE ROOKIE, <https://perma.cc/82DQ-WAY8>.

253. *Infra* APPENDIX B fig. 25.

254. Allison G., *supra* note 252.

255. *See id.*

256. *See* Brown et al., *supra* note 151, at 05:33–05:58.

257. The average cost of a basic four hoof shoeing in 2020 was \$154.91, which must be paid every four to six weeks, and many performance horses require additional shoeing needs like pads or stud holes, which can drive up the price. *How Much for Trims and Shoes*, AM. FARRIER’S J. (Mar. 11, 2021), <https://perma.cc/5H5H-6XS7>. Vet bills include regular vaccinations and medical testing, but also soundness assessments, joint injections, and more. *See* Telephone Interview with B. Lucy Gordon, *supra* note 148. Often performance horses are fed supplements for joint support, gut health, and more. Lydia Gray, *How Supplements Complement Horse Feed*, SMARTPAK, <https://perma.cc/D4LZ-N8DE>. Tack and equipment, while not a monthly expense, does need to be replaced and even basic items cost \$50 while more expensive items can reach into the hundreds or even thousands of dollars. *See generally* SMARTPAK, <https://perma.cc/U8N4-CYPV>. Competition entry fees, at a recognized level, are frequently several hundreds of dollars per show in addition to registration fees and membership costs and are widely recognized as a problem for accessibility in the industry. Leslie Mintz & Jessica Duffy, *The Entry Fee Is Only the Beginning: Part One*, U.S. EVENTING ASS’N (Feb. 13,

## 9. Future Employment

After completing a working student position, many carry on with careers in the equestrian industry, either as paid employees or by starting businesses of their own.<sup>258</sup> Programs with upper-level riders see as many as half of their working students continue on to long-term success working in the industry.<sup>259</sup> Additionally, working students who participate in a second position are twice as likely to expect an opportunity to transition into paid employment.<sup>260</sup> Nonetheless, seeking a future paying job was not the motivation for the vast majority of working students choosing to enter their positions.<sup>261</sup>

Typically, those respondents that did have an expectation of future employment in the same program either felt they had already been serving as employees and were owed wages or had been given verbal assurances that remaining in the program long enough would eventually lead to a paid position.<sup>262</sup> In that regard, working students who had an expectation of employment viewed their positions more as on-job training or a trial period than a separate program or an internship.

### C. Lasting Effects

Despite the long hours and manual labor, former working students overwhelmingly view their experiences positively.<sup>263</sup> When asked to qualify why they feel this way, individuals expressed that their positions were “career-building,” “a valuable experience,” and provided “life lessons.”<sup>264</sup> Working

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2021), <https://perma.cc/5ZF2-6GD3>; Ann Glavan, *Where Do We Go Now?*, CHRON. OF THE HORSE (Nov. 24, 2020), <https://perma.cc/VMR3-3N2L>.

258. Over 75% of respondents continued working in the equestrian industry. *Infra* APPENDIX B fig. 35.

259. Brown et al., *supra* note 151, at 08:08–08:30.

260. While 15% expected such opportunities after their first position, that number increased to 37% after their second. *Infra* APPENDIX B figs. 27–28.

261. Only 22% were motivated by employment. *Infra* APPENDIX B fig. 29.

262. See *infra* APPENDIX B figs. 17, 27–28 (finding the respondents who expected compensation were also those who expected an offer of employment).

263. Over 68% of respondents would recommend their experience to an aspiring rider. *Infra* APPENDIX B fig. 32.

264. Telephone Interview with B. Lucy Gordon, *supra* note 148; Telephone Interview with Zoe Jones, *supra* note 150.

student positions can have far-reaching benefits that last a lifetime.<sup>265</sup> Skills like work ethic, independence, and decision-making that are notably hard to teach and widely applicable to any career are commonly fostered in these positions.<sup>266</sup> Amidst that positivity, however, is the constant qualifier that good experiences come from good programs.<sup>267</sup> How does one find a good program, then? Top-level professionals suggest doing extensive research and even sleuthing into programs before committing.<sup>268</sup>

While there is general understanding that a working student position can lead to abuse,<sup>269</sup> both the industry and participants stands by it. Almost every respondent continued to ride horses and the vast majority kept doing so at a competitive level.<sup>270</sup> Whether the experience was positive or negative, every response indicated that it was an educational one that did not crush the love of horses that is behind each working student's desire to take on the job in the first place.<sup>271</sup>

### III. APPLYING THE MODERN PRIMARY BENEFICIARY TEST

*Flaming enthusiasm, backed up by horse sense and persistence, is the quality that most frequently makes for success.*

Dale Carnegie<sup>272</sup>

Regardless of how the equestrian industry, or even the working students themselves, view the position, courts will be

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265. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (detailing how lessons learned from her time as a working student helped her navigate college, jobs, and eventually a successful return to nursing school).

266. See *id.* (noting that many such skills crossed over valuably into her time as a paramedic and nurse).

267. See Brown et al., *supra* note 151, at 26:17–27:03 (suggesting that an equestrian should do significant research to ensure that she lands in a good program); Telephone Interview with Zoe Jones, *supra* note 151 (“Ask around and there are good programs with people who absolutely had the best time, but I have also seen a lot of the opposite.”).

268. See Brown et al., *supra* note 151, at 30:38–30:48.

269. See *id.* at 26:28–26:58.

270. Over 97% of respondents continued riding and 77% did so competitively. *Infra* APPENDIX B figs. 33–34.

271. *Infra* APPENDIX B figs. 32–33.

272. BRANDON IURATO, SPEAKING OF SUCCESS 194 (2007).

the ultimate judge of the position's legality. In today's legal landscape, courts will apply the modern primary beneficiary test by analyzing the position under the *Glatt* factors in order to determine which party benefitted more.<sup>273</sup> This Part attempts to peremptorily apply that analysis and determine its outcome.

### A. *The Factors*

To determine the future of the working student position, this Subpart asks whether a court is more likely to find that the position is an internship or an employment relationship by applying the seven factors, drawing on the characteristics of the working student position described above and comparing them to case law, and then predicts an outcome were the position to come under judicial scrutiny. Some programs may be able to successfully argue that a few factors indicate working students are bona fide interns. The overall finding, however, will indicate that the programs almost undoubtedly do not fall within the internship exception.

#### 1. Compensation

The first factor asks about “the extent to which the intern and the employer clearly understand that there is no expectation of compensation.”<sup>274</sup> The DOL specifically notes that “any promise of compensation, express or implied, suggests the intern is an employee—and vice versa.”<sup>275</sup> This factor is routinely analyzed first because when it weighs against an internship, it is difficult to swing the final outcome back towards internship status with the remaining factors.<sup>276</sup> The absence of compensation, however, is also not dispositive and a favorable outcome on this factor may still be overcome with failures later in the analysis.<sup>277</sup>

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273. FACT SHEET #71, *supra* note 9, at 1.

274. *Id.*

275. *Id.*

276. *Id.*

277. See *Mark v. Gawker Media LLC*, No. 13-cv-4347, 2016 U.S. Dist. LEXIS 41817, at \*29 (S.D.N.Y. Mar. 29, 2016) (finding the factor less important when both parties understood there was no expectation of compensation and noting that the right to receive minimum wage cannot be waived).

Working students are routinely neither promised nor expect compensation in the form of an hourly wage or salary.<sup>278</sup> It is typically abundantly clear that no salary or hourly wage is included in the position.<sup>279</sup> Given the lack of written contracts or explicit terms it would be difficult to prove otherwise, even if it were true.<sup>280</sup> Courts often rely on the language of contracts when assessing this factor.<sup>281</sup> It is thus very unlikely that a working student could provide persuasive evidence of a salary as professional equestrians typically steer clear of explicitly promising a salary either in writing or orally.

The prevalence of stipends in working student programs may also cause this factor to cut against internship status. Stipends, as discussed above, are not uncommon in working student programs.<sup>282</sup> While some other internships have stipends,<sup>283</sup> a court may determine this arrangement is de facto compensation or at least enough evidence to maintain the factor's neutrality.<sup>284</sup> Typically, a stipend that fails to cover even basic living expenses is not viewed as "compensation."<sup>285</sup> DOL guidance supports the separation of stipends as a general rule, noting that "the mere payment of a . . . stipend . . . will not be considered to establish an employment relationship."<sup>286</sup> On the whole, this factor likely tips in favor of internship status instead of an employment relationship.

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278. The survey found that 78% of respondents did not expect and were not promised compensation for their work. *Infra* APPENDIX B figs. 17–18.

279. *Infra* APPENDIX B figs. 17–18.

280. Just over 6% of respondents had written contracts. *Infra* APPENDIX B fig. 5.

281. See generally *Montoya v. CRST Expedited, Inc.*, 404 F. Supp. 3d 364 (D. Mass. 2019).

282. Almost 18% of respondents received stipends. *Infra* APPENDIX B fig. 19.

283. See Sasha Butkovich, *So You Want to Pay Your Interns: A Guide to Paid Internships*, JUSTWORKS (June 2, 2021), <https://perma.cc/79TT-GZNM>.

284. See *Lewis v. Nev. Prop. 1, LLC*, No. 2:12-cv-01564, 2013 U.S. Dist. LEXIS 8945, at \*30–34 (D. Nev. Jan. 22, 2013) (finding that a regular lunch stipend may be employee compensation).

285. See *Brown v. N.Y.C. Dep't of Educ.*, No. 12 Civ. 0035, 2012 U.S. Dist. LEXIS 176212, at \*14–17 (S.D.N.Y. Dec. 12, 2012) (finding that "small sums of money" in the form of a stipend do not constitute compensation).

286. FIELD OPERATIONS HANDBOOK, *supra* note 41, at ¶ 10b14.

## 2. Training Similar to an Educational Environment

The second factor asks about “the extent to which the internship provides training that would be similar to that which would be given in an educational environment.”<sup>287</sup> An educational environment may include “clinical and other hands-on training provided by educational institutions.”<sup>288</sup> Analysis of this factor often assesses the “content of the training” or the program’s curriculum and compares it with the instruction provided by a vocational school.<sup>289</sup> Where the training is unique to the employer and differs from a traditional curriculum, the court tends to find an employment relationship.<sup>290</sup> Typically, when training is seen as on-boarding for a specific role or company as opposed to generally applicable skills, internship status is not appropriate.<sup>291</sup>

Courts may struggle to analyze working student positions under this factor. As previously noted, there is no certification process for grooms, barn managers, or professional riders, thus there is no set curriculum to which to compare the working student programs.<sup>292</sup> There are two alternatives for how courts would proceed from this point of analysis. First, with no comparable academic program to guide them, courts could view the working student position as the product of the equestrian industry’s attempt to fill a void. Second, courts could compare the working student to an equine collegiate degree candidate.

If a court chose the first method, it would likely find the factor somewhat irrelevant but could potentially decide it indicated internship status. The equestrian industry in the United States has little to no academic licensing and does not frequently view an equine degree as a replacement for more

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287. FACT SHEET #71, *supra* note 9, at 1.

288. *Id.*

289. *Montoya v. CRST Expedited, Inc.*, 404 F. Supp. 3d 364, 385 (D. Mass. 2019).

290. *See id.* at 385–88 (explaining how non-transferable training is indicative of employee status).

291. *See id.*

292. *See supra* notes 224–225 and accompanying text.

practical experience in a working student position.<sup>293</sup> Instead, a young equestrian bolsters her resume by passing through one or more of these programs.<sup>294</sup> Jobs are often given out to those who have good references from their time as a working student under a reputable professional.<sup>295</sup> While there are undoubtedly unique aspects to each working student program that are tailored to the specific employer, as a whole there are many strong commonalities in duties assumed and lessons learned.<sup>296</sup>

The equestrian industry would likely argue that these positions are similar enough to have what could be likened to a common curriculum that provides hands-on training and is applicable throughout the industry beyond a specific program.<sup>297</sup> This strategy, however, may be more appropriately applied to developing some type of academic licensing or uniform curriculum amongst working student positions. Instead of tenuously arguing that internship status already applies based on this factor, the equestrian industry should accept that this factor provides the ultimate opportunity to chart a more legal course.

Working student positions may face a less sympathetic evaluation if a court follows the second strategy for its analysis. There are several collegiate programs that offer various equine degrees.<sup>298</sup> A degree in Equine Business often combines some equine-specific classes with typical business preparatory classes like tax, economics, and legal matters.<sup>299</sup> There are also various

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293. See Telephone Interview with Zoe Jones, *supra* note 151 (noting that none of the programs she participated in or any of her connections in the industry sought out employees with degrees).

294. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (“Most everyone I know that wanted to pursue horses professionally started off as a working student.”).

295. See Telephone Interview with Zoe Jones, *supra* note 151 (explaining how she was able to build a resume and work for higher-level professionals with working student experience).

296. See *supra* Part II.B.

297. See Brown et al., *supra* note 151, at 08:08–08:30.

298. See Sarah E. Coleman, *Horses and Higher Ed*, HORSE ILLUSTRATED (Sept. 4, 2020) <https://perma.cc/8SLK-XZRH>. Degree programs provide limited value in the equestrian industry and, as the cost of these collegiate programs are far from affordable, are an even more cost-prohibitive entry point into the industry.

299. See e.g., *Equine Industry*, UNIV. OF LOUISVILLE COLL. OF BUS., <https://perma.cc/NSJ2-SLEK> (describing the program and noting that the

degrees in Equine Sciences that can prepare a student to pursue veterinary school.<sup>300</sup> Some schools do offer a more general Equine Studies degree that can be molded to suit a student's goals to compete or train in the equestrian industry.<sup>301</sup> If courts were to compare the practical, hands-on labor of a working student position to such curricula, there would likely be significant disparity.<sup>302</sup> While working students are routinely exposed to experiences that prepare them to become a vital part of an equine business,<sup>303</sup> there is little to no formal instruction in finance, business theory, and taxation.<sup>304</sup> Similarly, working students routinely take part in basic veterinary care for horses, but are not taught biology or chemistry at the level of an equine science degree.<sup>305</sup> In addition, working students take on many tasks that are not incorporated into these curricula.<sup>306</sup> On the whole, if a court takes this path, the factor is likely to weigh against internship status.

### 3. Integrated Coursework and Formal Credit

Building on the second factor, the third asks how the internship and “the intern’s formal education” are tied together, suggesting either “integrated coursework or the receipt of

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degree is useful for a variety of positions but not listing any riding or training positions among them).

300. See *Degrees & Majors*, TEX. A&M EQUINE, <https://perma.cc/KL83-MSU4> (“Students who plan to attend veterinary, medical, pharmacy or graduate school are encouraged to select the science option.”).

301. See, e.g., *Equine Studies Department*, EMORY & HENRY COLL., <https://perma.cc/VAK7-9V6K>; *Equestrian Studies*, AVERETT UNIV., <https://perma.cc/X2CD-ZH3U>.

302. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (admitting that her experience and daily duties were not similar to the curricula from equine degree programs).

303. See generally Brown et al., *supra* note 151.

304. See Telephone Interview with Zoe Jones, *supra* note 151 (“I actually learned to use Quick Books during my first position, but after talking to other working students I realized that was not a normal activity.”).

305. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (“I practiced giving injections, wrapping legs, and cutting sutures, but it was more similar to what I learned as a kid in Pony Club than the science classes I ended up taking for my biology degree or nursing school.”).

306. See Brown et al., *supra* note 151, at 28:32–28:50 (describing menial, physical labor like stacking hay, fixing fence, and painting a barn).



academic credit” as appropriate links.<sup>307</sup> Courts often provide little analysis so long as programs provide academic credit.<sup>308</sup> Courts may be sympathetic when a position does not receive academic credit.<sup>309</sup> Given the disconnect between formal education and working student programs it seems unlikely this factor has much potential to weigh in favor of internship status.

The equestrian industry’s best argument to sway this factor in its favor is that working student positions often lead to competitive success.<sup>310</sup> Competitions have set requirements for each level, and better placings or moving up the levels can be analogized to academic success, much like how students receive report cards and proceed to the next grade.<sup>311</sup> This argument falters, however, when the majority of a working student’s time is not devoted to improving her riding and when considering that the industry focuses on the position as developing horsemanship not riding skills. As previously discussed, lessons and competitions are perks of being a working student, not the objectives of the program.<sup>312</sup> Overall, it is unlikely court would find that the factor favored internship status.

#### 4. Academic Calendar

The next factor analyzes “the extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.”<sup>313</sup> Often internships are successful under this factor when students can use the hours spent working as qualifications for licensing exams or

307. FACT SHEET #71, *supra* note 9, at 1.

308. *See, e.g.*, Benjamin v. B & H Educ., 877 F.3d 1139, 1147 (9th Cir. 2017).

309. Over half of the respondents attended college after being a working student. *Infra* APPENDIX B fig. 36; *see* Telephone Interview with B. Lucy Gordon, *supra* note 148 (noting that her working student positions and academic programs did not overlap).

310. *See* Telephone Interview with B. Lucy Gordon, *supra* note 148 (“I reached my goal of competing in my first international event during my first position.”).

311. *See, e.g.*, *Rule Refresher: Levels of Horse Trials*, U.S. EVENTING ASS’N (Sep. 4, 2020), <https://perma.cc/7JTT-FGQ4>; *USHJA Jumper Classic Series*, U.S. HUNTER JUMPER ASS’N, <https://perma.cc/FJ24-CNS2>; *Dressage Levels Explained*, EQUESTRIAN SPACE, <https://perma.cc/6KDS-RLBX>.

312. *See supra* Parts II.B.6, II.B.8.b.

313. FACT SHEET #71, *supra* note 9, at 1.

graduation requirements.<sup>314</sup> This is another factor that is likely not very relevant or determinative in the analysis of working students because, as noted earlier, the majority of working students do not have simultaneous academic commitments to be mindful of.<sup>315</sup> In such situations there is no schedule to pay deference to so an employer is not faulted for paying the academic calendar no mind.

Working student positions that are designed to take place during the summer or over school breaks are most likely to achieve a favorable result on this factor. By acknowledging that the working student position is temporary, for a set duration, and limited by academic commitments, these positions show attention and accommodation to an academic calendar.<sup>316</sup> A court is likely to find this factor in favor of internship status in such programs.<sup>317</sup> Similarly, when students pursue programs with no intention of receiving academic credit, courts are more sympathetic to the employer and often find the factor favors internship status.<sup>318</sup> When a working student is neither enrolled in an academic program nor looking for some credit-based licensing, the court may not heavily fault the program for not providing academic credit, but this issue may call into question what benefit is being provided to the intern by such programs.

Positions that exist while the working student is simultaneously enrolled in school are less likely to succeed. With the rise of online and virtual education, the percentage of working students attempting to double-dip is rising.<sup>319</sup> Typical

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314. See *Benjamin*, 877 F.3d at 1147 (“The students’ clinical work corresponded to their academic commitments under the fourth factor because clinical work allowed students to clock the hours they needed to sit for state licensing exams.”).

315. See *supra* note 309 and accompanying text.

316. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (explaining how one working student program allowed for flexible scheduling over school breaks and the barn owner was supportive of the working students putting their traditional education first).

317. See *Wang v. Hearst Corp.*, 877 F.3d 69, 75 (2d Cir. 2017) (noting that working over academic breaks favors internship status).

318. See *id.* (finding that the employer did not fail the factor when there were no schedules to accommodate).

319. See *Brown et al.*, *supra* note 151, at 2:11–2:33 (explaining how riders who returned to college were drawn back into working student positions after schools turned to online education in response to COVID-19).

issues that arise from this situation include internet connectivity problems at barns and competitions, timing constraints making it difficult to complete assignments by set due dates and meet with professors or class groups, and a general culture of de-prioritizing academics.<sup>320</sup> Despite what an employer may promise at the beginning of the program, working students routinely find that this commitment to academic schedules and requirements falls by the wayside.<sup>321</sup> One commonality of equine businesses is, after all, the intense hours and all-day commitment.<sup>322</sup> Even with the best laid plans, working students are routinely called on to accommodate injured horses, weather delays, and the ever-changing needs of horses.<sup>323</sup> As most working student programs have no set hours to limit lengthy days, the position is likely to be in constant tension with any academic responsibilities.<sup>324</sup>

Though courts have found the factor to be neutral when an internship has respected and accommodated academic scheduling, many programs will struggle to provide evidence of this.<sup>325</sup> Especially given that no day working with horses is the same, professional equestrians would struggle to show a consistent accommodation to academic requirements. This factor will likely weigh in favor of an employment relationship

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320. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (noting how unreliable internet access was at barns and recalling stories of working students struggling to make time for academics while in the program); Telephone Interview with Zoe Jones, *supra* note 151 (discussing the lack of deference or support given to academic commitments in her equestrian industry experiences).

321. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (relaying how other working students struggled to make time for a full course load once competition season or other scheduling issues came into play).

322. See *id.* (“No day is the same. Even when we didn’t have a competition coming up or a packed schedule, something always comes up. It could be a hurt horse, it could be a broken fence, sometimes a thunderstorm. There’s no normal no matter how hard we try.”).

323. See Brown et al., *supra* note 151, at 29:07–29:10.

324. Over 80% of respondents worked between eight and sixteen hours a day and at least five days a week. *Infra* APPENDIX B figs. 6–7.

325. See *Nozaki v. Tram’s LLC*, No. 18-00314, 2019 U.S. Dist. LEXIS 224569, at \*19 (D. Haw. Nov. 1, 2019) (relying on the defendant’s evidence of accommodation to neutralize the finding that the intern worked “during normal business hours throughout the year”).

for any working student simultaneously taking on an academic program.

### 5. Limited Duration

The next factor assesses “the extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.”<sup>326</sup> The analysis here asks whether the program is truly tailored to provide the intern with training and then release her into the workforce or if the position is trapping an intern in an employment relationship without pay.<sup>327</sup> “Designing an internship is not an exact science,” however, and programs will not always perfectly match their duration to the ideal period of learning.<sup>328</sup> Courts often view programs that do not require students to participate longer than necessary sympathetically and find this factor indicates internship status.<sup>329</sup> Additionally, programs do not fail this factor simply because they include repetitive tasks that have been attempted or taught before.<sup>330</sup>

Here, the imprecise nature of the working student position yet again provides potential friction. While many positions have mandatory minimum durations, few have maximums.<sup>331</sup> Additionally, many programs offer the opportunity to stay

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326. FACT SHEET #71, *supra* note 9.

327. See *Wang v. Hearst Corp.*, 877 F.3d 69, 74 (2d Cir. 2017) (limiting the duration to “beneficial learning” but understanding that period may require repetition).

328. *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1213 (11th Cir. 2015).

329. See *id.* at 1214 (indicating that to fail this factor an internship must be “grossly excessive in comparison to the period of beneficial learning”); *Benjamin v. B & H Educ.*, 877 F.3d 1139, 1147 (9th Cir. 2017) (“[N]othing in the record suggests that Marinello required its students to participate in their programs for longer than was necessary to complete their hour requirement for the state exams.”).

330. See *Wang*, 877 F.3d at 74 (“As exemplified by the meeting minutes and photoshoots, practical skill may entail practice, and an intern gains familiarity with an industry by day-to-day professional experience.”).

331. See Telephone Interview with Zoe Jones, *supra* note 151 (“I know programs that won’t take anyone for less than six months, but I don’t know anyone who has been turned away for staying too long. That’s honestly the dream if a working student wants to stay on.”).

longer or extend the program.<sup>332</sup> While working students typically stay the expected duration of their program, it is not uncommon to stay longer.<sup>333</sup> Similarly, it is common for working students to take on more than one such position.<sup>334</sup> While the equestrian industry has multiple explanations for this process,<sup>335</sup> the potential for a court to find these explanations problematic is significant.<sup>336</sup>

The lack of planned curricula may also prevent a favorable finding on this factor. While many internships have set objectives,<sup>337</sup> working student positions are far more amorphous.<sup>338</sup> Without such objectives, it is hard to argue that a working student position has been formed around the beneficial learning period.<sup>339</sup> An ever-present mantra of the equine world is that you are forever learning,<sup>340</sup> but this feel-good refrain, while true, is not likely to justify the working

332. See *id.* (“I have been asked to stay on either because the relationship was going well or because leaving would have left the barn shorthanded.”).

333. At least 29% of respondents extended the duration of their programs. *Infra* APPENDIX B fig. 16.

334. More than half of respondents held more than one position. *Infra* APPENDIX B fig. 3.

335. See Brown et al., *supra* note 151, at 22:30–23:15 (explaining how stints at lower-level programs are necessary to gain the required experience to participate in a top-level program).

336. See Wang, 877 F.3d at 74 (allowing repetitive tasks within a program, but not expanding such repetition beyond the scope of one position).

337. See *The Goals for an Intern*, CHRON, <https://perma.cc/VLH3-FVP8> (last updated July 23, 2020) (“Colleges often establish requirements that interns must meet to complete the internship program successfully and earn college credit.”).

338. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (noting that programs often promise increased riding and horsemanship knowledge but rarely set precise goals or weekly curricula similar to academic environments). See generally Brown et al., *supra* note 151.

339. See Wang v. Hearst Corp., 877 F.3d 69, 74 (2d Cir. 2015) (accepting repetitive tasks but only when in furtherance of “good life skills” or “not incompatible with the account of vocational training and mentorship”); Mark v. Gawker Media LLC, No. 13-cv-4347, 2016 U.S. Dist. LEXIS 41817, at \*34–35 (S.D.N.Y. Mar. 29, 2016) (using a capstone project, a concept not present in working student programs, as a milestone for the end of the appropriate duration).

340. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (“I can’t tell you how many times someone has told me there is no end to learning around horses.”).

student position in the eyes of the courts.<sup>341</sup> Only 20% of working students reported learning new skills on a daily basis, with another 36% indicating they did so weekly.<sup>342</sup> That leaves 44% of respondents reporting learning new skills only on a monthly or infrequent basis.<sup>343</sup> To compound this issue, the majority of working students do not receive overall assessments of their performance, making it difficult for the professional to argue she was monitoring the beneficial learning period.<sup>344</sup> The flexible duration of most working student programs paired with the lack of clear goals or assessments likely makes this factor weigh in favor of an employment relationship.

## 6. Paid Employees

The sixth factor centers on the intern's work, asking if it "complements, rather than displaces, the work of paid employees" while still "providing significant educational benefits to the intern."<sup>345</sup> Typically, "an intern's work is complementary if it requires some level of oversight or involvement by an employee, who may still bear primary responsibility."<sup>346</sup> Courts have looked favorably on programs that retain a staff surrounding the interns—both in supervisory roles and supportive or logistical roles.<sup>347</sup> The factor tips towards employment, however, when "the interns complete some work regularly performed by paid employees."<sup>348</sup> When a program combines "drudge work" and "complementary work," ultimately the factor may be viewed as "a wash."<sup>349</sup>

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341. See *Wang*, 877 F.3d at 74 (finding that repetition must be for some purpose and to gain practice, not for an undefined length of time).

342. *Infra* APPENDIX B fig. 13.

343. *Infra* APPENDIX B fig. 13.

344. Fifty-three percent of respondents received no assessment, 13% received one weekly, 9% monthly, and 25% rarely or at the completion of the program. *Infra* APPENDIX B fig. 14.

345. FACT SHEET #71, *supra* note 9, at 1.

346. *Wang*, 877 F.3d at 75.

347. See *Benjamin v. B & H Educ.*, 877 F.3d 1139, 1147–48 (9th Cir. 2017) ("[T]he school maintained staff to instruct the students, run clinics, operate front desks, inventory and stock the dispensary, handle the logistical needs of the clinics, and perform nighttime janitorial services.").

348. *Wang*, 877 F.3d at 75.

349. *Sandler v. Benden*, 715 F. App'x 40, 44 (2d Cir. 2017).

A considerable majority of working students reported their duties were similar to those of paid employees, tipping this factor strongly in favor of an employment relationship.<sup>350</sup> Similarly, the majority of respondents reported that the programs had very few paid employees.<sup>351</sup> When combined, this evidence makes it seem that the equestrian industry is using working student programs to staff their businesses for free while paying a few employees—likely ex-working students that have progressed to a paid position—to help train and supervise the working students and provide some consistency.

Looking at the daily breakdown of a working student's duties may help isolate the tension. While a professional equestrian spends the majority of her time riding horses, instructing, and managing the business, a working student's duties mostly involve horse care.<sup>352</sup> The working student is not so much shadowing the professional and learning how to be her as earning stripes by taking on low-level employee duties in the hopes of working toward the status of being a professional equestrian.<sup>353</sup>

The equestrian industry's best counterargument to this assessment is that a working student is not interning to become a professional rider but instead to be a barn manager or paid groom.<sup>354</sup> Here, while a working student is still taking on menial duties, they are at least the foundational duties of the position and can more easily be viewed as complementing the duties of any paid employees.<sup>355</sup> Programs that have the most difficulty using this argument will be those that have absolutely no paid

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350. Almost 79% of respondents had similar duties to paid employees in the same programs. *Infra* APPENDIX B fig. 12.

351. *Infra* APPENDIX B fig. 11.

352. *See supra* Part II.B.6.

353. *See* Telephone Interview with B. Lucy Gordon, *supra* note 148 (“I learned how to care for horses, run a barn, and support a professional as a groom—I even improved my riding, but I did not learn how to *be* a professional rider.”).

354. *See generally* Brown et al., *supra* note 151.

355. *See* Telephone Interview with Zoe Jones, *supra* note 151 (explaining how working student positions are more similar to head grooms in their daily duties and that in some programs the paid barn manager is able to take on more complicated, specialized jobs if the working students are able to cover the basics).

employees,<sup>356</sup> those that only employ a small number of employees whose duties are not discernably different from working students',<sup>357</sup> and those that exclusively hire from their (or neighboring) programs.<sup>358</sup>

On the whole there is considerable tension in this factor that courts are not likely to overlook. While the equestrian industry may try to explain away the working student positions comparison to entry-level employees, many of its arguments are likely to fall on deaf ears. To an industry outsider, the differentiation between mucking stalls as a stablehand and as a working student is difficult to overcome.

## 7. Entitlement to Employment

The final factor asks about “the extent to which the intern and employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.”<sup>359</sup> A promise of future employment indicates that an intern is, in fact, a “beginner employee, rather than a bona fide intern.”<sup>360</sup> This factor typically falls in favor of internship status unless there is specific evidence that an intern was promised a paid position after completing the internship.<sup>361</sup>

Despite the routine explanation that all roads lead through a working student position,<sup>362</sup> most working students, surprisingly, did not report any expectation of a job offer at the

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356. See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 527 (6th Cir. 2011) (noting that one of the targets of the FLSA is the displacement of regular employees).

357. See *Wang v. Hearst Corp.*, 877 F.3d 69, 75 (2d Cir. 2017); *Mark v. Gawker Media LLC*, No. 13-cv-4347, 2016 U.S. Dist. LEXIS 41817, at \*35 (S.D.N.Y. Mar. 29, 2016) (“[T]hat complementary labor must be educational rather than mere scut work that the paid employees would rather avoid.”).

358. See *Montoya v. CRST Expedited, Inc.*, 404 F. Supp. 3d 364, 385 (indicating the court’s suspicion of internships that are exclusively acting as specialized on-boarding training for future hires). *But see Mark*, 2016 U.S. Dist. LEXIS 41817, at \*42–43 (“Nor was it unfair or abusive for Defendants to look to their interns as a potential pool of future employees.”).

359. FACT SHEET #71, *supra* note 9, at 1.

360. *Mark*, 2016 U.S. Dist. LEXIS 41817, at \*38–39.

361. *Sandler v. Benden*, 715 F. App’x. 40, 44 (2d Cir. 2017).

362. See *Mintz*, *supra* note 11 (“How else will you learn what it is really like to be a professional in the sport?”).



conclusion of the position.<sup>363</sup> While this may seem like a free and easy factor to chalk up in the internship column, courts may not be so quick to agree.

As the majority of working students continued to pursue work and be a part of the equestrian industry,<sup>364</sup> courts may find a disconnect between the explicit promises of a program and the realities of it.<sup>365</sup> While a growing number of jobs require applicants to have in-field experience,<sup>366</sup> hiring almost exclusively out of the working student pool may lead the court to question how realistic it is to believe working students' and professionals' alleged understandings of the position.

Additionally, many advertisements for working student positions make an offer of future opportunities, in the form of both explicit promises to be promoted into paid employment and implicit promises of future connections and prospects.<sup>367</sup> As these advertisements may be some of the only concrete evidence of the working student position,<sup>368</sup> a court may interpret these as a more reliable understanding of the employer's and working student's post-program expectations than oral affirmations after the fact.

An additional issue could arise from programs that choose to offer working students promotions to paid positions during the course of the program.<sup>369</sup> This may be motivated by a desire

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363. *Infra* APPENDIX B figs. 27–28.

364. Over 75% of respondents continued to work in the industry. *Infra* APPENDIX B fig. 35.

365. *See* Vlad-Berindan v. N.Y.C. Metro. Transp. Auth., No. 14-CV-10304, 2016 U.S. Dist. LEXIS 43613, at \*21 (S.D.N.Y. Mar. 31, 2016) (concluding that the factor weighed in favor of an employment relationship when the plaintiff “believed” the internship was followed by a paid job and had received an offer of employment that was contingent on completing an internship first).

366. *See* Carson Kohler, *Why Do Entry-Level Positions Require Experience? Plus How to Get Around It*, TOP RESUME, <https://perma.cc/V9DR-LKFG>.

367. *See* Telephone Interview with B. Lucy Gordon, *supra* note 148 (“I have seen plenty of listings offering the potential for benefits or to become a permanent member of the team after some duration of time, but I don’t know anyone who had those offers become a formal part of the agreement.”).

368. *See infra* APPENDIX B fig. 5 (reporting that less than 7% had written terms and over 40% had no set terms at all); Berendt, *supra* note 14 (noting the overwhelming lack of clarity in working student programs’ terms).

369. Almost half of those who were offered paid positions were given the promotion during the course of their working student position. *Infra* APPENDIX B fig. 30.

to retain help or because a working student has excelled in her position.<sup>370</sup> As most programs make this transition without a full hiring process or even listing the job,<sup>371</sup> the equestrian industry does not necessarily have a solid case that there is no expectation of paid employment as a result of a working student position. Upon a deeper analysis, courts may find significant evidence that the reality of the position comes with an expectation of future employment.

## 8. Outcome

It seems inevitable that the average working student position will run afoul of the modern primary beneficiary test. While some positions may be able to neutralize a factor here or there, few would be able to tip the scales to an overall favorable finding for internship status. As no one factor is dispositive,<sup>372</sup> even when a program is able to successfully argue that one or two factors are neutral or fall in favor of an intern relationship, the court is unlikely to ignore the failure on the remaining factors.<sup>373</sup> Overall, the standard working student program fails to find success on almost every factor. While courts may oscillate in their analysis of each aspect of the test, the ultimate finding seems to be written on the wall: these factors indicate that working students are *not* properly interns and should be treated as employees or the positions need to be restructured.

### B. *The Primary Beneficiary*

Though the factors guide the analysis of internships through judicial precedent and DOL guidance, it is important to remember that the inquiry should always center around determining which party is the primary beneficiary of the

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370. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (describing popular reasons for converting a working student to a paid employee).

371. See *id.* (noting that programs often hire from within and that they will make efforts to do so before looking outside or listing the job); Telephone Interview with Zoe Jones, *supra* note 151 (explaining how it was ideal to fill a position with someone known instead of advertising).

372. FACT SHEET #71, *supra* note 9, at 1.

373. *Id.*

relationship.<sup>374</sup> One of the hallmarks of the modern primary beneficiary test is its flexibility to reach beyond the *Glatt* factors to view the totality of the circumstances of an arrangement.<sup>375</sup> Though many working student programs fail on a significant number of the factors, there is still room for the equestrian industry to bring additional evidence and circumstances into the discussion.<sup>376</sup>

The primary beneficiary need not be the only beneficiary.<sup>377</sup> Instead, the tests finds that “an employment relationship is not created when the tangible and intangible benefits provided to the intern are greater than the intern’s contribution to the employer’s operation.”<sup>378</sup> While assessing a relationship, courts instead must identify which party benefits more.<sup>379</sup> The employer may offset the benefits they receive “in various ways,” such as having to hire more supervisory and teaching staff or being less profitable because the interns take longer to complete tasks than a full-time staff would.<sup>380</sup> This opening, however, is limited by courts’ duty to “recognize the potential for some

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374. *Id.*; see *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011).

375. FACT SHEET #71, *supra* note 9, at 1; see *Blair v. Wills*, 992 F.2d 1023, 1027 (10th Cir. 1993); *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 383–84 (2d Cir. 2015). This question, after all, stems from the Supreme Court’s opinion in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), which still carries weight as the Court has not directly spoken on the question of unpaid interns. See *id.* at 152–53.

376. See FACT SHEET #71, *supra* note 9, at 1; *Benjamin v. B & H Educ., Inc.*, 877 F.3d 1139, 1147 (9th Cir. 2017).

377. See *e.g.*, *Solis*, 642 F.3d at 530 (detailing how the school received some benefits from the interns’ work but that this was outweighed by the benefit passed to the interns); *Wang v. Hearst Corp.*, 877 F.3d 69, 73 (2d Cir. 2017) (noting that the modern primary beneficiary test’s departure from previous tests in allowing the employer to also benefit); *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1211 (11th Cir. 2015) (adopting the modern primary beneficiary test because “there is nothing inherently wrong with an employer’s benefitting from an internship that also plainly benefits the interns”).

378. *Glatt*, 791 F.3d at 535.

379. See *Solis*, 643 F.3d at 530–31.

380. *Id.* at 530; *Glatt*, 791 F.3d at 535; see *Mark v. Gawker Media LLC*, No. 13-cv-4347, 2016 U.S. Dist. LEXIS 41817, at \*40–41 (S.D.N.Y. Mar. 29, 2016) (“[T]he cost of managing interns in time and effort outweighed the benefits.”).

employers to maximize their benefit at the unfair expense and abuse of student interns.”<sup>381</sup>

Benefits may be both tangible and intangible.<sup>382</sup> Courts have repeatedly accepted intangible benefits such as responsibility, leadership, and work ethic.<sup>383</sup> These are all values that are commonly fostered and grown in working student positions.<sup>384</sup> While no factor speaks to the presence of intangible benefits, a court may find “they are of significant value.”<sup>385</sup> Intangibles, especially those seen as useful beyond the specific position, may “tip the scale” in favor of an internship even when the tangible benefits point toward an employment relationship.<sup>386</sup>

The equestrian industry’s best defense of working student programs relies strongly on intangible benefits. After all, “there is a lot to be said for classroom learning, but nothing compares to getting out and experiencing first-hand what it truly takes to succeed.”<sup>387</sup> The fast-paced, intensive realities of working in an active business often make working students “get better faster.”<sup>388</sup> These lessons reach beyond the equestrian industry by teaching harsh realities and pushing working students to prioritize and develop plans for their lives and careers.<sup>389</sup> Additionally, working student programs are one of the few ways

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381. *Schumann*, 803 F.3d at 1211.

382. *See Solis*, 642 F.3d at 531 (“On the other side of the ledger are the tangible and intangible benefits that accrue to students.”).

383. *Id.*

384. *See supra* Part II.B.C.

385. *Id.*

386. *Id.*; *see Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (finding value in tasks that “were intended to instill in each student a sense of teamwork, responsibility, accomplishment, and pride”).

387. *Mintz, supra* note 11.

388. *Id.*

389. *Id.*; *see Telephone Interview with B. Lucy Gordon, supra* note 148 (“Being a working student solidified that I was not going to pursue a full-time equestrian career and had to make some hard choices about my future.”); *Telephone Interview with Zoe Jones, supra* note 151 (“For a long time I planned to stay working in the equestrian industry, but eventually it just wore me down and the many lessons I had learned along the way encouraged me to put myself first.”).

to make an inroads into an insularly expensive and elitist sport.<sup>390</sup>

The value of these intangibles may be difficult to explain to those outside the industry. A court might ask why the working student position is not better suited to an employment relationship than an internship relationship if classroom education does not suit the industry. Surely, a court may think, the same benefits can be obtained through a traditional employment relationship. The answer may be “yes,” but that reality may also be impractical. Working student programs are one of the foundational aspects of the equestrian industry, making the potential legal problems that much more powerful.<sup>391</sup> Losing working students could push many barns into financial turmoil, leading to shuttered businesses or heightened prices and driving the equestrian industry into an even more elite and restricted community.<sup>392</sup> If working student programs were converted into strict, FLSA-compliant employment relationships, many of the intangibles may fall away.

While the *Glatt* factors will dominate the analysis of a working student’s status under the FLSA, it is important to keep in mind that the controlling question is deciding which party benefits more. Though the equestrian industry will struggle to tip many factors in their favor, some ground will undoubtedly be won back by the extensive intangible benefits provided to working students. In the end, however, the working student position is plagued with legal landmines, which will prevent courts from applying the internship exception and instead indicate that the positions breach the FLSA.

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390. See generally Mintz, *supra* note 11; Brown et al., *supra* note 151.

391. See Berendt, *supra* note 14.

392. See Brown et al., *supra* note 151 at 04:08–04:30 (noting that working student opportunities are the only opening for equestrians without access to family funding); Berendt, *supra* note 14 (presenting working student positions as one of the few access points into an elite sport).

## IV. COMPLIANCE EFFORTS

*Some horses will test you, some will teach you, and some will bring out the best in you.*

Unknown<sup>393</sup>

The equestrian industry ceaselessly praises the working student position for developing dedicated and hardened professionals, but the industry must face facts and realize the legal issues that surround these positions. Primarily, the lack of connection to academic credit, training, or degrees and the difficulty of separating working students from paid employees pose significant obstacles to internship status.<sup>394</sup> These issues place the entire industry in jeopardy because the working student system acts as the backbone of many businesses. Whether a case is filed by the DOL or a disgruntled former working student, a judicial finding on the illegality of working students could easily cripple the industry. While there may be no easy solution that preserves the benefits afforded by working student programs such as access to an elite industry and unmatched exposure into the realities of the industry, waiting for DOL or judicial enforcement could cause even more turmoil in an industry that often rejects change.

The equestrian industry should act now, and with some degree of unity, to bring the working student position into compliance so that the symbiotic relationship may continue to benefit both sides. These adjustments could take one of two forms: (i) converting working students into a FLSA-compliant employment relationship with wages and charging the students for all the aforementioned benefits, or (ii) adapting the programs to conform with the internship exception and pass the modern primary beneficiary test.

A. *Conversion to Employees*

Perhaps the cleanest way of resolving these muddy waters would be to convert working students into employees with full

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393. Emily Fought, *Inspirational Horse Quotes for the New Year*, COWGIRL MAG. (Dec. 27, 2019), <https://perma.cc/QQ76-7UHA>.

394. See *supra* Part III.A.

FLSA protections and benefits. This would mean an hourly wage and an overtime wage for any work done beyond forty hours per week.<sup>395</sup> Additionally, this would create tax liability for the workers as well as questions of benefits such as health insurance and workers' compensation.<sup>396</sup> Converting the position in this manner would end all questions of legality if it was done thoroughly and in full compliance with the FLSA and other labor law.

This solution, however, may not be a functional resolution and the costs of the conversion are likely more than just the wages being doled out to working students. Working students who often compete as amateurs would lose that status, something that is relevant to some but not all based on the rules and practices of their chosen discipline.<sup>397</sup> Additionally, employers may try to create independent contractor relationships instead of employment relationships in order to avoid some legal obligations such as the FLSA.<sup>398</sup> The test for determining if a relationship is employment or contractual is complex and fact-specific, much like the modern primary beneficiary test.<sup>399</sup> The factors focus on the duration of the relationship, the control of the principal, and the independence of the alleged contractor.<sup>400</sup> While a full analysis of this solution is beyond the scope of this Note, it too is likely untenable for the average working student position and would serve only as a quick fix instead of a long-term solution.

An additional concern would be the complexity of the relationship that developed and whether equestrian professionals would be willing to take part in such an intricate

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395. See 29 U.S.C. §§ 201–219.

396. See *Understanding Employment Taxes*, IRS (Mar. 14, 2022), <https://perma.cc/957V-89YH>; *Depositing and Reporting Employment Taxes*, IRS (Mar. 3, 2022), <https://perma.cc/PB7X-LRTQ>.

397. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (noting the implications surrounding amateur status for various types of horse showing). While an equestrian can move between amateur and professional status, the conversion from professional to amateur requires considerable effort. *See id.*

398. *See id.* (explaining her experience with an employer who treated her as an independent contractor).

399. See WAGE & HOUR DIV., DOL, FACT SHEET #13: EMPLOYMENT RELATIONSHIP UNDER THE FLSA 1 (2018), <https://perma.cc/3MFF-TKYE>.

400. *Id.*

dynamic. Working students and their employers would need to develop a system of timekeeping—determining when a worker was spending time on the job versus taking care of a personal horse.<sup>401</sup> Similarly, the additional tax filings, insurance, and workers' compensation implications could prove problematically complex both for young riders and equestrian business owners.<sup>402</sup> Employment relationships require considerable documentation and upkeep—two things the equestrian industry is both poorly suited to and overly critical of.<sup>403</sup> This conversion would also remove flexibility from the equine professional's finances by requiring additional regular paydays instead of covering labor costs with working student benefits. Such rigidity could put further financial pressure on an industry with razor-thin profit margins.

Finally, this process would result in employers itemizing the costs of all the benefits discussed above. This could lead to professionals driving up the cost of things like lessons, coaching, and board.<sup>404</sup> Many professionals would need to ensure that any wages were fully recouped from former working students.<sup>405</sup> Beyond this, it is difficult to say how many professionals would continue to raise prices to turn their workers into a vehicle for profit. As one of the most important aspects of the working student program is the accessibility it can provide to lower-income and less privileged young equestrians, this solution immediately becomes less attractive under this lens. Transitioning to employee relationships may additionally encourage employers to only take on those who have experience through age and prior positions or are from an inner circle of known candidates. For all these reasons, while an outside eye

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401. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (explaining that timekeeping during the chaos of a day as a working student would be difficult if not impossible).

402. *Understanding Employment Taxes*, *supra* note 384; *Depositing and Reporting Employment Taxes*, *supra* note 384.

403. See Telephone Interview with Zoe Jones, *supra* note 151 (noting that many employers struggled to fill out the taxes and official paperwork already required of them).

404. See Telephone Interview with B. Lucy Gordon, *supra* note 148 (describing how one program that made this transition ended up costing the working students even more than before the change); Berendt, *supra* note 14 (noting that a working student “could lose out even more” in this system).

405. See Berendt, *supra* note 14.



may see this solution as the express track to legality, creating traditional employment relationships would likely remove the best parts of the working student program, while economically hamstringing the equestrian industry.

### B. *Restructuring Programs*

Instead of leaning away from internships and towards the employment relationship, the equestrian industry could implement changes such as encouraging written contracts that speak to the concerns of the modern primary beneficiary test and developing curricula and stated short-term goals for the programs. If the industry paired this stopgap with efforts to develop a more formal certification process, many of the previously problematic factors may begin to indicate internship status after all. All the more if the industry was able to create a certification that would act as a vocational or trade school complement to equine collegiate degrees in the long-term. While the equestrian world often balks from change to its traditions, it is time to update the working student program for the modern world, legal compliance, and the benefit of both students and professionals.

The first and most immediate step equestrian professionals and working students must take is to get honest and start communicating. The majority of disputes that arise from these positions come from a place of miscommunication—and neither side of the relationship has much space to point fingers at the other. Instead of using casual conversations and social media posts to define the relationship and terms of the program, equestrian professionals should draft contracts that make it clear what the expectations of the programs are. Similarly, working students should learn to communicate their needs and make sure the benefits are also clear in those contracts. Equestrian professionals could fix many issues surrounding their programs such as questionable duration and the unclear expectations of future employment with well-drafted contracts. Additionally, this honest communication could keep working students and their families happier, which in turn would likely help to prevent the DOL from taking action against the industry during the transition to legal compliance. This step could lead to improved communication and relations between working

students and professionals, as well as open the door for the next steps.

In the future, the equestrian industry needs to consider reworking these programs by (i) creating a program that is comparable to an educational one, and (ii) standardizing working student programs. While adjusting to an employment relationship would expunge many of the legal issues surrounding the working student program, another angle is simply fixing the factors that are most problematic to receiving internship status. As discussed above, courts will likely view the position much more sympathetically if there is a recognizable academic component.<sup>406</sup> Though equestrians can clearly see the educational value in the working student program, that value is likely both lost on a judge, jury, or government agency. After all, the benefits of a working student position are unreliably present depending on the position. Given the specialization of the equestrian industry, developing a readily-accessible standard that complements more known industries would be instrumental in complying with the primary beneficiary test. This is a golden opportunity for the equestrian world to show it is capable of change and to take guidance from other industries instead of remaining in isolation.

If the equestrian industry could develop a degree of curriculum standardization such that a young rider would emerge with a certification—much like one from a trade school—that meant she had a reliable set of skills that qualified her to take on a paid position in the industry, the value of a working student position would become more obvious. While the working student position is understandable to industry insiders, those insiders will not be the ones deciding its ultimate legality. Instead of relying on arguments like “it’s always been this way,” the equestrian industry needs to think about how its actions comply with the legal framework in the world that surrounds it.

Such a certification program would likely require cooperation and support from high-level organizations like the United States Equestrian Federation as well as grass-roots support from industry professionals. Thankfully, this path is already being carved by the Equine Management Training Center, an organization offering an eight-week course and

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406. See *supra* Part II.B.

certification that is supported by several top riders and the Professional Rider's Organization.<sup>407</sup> While this journey may be difficult, is an obtainable goal that would retain the benefits of a symbiotic relationship between working student and professional, while ensuring the position is both legally compliant and resolving many of the long-standing complaints young riders have with the system. Ultimately, this Author finds the most promise in this solution and notes that while it is labor-intensive, there are many industry participants who would aid in the efforts to both maintain all the good experiences they received as working students and spare future equestrians from the bad ones.

### CONCLUSION

*There is something about the outside of a horse that is good  
for the inside of a man.*

Winston Churchill<sup>408</sup>

Today's society is full of alternative relationships and internships are amongst the most prevalent. In response, various branches of government have taken turns at attempting to resolve a tricky question: What does a legal internship look like? The reigning guidance was developed by courts and carves out a narrow but imprecise exemption to the FLSA's minimum wage and overtime rules based on elucidating the true primary beneficiary of the relationship.<sup>409</sup> While this exemption is known for its flexible and fact-based approach, it is still possible to hypothesize how a court may decide a position's legality based on the enumerated factors. This Note gathered data on the working student position to assess the likelihood of its success or failure under this guidance and provided context for that data through further exploration into the industry.<sup>410</sup> After applying the modern primary beneficiary test, this Note concludes that the equestrian industry's working student position as it exists

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407. *Equine Management Training Center*, SANDY RIVER EQUESTRIAN, <https://perma.cc/SC4U-9ZDA>.

408. Silver, *supra* note 145.

409. *See supra* Part I.B.

410. *See supra* Part II.

today will likely not gain protected internship status and thus runs afoul of the FLSA.<sup>411</sup>

The working student position, however, is not without merit. Yes, these programs may not be legally compliant and are ultimately seen as problematic even amongst their supporters. Nevertheless, the same programs often provide access to the upper levels of the industry for a larger pool of young riders, teach valuable life and equine lessons, and can be an opportunity that shapes the remainder of a young equestrian's life. For all these reasons, the equestrian industry should seek to adapt instead of replace. Ultimately, this Note shows that conversion into an employment relationship is more likely to harm both the industry and young riders than help and calls on the equestrian industry to play the longer game. Instead of removing the working student, the industry should rework these programs to traverse a clear—though uphill—path to both legal compliance and a more symbiotic future for working student programs.

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411. See *supra* Part III.

APPENDIX A: SURVEY AND INSTITUTIONAL REVIEW BOARD  
APPROVAL

Figure 1: The Survey

CONSENT TO PARTICIPATE IN HUMAN RESEARCH  
PROJECT

Washington and Lee University  
**Working Student Experiences**  
*Lara Morris, 434-294-6786*

You have been asked to participate in a research study reviewed and approved by the Washington and Lee University Institutional Review Board for Research with Human Subjects.

The purpose of this study is to examine the experiences of working students in the equine industry.

The purpose of this study is to gather data on working student positions for a Law Review student Note. The Note will analyze whether working students would be understood as an intern position or if the position is truly that of an employee as defined by the Fair Labor Standards Act.

The survey will ask basic information about the position and your experiences while holding it. Additionally, there are some questions about your choices after leaving the working student position. The survey includes up to eighty-four questions if you have held multiple working student positions.

Participation in research is entirely voluntary. You may refuse to participate or may withdraw from participation at any time without penalty. Also, you may skip any question you would prefer not to answer. Results collected in this study may be used for future research or external publication, but individual identification and responses will be kept confidential.

The investigator may withdraw you from participation at his/her professional discretion.

Any information derived from this research project which personally identifies you will not be voluntarily released or

disclosed without your separate consent, except as specifically required by law.

If, at any time, you have questions regarding this research or your participation in it, you should contact the investigator, Lara Morris at morris.l23@law.wlu.edu.

If, at any time, you have questions regarding the conduct of this research, or if you wish to discuss your rights as a research participant, you may contact the chair of the Institutional Review Board for Research with Human Subjects, at bprice@wlu.edu.

I confirm that I am 18 years or older and consent to participate in this study. By proceeding into the study and providing answers you have consented to be a part of this study.

#### Part I

*Please answer these questions about you at the time you were a working student.*

1. How many years old were you when you were a working student? *Select all that apply.*
  - a. Under 16
  - b. 16–18
  - c. 19–20
  - d. 22–24
  - e. 25 and older
2. Please list the state(s) you worked in as a working student.
3. 

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What gender do you identify with?
  - a. Male
  - b. Female
  - c. Non-binary
  - d. Rather not say
4. What kind of riding do you do?
  - a. Eventing
  - b. Dressage
  - c. Hunter/Jumper
  - d. Other

5. At what level did you compete when you began your working student position? \_\_\_\_\_
6. At what level did you compete when you left your working student position? \_\_\_\_\_
7. Did you have access to health insurance?
  - a. Yes
  - b. No
8. If your answer to question seven was “Yes” then what type of access did you have?
  - a. Through parent or spouse
  - b. Personally paid
  - c. Through working student program
9. How many working student positions have you held?
  - a. One
  - b. Two
  - c. Three
  - d. Four or more

## Part II

*Please answer these questions about your FIRST or ONLY working student position.*

10. How did you find your working student position? *Select all that apply.*
  - a. Recommendation
  - b. Social media
  - c. Online listing
  - d. Other
11. How were the terms of the position set out?
  - a. Written contract
  - b. Oral agreement
  - c. There were no official terms
12. How long was the position supposed to last?
  - a. Less than 6 months
  - b. 6–12 months
  - c. Over 12 months
13. Did you extend or cut short your position?
  - a. Extended
  - b. Cut short
  - c. No

14. How many hours did you work in an average day?
  - a. 1–4
  - b. 4–8
  - c. 8–12
  - d. 12–16
  - e. More than 16
15. How many days did you work in an average week?
  - a. 1–2
  - b. 3–4
  - c. 5–6
  - d. 7
16. How many paid employees (*not* working students) worked at the program where you were a working student?
  - a. 0
  - b. 1–3
  - c. 4–6
  - d. 7–9
  - e. 10 or more
17. Were your duties similar to the duties of paid employees?
  - a. Yes
  - b. No
18. Briefly describe your duties. \_\_\_\_\_
19. What percent of your time was spent riding a horse?
  - a. 0–25%
  - b. 25–50%
  - c. 50–75%
  - d. Over 75%
20. What percent of your time was spent directly interacting with a horse? Examples: tacking, grooming, healthcare.
  - a. 0–25%
  - b. 25–50%
  - c. 50–75%
  - d. Over 75%
21. What percent of your time was spent doing work that did not directly involve a horse? Examples: mucking stalls, cleaning tack, dragging rings.
  - a. 0–25%
  - b. 25–50%
  - c. 50–75%
  - d. Over 75%



22. How often did you learn a new skill relating to being a professional equestrian? NOT including basic manual labor and barn tasks.
- Daily
  - Weekly
  - Monthly
  - Infrequently
23. Did you receive feedback on individual tasks? Feedback can be understood as commentary on an individual or small group of tasks given shortly after or while completing tasks.
- Yes, I was told when I did something correct or incorrect
  - Yes, I was told when I did something correct ONLY
  - Yes, I was told when I did something wrong ONLY
  - No
24. Was the feedback helpful?
- Yes, I was able to know what I did right and wrong AND WHY it was right or wrong
  - Yes, I knew what I did right or wrong BUT did not know why it was right or wrong
  - No
25. Did you receive any assessments of your performance? Assessments can be understood as overall commentary on the quality of your entire work during a set time. Examples of assessments are performance reviews or exams.
- Yes, weekly discussion
  - Yes, monthly discussion
  - Yes, rarely or at the end of my position
  - No

#### Part IV

*Please answer these questions about benefits you received from your FIRST or ONLY working student position.*

26. Did you ever expect a salary or hourly wage?
- Yes
  - No
27. Were you promised a salary or hourly wage?
- Yes
  - No

28. Did you receive a stipend? A stipend is a cash allotment meant to cover or help cover necessary living expense such as food, gas, housing.
- Yes
  - No
29. If your answer to question 28 was “Yes” how much did you receive? \_\_\_\_\_
30. Did you receive housing?
- Yes, a room in a house
  - Yes, a shared room in a house or apartment
  - Yes, an apartment
  - Yes, a barn apartment
  - No, I lived at home
  - No, I found and funded my own housing
31. If your answer to question 30 was “Yes” please indicate the conditions of the housing.
- Excellent (as an example: clean, safe, fully functional utilities, repairs when needed)
  - Good (as an example: clean, safe, some normal wear and tear on utilities)
  - Acceptable (as an example: safe, basic utilities)
  - Poor (as an example: not clean or safe)
32. Did you receive regular (i.e., monthly or bimonthly) assistance in paying for living expenses such as utilities, gas, internet, and phone?
- Yes
  - No
33. Did you have access to a horse to ride regularly?
- Yes, my own
  - Yes, through my working student position I was given access
  - No
34. Did you receive riding lessons from the professional you worked for?
- Yes, 1 time a week
  - Yes, 2–3 times a week
  - Yes, 4 or more times a week
  - Yes, but irregularly
  - No
35. Did you receive board for your horse?
- Yes, discounted
  - Yes, full board

- c. No, I paid for my horse's board or someone else paid for me
  - d. No, I did not bring a horse to my position
36. Did you receive training at shows? Training includes things like course walks and warm-ups.
- a. Yes, always
  - b. Yes, the majority of shows
  - c. Yes, some shows
  - d. No
37. Did you get any opportunities to make money by working for clients/boarders? Examples include pulling manes, braiding, clipping, exercising horses.
- a. Yes
  - b. No
38. Were you offered the opportunity to transition into a paid employee?
- a. Yes
  - b. No
39. If your answer to question 38 was "Yes" *when* was the opportunity given?
- a. Before you began the position
  - b. During your time at the position
  - c. At the end of your position or after you left
40. Did you *expect* to be given an opportunity to become a paid employee?
- a. Yes
  - b. No
41. If your answer was "yes," why or what made you expect this? \_\_\_\_\_
42. Was seeking a paid position a reason you chose to become a working student?
- a. Yes
  - b. No
43. Did you receive any academic credit for being a working student?
- a. Yes
  - b. No
  - c. No, but I tried

## Part IV

*Please answer these questions about your time after you left your working student position(s).*

44. Do you still ride?
  - a. Yes
  - b. No
45. Do you still compete?
  - a. Yes
  - b. No
46. Would you recommend your working student experience to an aspiring rider?
  - a. Yes
  - b. No
47. Why or why not? \_\_\_\_\_
48. Did you continue to work in the equine industry?
  - a. Yes, and still do
  - b. Yes, but no longer do
  - c. No
49. Did you attend an academic program after you left your working student position?
  - a. Yes, college
  - b. Yes, post-grad
  - c. Yes, vocational or trade school
  - d. No
50. Was maintaining amateur status (i.e., not being an employee) important to you?
  - a. Yes
  - b. No

## Part V

*Please answer these questions about benefits you received from your SECOND working student position. If you did not have a second position, please submit your survey now and do not answer further questions.*

51. How did you find your working student position? *Select all that apply.*
  - a. Recommendation
  - b. Social media

- c. Online listing
  - d. Other
52. How were the terms of the position set out?
- a. Written contract
  - b. Oral agreement
  - c. There were no official terms
53. How long was the position supposed to last?
- a. Less than 6 months
  - b. 6–12 months
  - c. Over 12 months
54. Did you extend or cut short your position?
- a. Extended
  - b. Cut short
  - c. No
55. How many hours did you work in an average day?
- a. 1–4
  - b. 4–8
  - c. 8–12
  - d. 12–16
  - e. More than 16
56. How many days did you work in an average week?
- a. 1–2
  - b. 3–4
  - c. 5–6
  - d. 7
57. How many paid employees (*not* working students) worked at the program where you were a working student?
- a. 0
  - b. 1–3
  - c. 4–6
  - d. 7–9
  - e. 10 or more
58. Were your duties similar to the duties of paid employees?
- a. Yes
  - b. No
59. Briefly describe your duties. \_\_\_\_\_
60. What percent of your time was spent riding a horse?
- a. 0–25%
  - b. 25–50%
  - c. 50–75%
  - d. Over 75%

61. What percent of your time was spent directly interacting with a horse? Examples: tacking, grooming, healthcare.
- 0–25%
  - 25–50%
  - 50–75%
  - Over 75%
62. What percent of your time was spent doing work that did not directly involve a horse? Examples: mucking stalls, cleaning tack, dragging rings.
- 0–25%
  - 25–50%
  - 50–75%
  - Over 75%
63. How often did you learn a new skill relating to being a professional equestrian? NOT including basic manual labor and barn tasks.
- Daily
  - Weekly
  - Monthly
  - Infrequently
64. Did you receive feedback on individual tasks? Feedback can be understood as commentary on an individual or small group of tasks given shortly after or while completing tasks.
- Yes, I was told when I did something correct or incorrect
  - Yes, I was told when I did something correct ONLY
  - Yes, I was told when I did something wrong ONLY
  - No
65. Was the feedback helpful?
- Yes, I was able to know what I did right and wrong AND WHY it was right or wrong
  - Yes, I knew what I did right or wrong BUT did not know why it was right or wrong
  - No
66. Did you receive any assessments of your performance? Assessments can be understood as overall commentary on the quality of your entire work during a set time. Examples of assessments are performance reviews or exams.
- Yes, weekly discussion
  - Yes, monthly discussion
  - Yes, rarely or at the end of my position
  - No

## Part VI

*Please answer these questions about benefits you received from your SECOND working student position.*

67. Did you ever expect a salary or hourly wage?  
a. Yes  
b. No
68. Were you promised a salary or hourly wage?  
a. Yes  
b. No
69. Did you receive a stipend? A stipend is a cash allotment meant to cover or help cover necessary living expense such as food, gas, housing.  
a. Yes  
b. No
70. If your answer to question 28 was “Yes” how much did you receive? \_\_\_\_\_
71. Did you receive housing?  
a. Yes, a room in a house  
b. Yes, a shared room in a house or apartment  
c. Yes, an apartment  
d. Yes, a barn apartment  
e. No, I lived at home  
f. No, I found and funded my own housing
72. If your answer to question 30 was “Yes” please indicate the conditions of the housing.  
a. Excellent (as an example: clean, safe, fully functional utilities, repairs when needed)  
b. Good (as an example: clean, safe, some normal wear and tear on utilities)  
c. Acceptable (as an example: safe, basic utilities)  
d. Poor (as an example: not clean or safe)
73. Did you receive regular (i.e., monthly or bimonthly) assistance in paying for living expenses such as utilities, gas, internet, and phone?  
a. Yes  
b. No
74. Did you have access to a horse to ride regularly?  
a. Yes, my own  
b. Yes, through my working student position I was given access

- c. No
75. Did you receive riding lessons from the professional you worked for?
- a. Yes, 1 time a week
  - b. Yes, 2–3 times a week
  - c. Yes, 4 or more times a week
  - d. Yes, but irregularly
  - e. No
76. Did you receive board for your horse?
- a. Yes, discounted
  - b. Yes, full board
  - c. No, I paid for my horse's board or someone else paid for me
  - d. No, I did not bring a horse to my position
77. Did you receive training at shows? Training includes things like course walks and warm-ups.
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  - b. Yes, the majority of shows
  - c. Yes, some shows
  - d. No
78. Did you get any opportunities to make money by working for clients/boarders? Examples include pulling manes, braiding, clipping, exercising horses.
- a. Yes
  - b. No
79. Were you offered the opportunity to transition into a paid employee?
- a. Yes
  - b. No
80. If your answer to question 38 was "Yes" *when* was the opportunity given?
- a. Before you began the position
  - b. During your time at the position
  - c. At the end of your position or after you left
81. Did you *expect* to be given an opportunity to become a paid employee?
- a. Yes
  - b. No
82. If your answer was "yes," why or what made you expect this? \_\_\_\_\_



83. Was seeking a paid position a reason you chose to become a working student?
- a. Yes
  - b. No
84. Did you receive any academic credit for being a working student?
- a. Yes
  - b. No
  - c. No, but I tried

## Figure 2: Institutional Review Board Approval

## INSTITUTIONAL REVIEW BOARD

To: Lara Morris  
From: Bryan Price  
Chair, W&L Institutional Review Board  
Assistant Provost of Accreditation & Institutional Research  
Date: 12/06/2021  
RE: IRB Proposal

**Project:** Working Student Experiences  
**Submission Date:** 11/29/2021  
**Status:** Approved – Exempt  
**Case Number:** EXEMPT.202122.011

**Comments:**

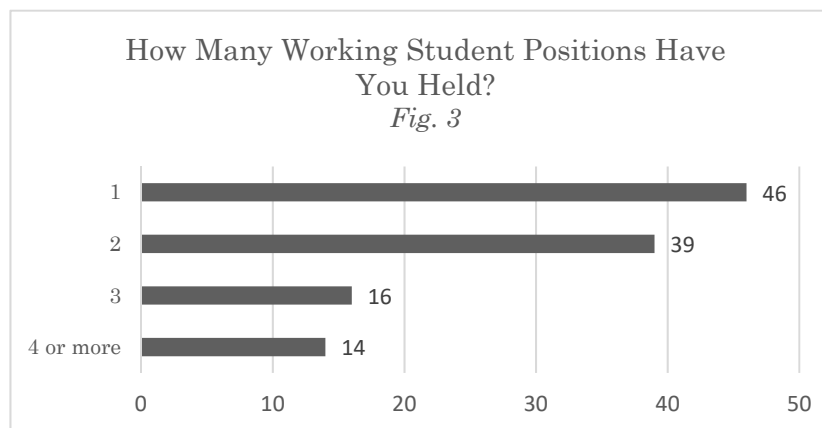
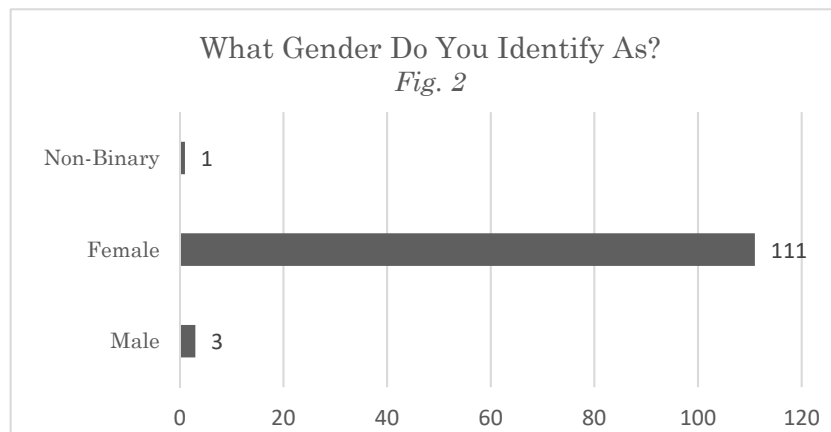
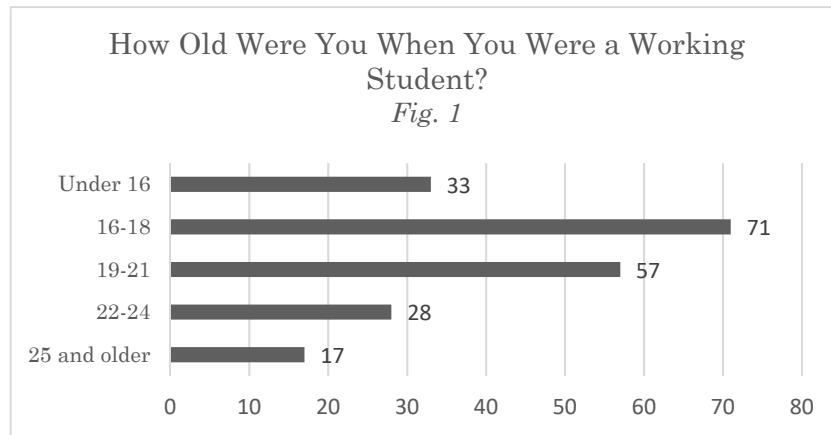
Your proposal, *Working Student Experiences* (as submitted 11/29/2021, including an attachment submitted 12/6/21), meets the following thresholds: 1) poses no foreseeable risk to the research population; 2) meets ALL of the criteria listed on the Washington & Lee University IRB website, *Exempt, Part A*; 3) meets one or more of the criteria listed on the Washington and Lee University IRB website, *Exempt, Part B*; and 4) meets one or more of the federal exempt categories criteria (Exempt, Part D, Item 2 – [45CFR46.104(d)(2)]). As a result, **the study has been determined to be EXEMPT on 12/06/2021** and the research may proceed per your protocol and the stipulations **below**. Your IRB case number is **EXEMPT.202122.011**.

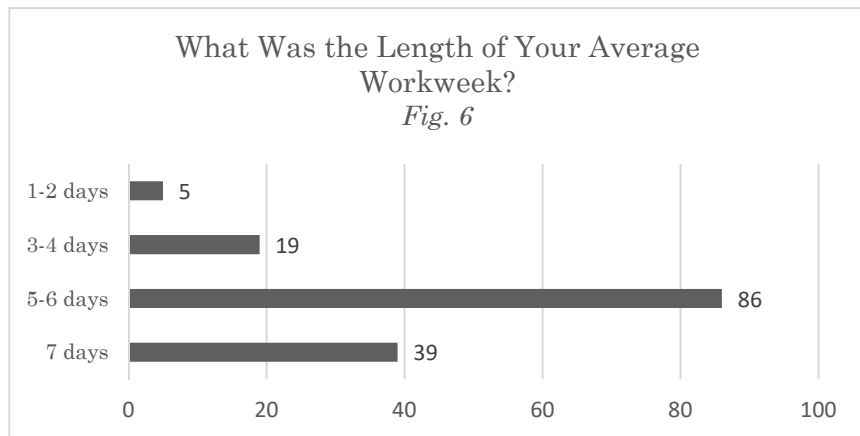
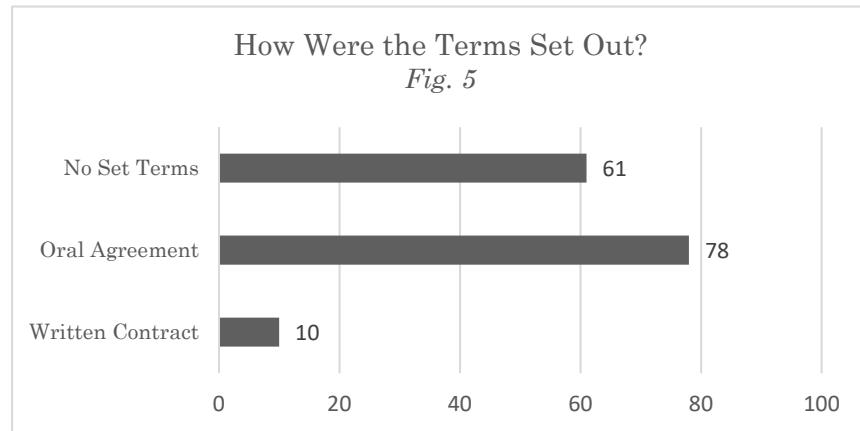
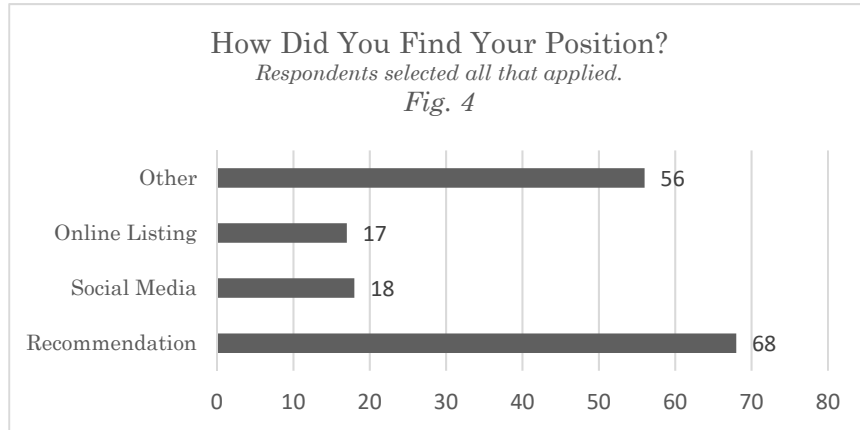
It is noted that COVID protocols are not applicable due to the online nature of survey research.

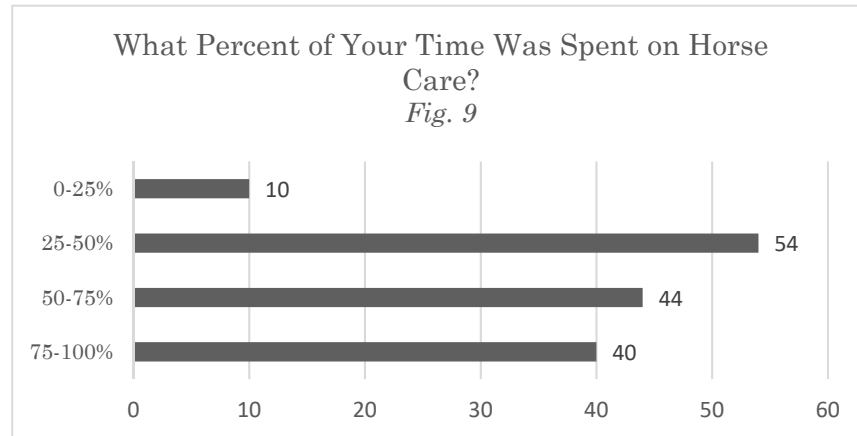
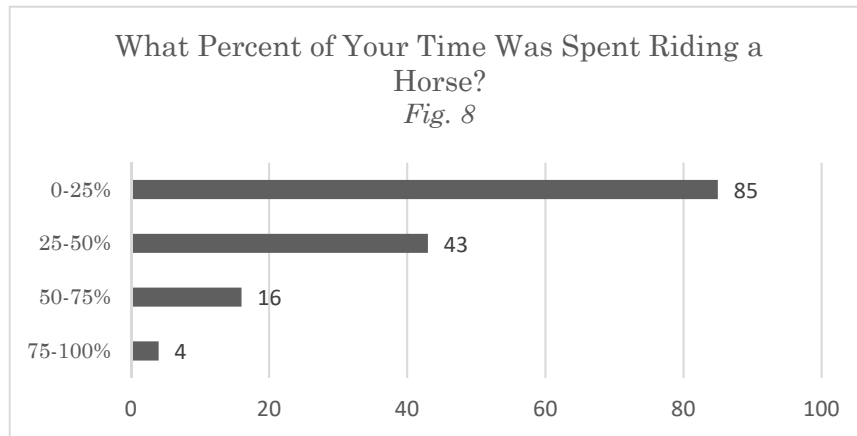
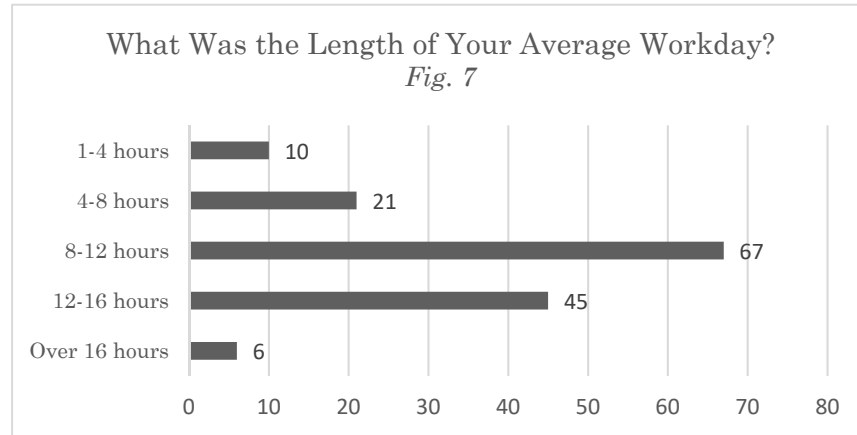
**Stipulations:**

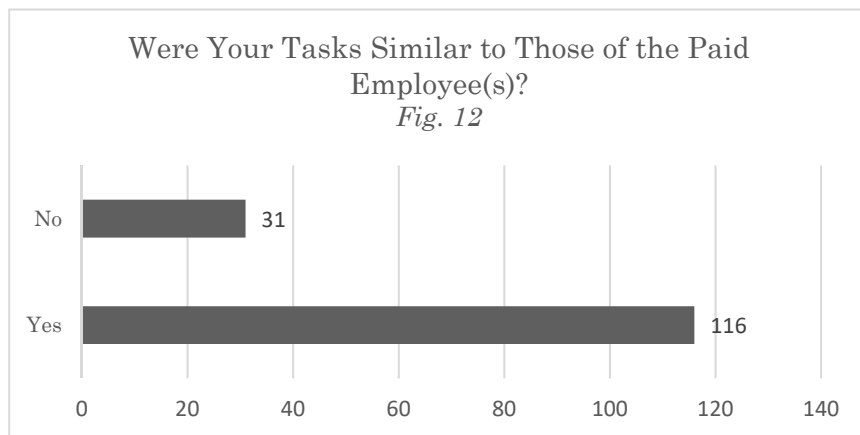
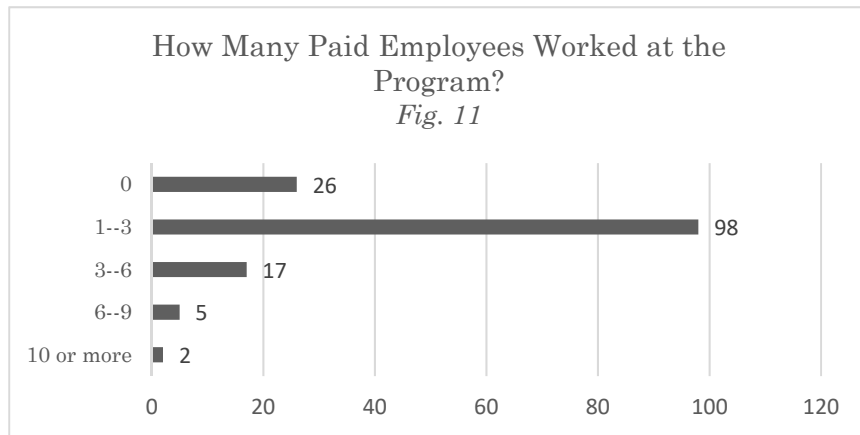
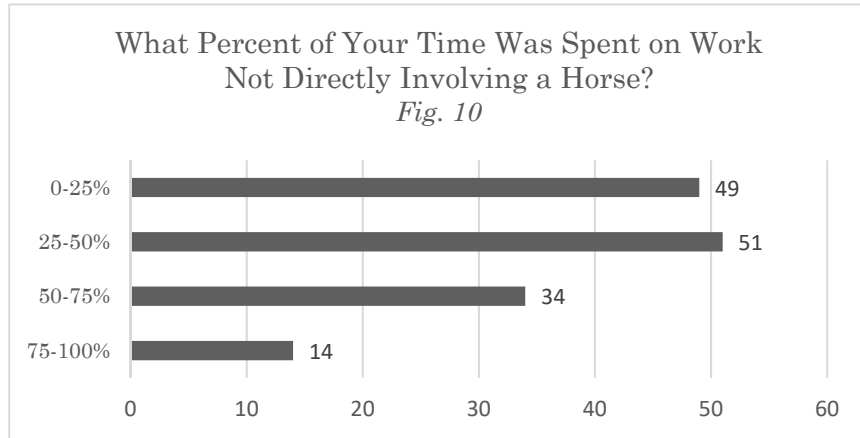
1. Your IRB approval (**EXEMPT.202122.011**) is valid for one year, **expiring 12/05/22**. Should you wish to collect data after that time OR if you make changes to your research design, data collection procedures, or methodology, **you are required** to notify the Institutional Review Board **prior** to continuing your research. When contacting the IRB, please **reference your approval number**. In general, *most* protocol amendments can be handled *via an explanatory email* and do not require the submission of a revised proposal. As a reminder, approvals may be renewed annually if the research is to be continued. To avoid processing delays, please submit your proposal prior to the expiration deadline.

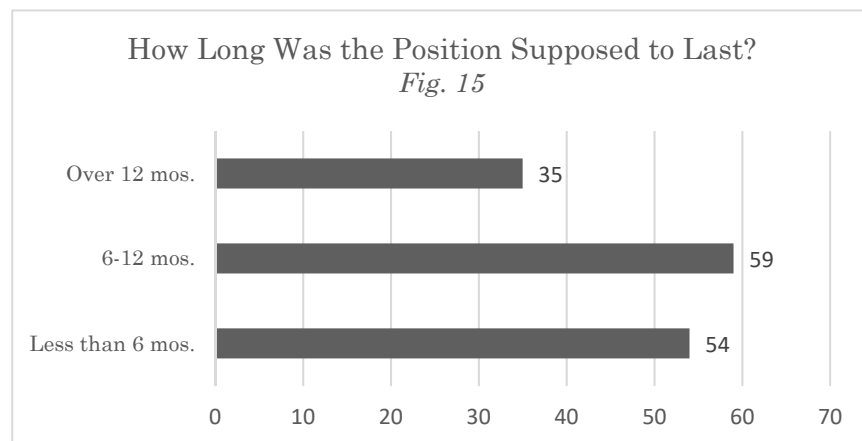
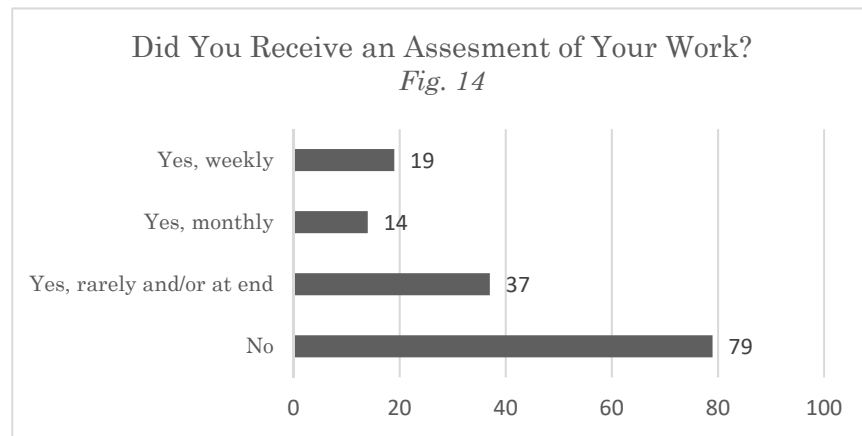
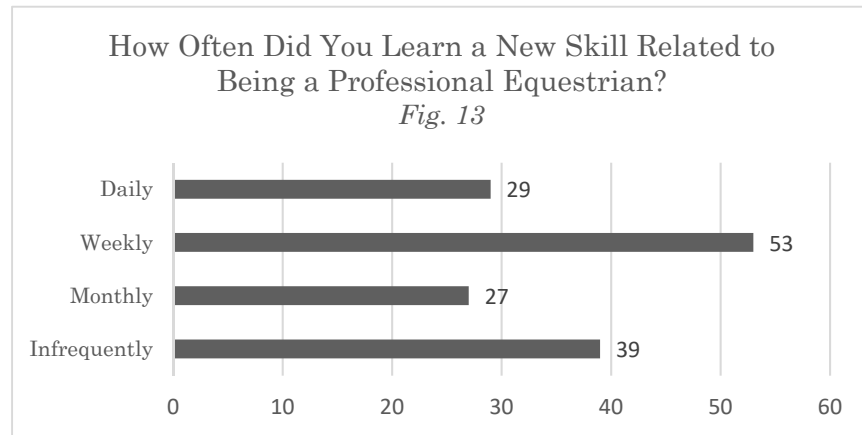
## APPENDIX B: SURVEY RESULTS

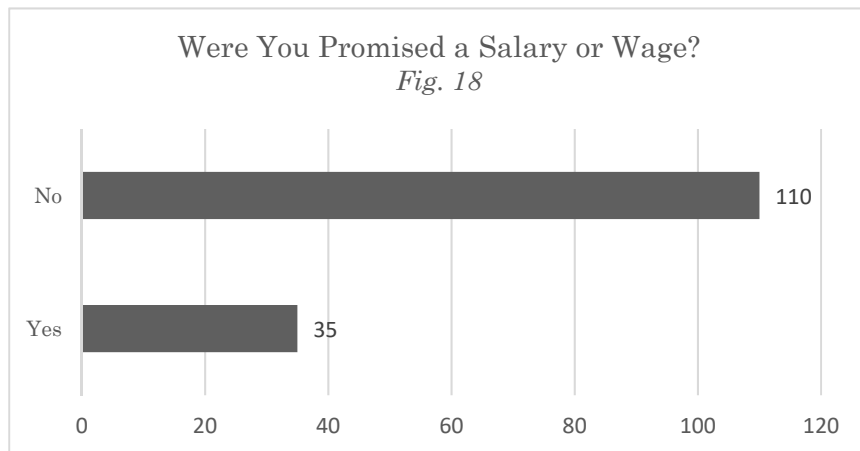
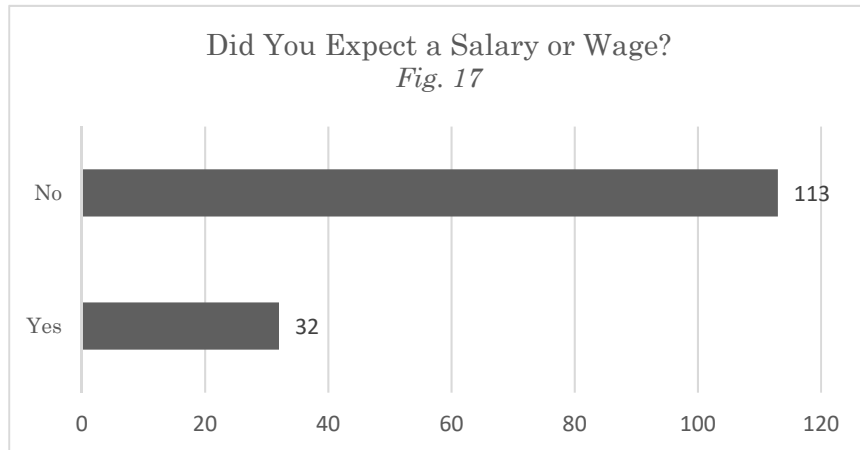
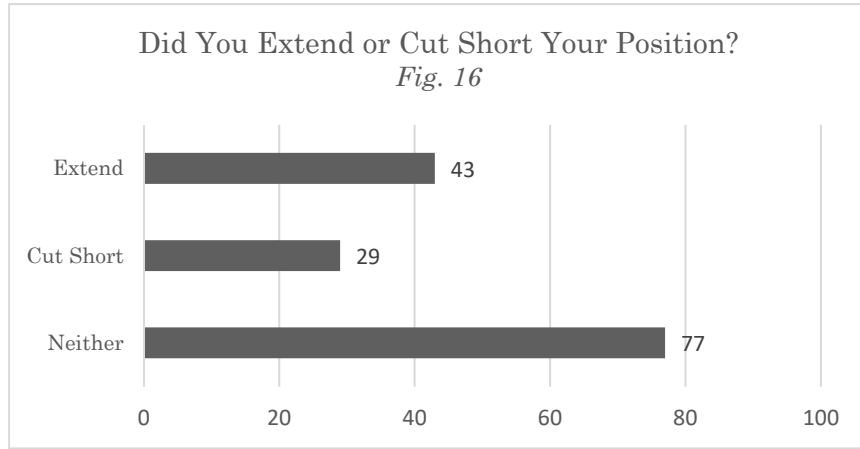




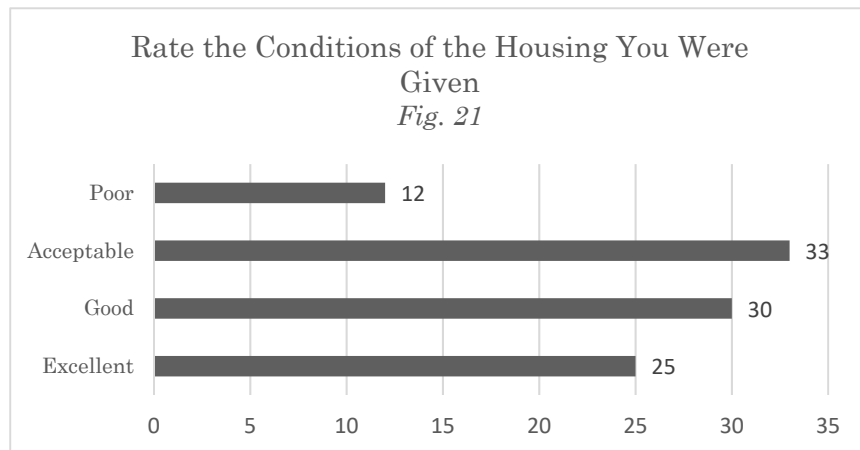
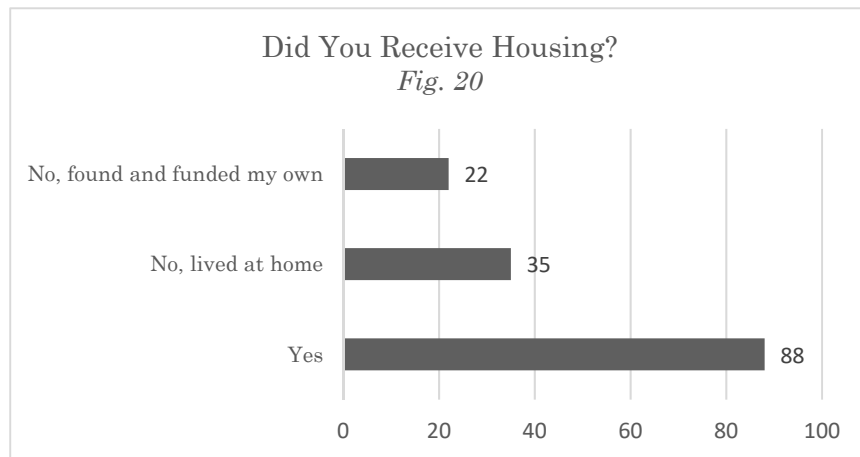
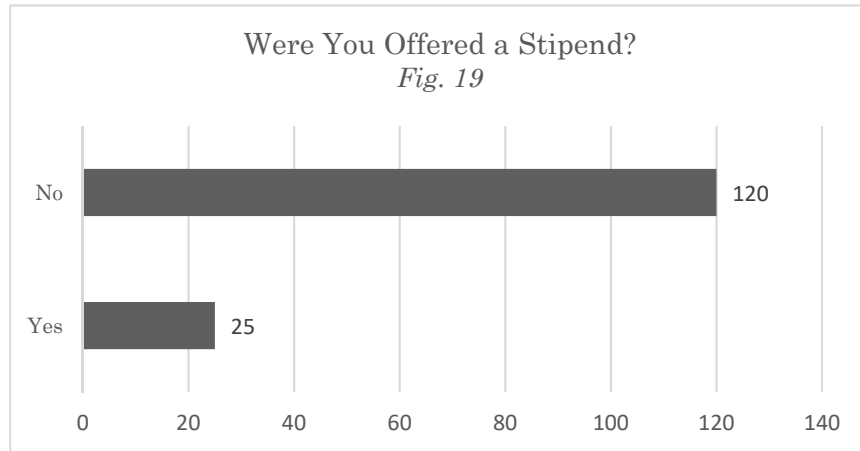


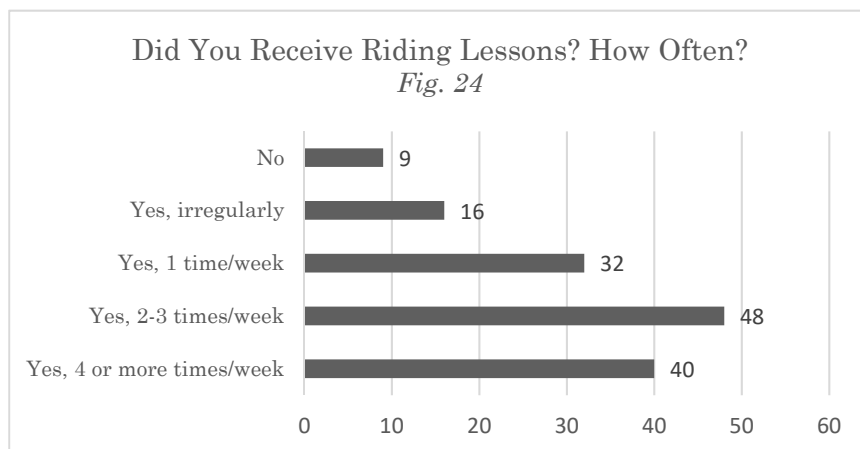
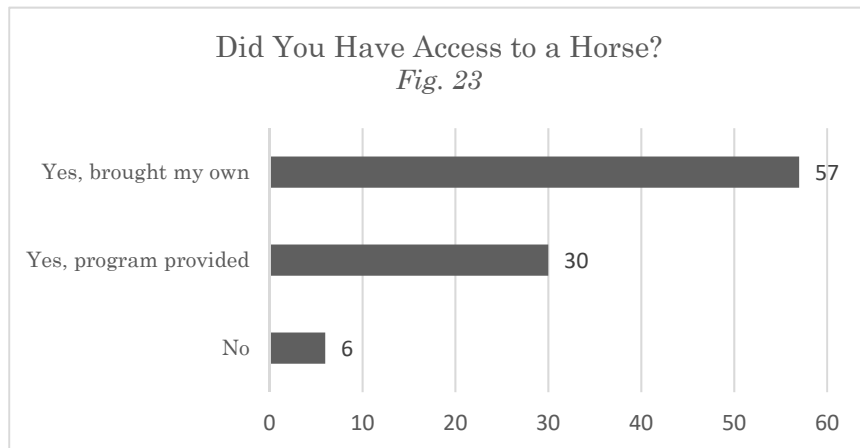
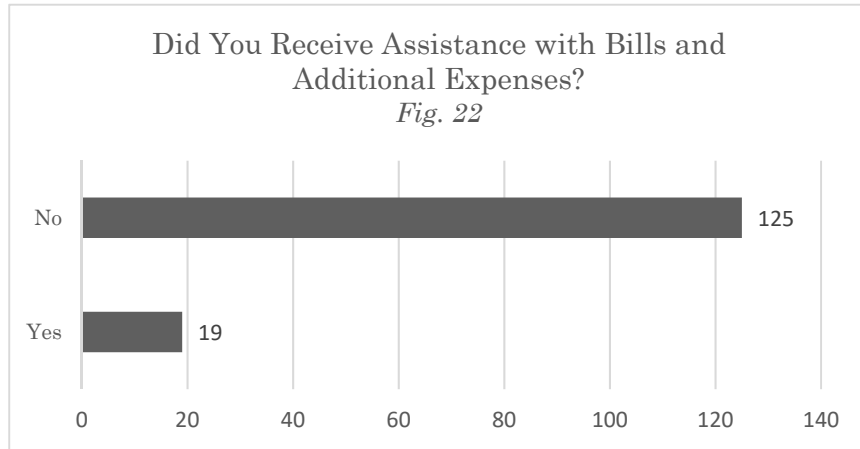


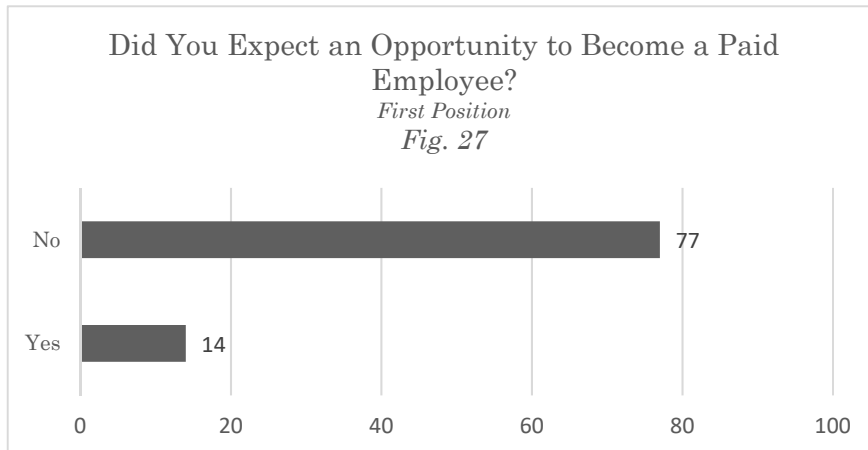
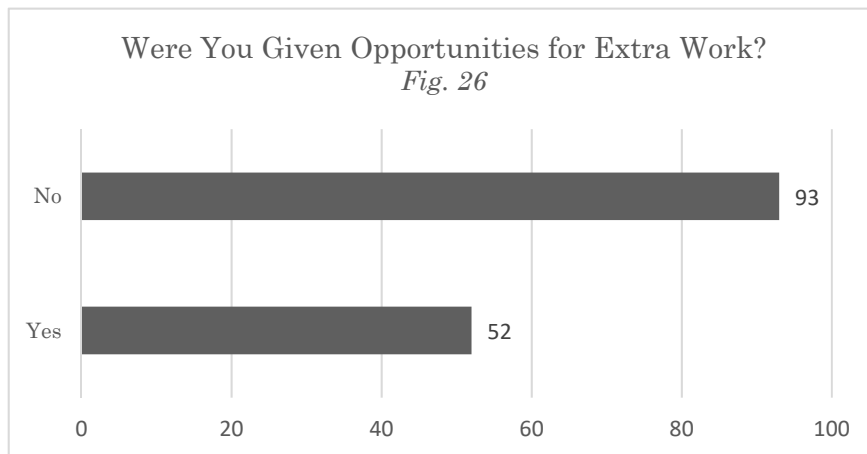


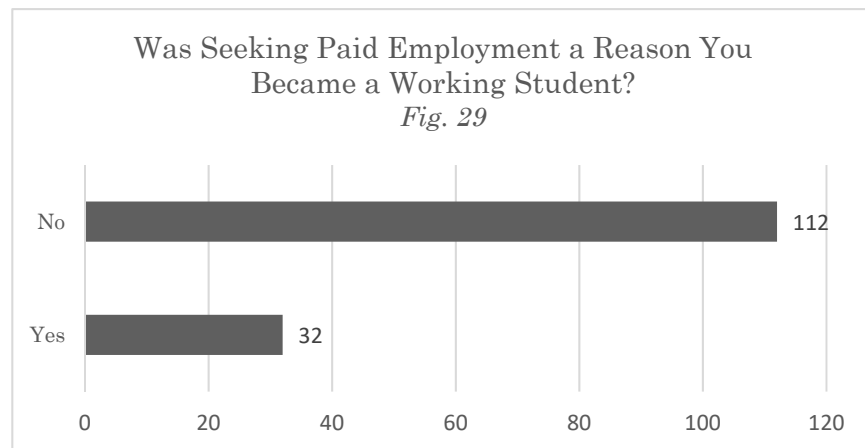


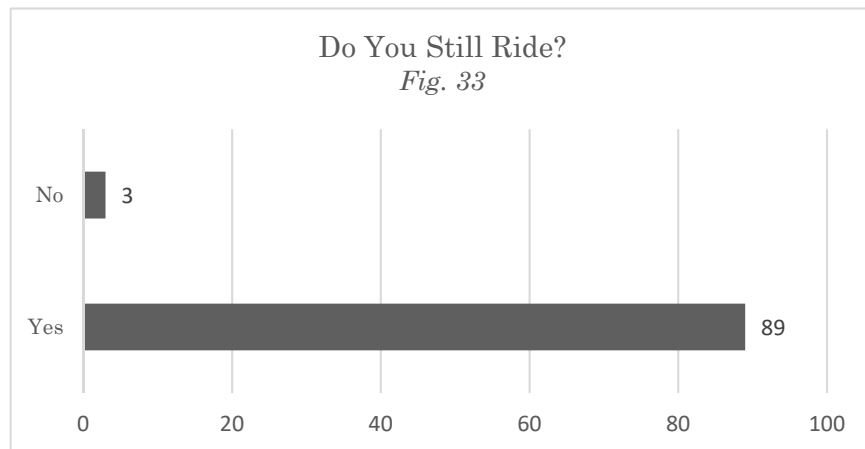
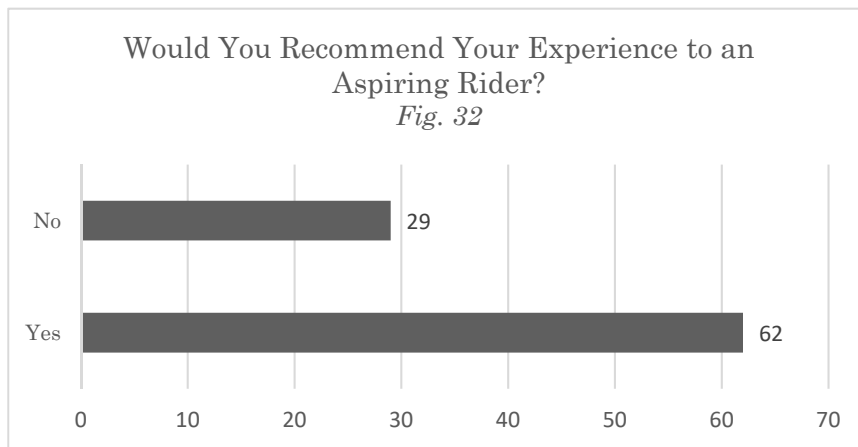
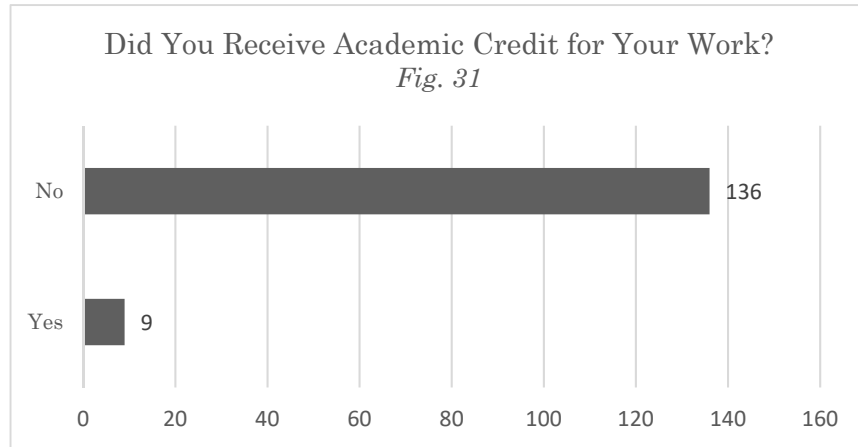


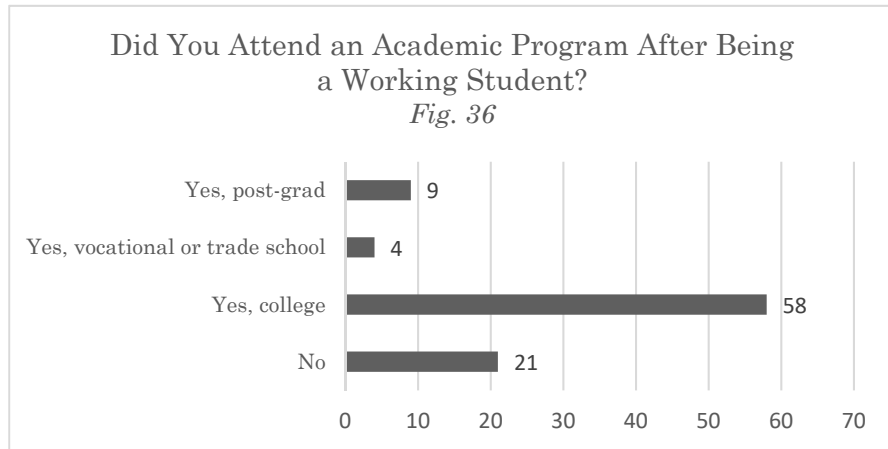
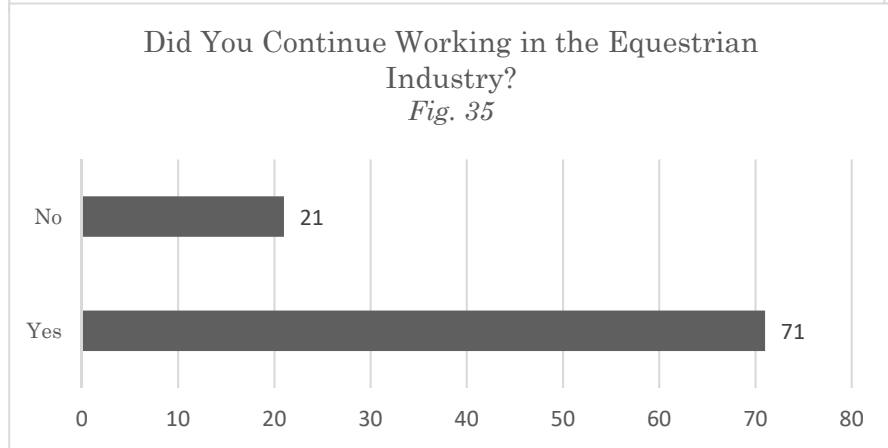
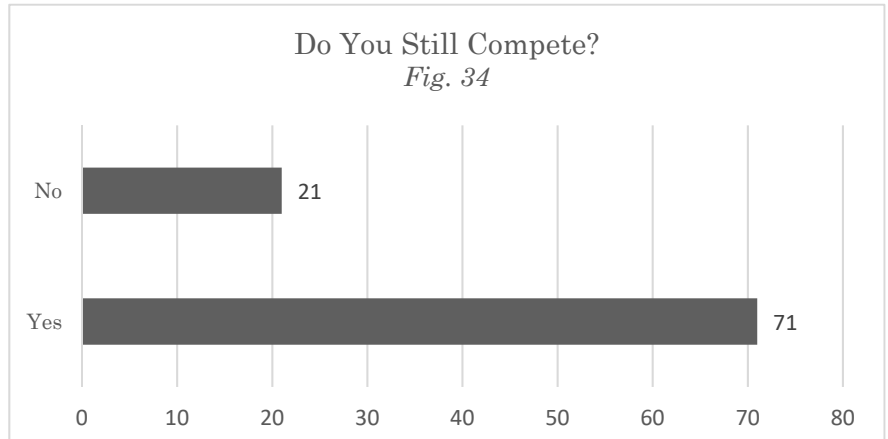












What State(s) Were You a Working Student In?

*Fig. 37*

Illinois	Colorado	Indiana
West Virginia	Virginia	New Jersey
Missouri	North Carolina	Kentucky
Washington	Tennessee	Vermont
Texas	South Carolina	New Mexico
Wisconsin	Pennsylvania	Connecticut
Georgia	California	Massachusetts
New York	Florida	Maine
Alabama	Michigan	Maryland
Ohio	Oregon	Rhode Island

Stipend Problems

*Fig. 38*

When answering the question on stipends two respondents replied, “I did not receive it” and “I didn’t end up receiving what was promised.”

All those who provided a stipend amount noted that the amount was set in advance and was doled out despite varying factors like hours actually worked.