

January 9, 2018 (and revised January 30, 2018)

Dear Chris,

Thank you for forwarding me these links regarding the Employment Summary Form. As you know, through the notice and comment process Ohio State played a role in creating what I thought of as the “compromise” that your previous Committee, together with Council, used to create the 2015 Employment Summary Report (“ESR”). I am grateful for this opportunity to comment on your Working Group’s proposals, and please feel free to share these comments with any interested parties.

Your memo of December 31, 2017 to the Standards Review Committee details outstanding survey work conducted by a Working Group of that Committee, four different potential versions of the ESR for the future, and six additional recommendations regarding the ESR. Let me start with my conclusion: of the four potential versions of the ESR submitted by the Working Group, only the first (which is the current version) would be satisfactory. Each of the other three contain disqualifying flaws. Separately, the six additional recommendations of the Working Group each make sense to me. My explanation follows.

Law School Funded Positions.

Background: The current ESR resulted from the outstanding work of a committee that you led. Your committee took a very close and detailed look at the jobs new graduates were obtaining that were funded by their law schools. In particular, the definition of “full-time, long-term, J.D. required” job was written in such a way that if a law school provided, for example, a \$1,500 monthly stipend for a graduate to volunteer at a legal organization for up to a year (while looking for permanent work), the work under that stipend would count as a full-time, long-term, J.D. required job and be indistinguishable for reporting purposes from a permanent job with a law firm or a government or public interest organization. Your committee pointed out that while such opportunities were a welcome tool for otherwise unemployed graduates as a pathway to work, characterizing them as full-time, long-term made job statistics potentially misleading. Your committee detailed the very low pay of most such stipends and the fact that they were created with the hope that they would *not* last a year and explained how their inclusion led to a distorted picture of employment outcomes. Your committee proposed as a solution not allowing law school funded positions to count as full-time, long-term, J.D. required---even though they might otherwise meet the definition.

There were objections to your committee’s proposal, principally (at least in my memory) from the most well-resourced schools (I remember a joint letter from the deans of Harvard and Yale), which noted that they had long offered public service fellowships to their graduates that do great public good, launch public services careers, pay a bona fide public service salary, and that the opportunity to seek such fellowships was a strong reason for attending such schools. Not counting those valuable fellowships as “full-time, long-term, J.D. required” jobs, they argued, would itself be misleading, since they are legitimately all those things, and would create terribly inappropriate incentives for law schools by punishing them (through reduced employment statistics) for finding funding for such opportunities.

At that point, Ohio State proposed a compromise that recognized and accommodated the merit in both sides of the argument. The Ohio State proposal urged following your Committee’s recommendation in generally not counting law school funded jobs as full-time, long-term, J.D. required, but with an express exception: if the job was expected to last at least a year *and* paid at least the equivalent of a G8 salary (the federal government starting salary for a public service lawyer), it *would* count as “full-time, long-

term, J.D. required.” This compromise would eliminate the clear majority of law school funded jobs as documented by your committee from the category, but allow the ones accurately worthy of that title to be included, avoiding the perverse incentive and presenting statistics that most accurately reflected reality. Eventually, the essence of the Ohio State proposal was adopted. G8 (which would have automatically adjusted itself for inflation and allowed for location adjustments based on cost of living, all preset by the federal government) was changed to \$40,000, and the bar passage required part was placed “below the line,” but the essentials of the compromise were there: only jobs that paid an appropriate competitive salary and were expected to last at least a year (analogous to a judicial clerkship) would count as full-time, long-term, J.D. required when funded by a law school, *and* the number of such full-time, long-term, bar passage required jobs was listed on the form.

Conclusion:

Version 4 of the four proposed ESR’s eliminates the ability to determine whether a law school funded position is J.D. required, J.D. advantage or operating a copy machine. It would make it impossible for a law-school funded position to count in the gold-standard category of “full-time, long-term, J.D. required” and would have the negative effects that underlay my original objection and would destroy the compromise. I think that would be a terrible mistake for the reasons I articulated 3 and 4 years ago during the last round of revisions—reasons that evidently were persuasive since the compromise was adopted. I see no basis for undoing the compromise. (Similarly, I see no basis for abandoning the compromise in the other direction by eliminating the law-school funded characterization completely; although none of the Working Group’s proposals do that, I have seen other proposals that do. Indeed, I believe one such proposal is what started this new round of discussion).

Version 1, of course, preserves the status quo, Version 2 does not change the “law school funded” treatment from the status quo, and Version 3 retains this core aspect of the compromise but makes some changes (eliminating the “law school” category above the line, and distributing the law school graduates in such positions into the appropriate categories above the line) that I think treats such jobs even more fairly, though such advantage must be balanced against the costs of change---year-to-year consistency is undermined, and continuing battles are encouraged instead of accepting that the present system works. In any event, however, Versions 2 and 3 are unsatisfactory for a different reason set out below.

Short-term and Part-Time.

Versions 2, 3, and 4 each collapse the current categories: Full-time Short-term, Part-Time Long-Term, and Part-Time Short-Term into a single category: “NOT Full-time and Long-term.” The justification for this change, I imagine, is an argument that it would simplify the form to reflect what students care most about. To begin with, the assumption that this is *the* crucial piece of information for prospective students is not supported by the reported results. According to the memo, there were 290 responses to the Working Group survey, 96 of them said the “most important” piece of the ESR in deciding what law school to attend was employed vs. unemployed, “with many referring to full-time, long-term employment.” If “many” means half, then only 48 of 290, 16.6% of respondents, called that distinction the most important. Even if all 96 noted that, it would still amount to only 1/3 of respondents. In short, the evidence does not support the view that this is the crucial distinction for prospective students.

Second, collapsing the categories in this way eliminates access to information that prospective students *do* consider important. Sixty-four percent of students said the distinction between part-time work and full-time work was very important to them and 66% said the difference between long-term and short-

term was very important to them. Under Versions 2, 3 and 4, if a job is part-time, a student will not be able to tell whether it is short-term or long-term. If a job is short-term, a student will not be able to tell whether it is full-time or part-time. These distinctions, each of which was denominated as important by 2/3's of students, would be rendered inaccessible. Moreover, students are right to be interested in this distinction. A full-time job lasting six months is a very different thing from working six months for ten hours a week. Having a 20-hour per week job that lasts indefinitely, is very different from having a 20-hour per week job that will end in a month. Lumping all these things together eliminates information that students *do* and *should* care about.

Third, collapsing the categories in this way will have a long-term, negative impact on law school students. If once a job is not full-time, there is no reporting distinction between long-term and short-term, then (over time) career services professionals will devalue the difference between long-term and short-term in this context. If it is not on the report card, if it isn't recognized, if it doesn't count, the drive to accomplish it will inevitably diminish. Similarly, if once a job is not long-term, there is no reporting distinction between full-time and part-time, then (over time) career services professionals will devalue the difference between full-time and part-time in this context. Again, if it is not on the report card, if it isn't recognized, if it doesn't count, the drive to accomplish it will inevitably diminish. (This impact is described in the December 22, 2017 letter to the ABA from Interested Deans and Career Services Professionals regarding proposed revisions to the ESR at p. 29). This is not to say anything negative about career services professionals. To the contrary, it is to recognize that they are human beings. And this inevitable impact on career services professionals will be a bad thing for students, because full-time usually is better than part-time, and long-term usually is better than short-term. There is a reason that two-thirds of surveyed students think these distinctions are important, and changing the form to make take them unimportant to "counting" will harm students by reducing the drive amongst schools for the better outcome. I think predictable impacts of the ESR on the circumstances of law school graduates is at least as important a consideration as the value for prospective students. Here, both groups are harmed by the proposed change.

In opposition to these very strong reasons for *not* collapsing five categories into two is the argument, I suppose, that prospective students find the current five categories too confusing, and that it is better to just focus on what they care about most. Even putting aside the lack of evidence about the "care most about," I see no evidence that the current form is too confusing. That did not seem to be a response from the Working Group survey. To the contrary, a strong majority of respondents indicated these distinctions were an important part of the form, which is strong evidence that they did *not* find it too confusing. For the reasons cited in my third point above, I would oppose the collapsing of these categories even if there were some confusion with the current form, but I do not believe that there is such confusion and evidence of such confusion has not been presented. The collapsing causes harm by solving a non-existent problem. Nor is it any answer to say the deeper information is available upon request for those that are interested. (Though the continuing need to provide the information would mean that Versions 2, 3 and 4 would not lessen the burdensome and costly nature of current reporting requirements (a cost and burden I approve of with the current form, but a substantial one that might not make sense if no one was looking at the data that schools were being forced to gather and prepare for audit). The ESR will drive prospective students and career services professionals. Few will do the "deep dive" required to look beyond the form and, while "few" is slightly better than "none," it does not significantly ameliorate the three core problems cited above.

Other Changes

Versions 2-4 amongst them make a number of other changes: (i) combining unemployed seeking with employment status unknown; (ii) combining state and local clerkships with clerkships other; (iii) consolidating the law firm size rows. None of these changes strike me as problematic, and starting from scratch, I would probably prefer an ESR that reflected these changes. As noted earlier, I think consistency with the form is itself a value, and whether these changes are “worth” undermining that value (particularly as each change leaves net less information for prospective students) is an open question on which I am agnostic.

Conclusion

For the reasons set out above, none of the proposed revised forms (i.e., Versions 2-4) is acceptable. If these are the four choices, the clear choice should be Version 1. Altering Version 1 in some of these ways (e.g., some combination of the law-school funded treatment of Version 3 and/or some or all of the three “Other Changes” described immediately above would substantively be OK, though the Committee would have to weigh whether the improvement would be worth the disruption—both in easy year-to-year comparison and in the undermining of the *stare decisis* value of treating the ESR as a settled matter.

Thank you again, Chris, for your hard work on this important matter.

Best Regards,

Alan



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