Transforming Veteran Hiring: The Legal Implications of the Defense Department’s “Skillbridge” Program and Hiring Active-Duty Servicemembers as Unpaid Interns

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Abstract

This article examines employment law and related issues facing private companies who, pursuant to the Defense Department’s Skillbridge Program, hire active-duty servicemembers as unpaid interns. Since January 2014, U.S. servicemembers with at least 180 days of active duty have been eligible to intern with civilian employers while still on active duty (retaining full pay and benefits) as they transition from military service to civilian employment. Facing this new pool of talent, employers, for good reason, have concerns about the legal implications of the differences between Skillbridge interns and the typical college student interns. Through an examination of the intersection of employment law and military regulations, this article will serve as a critical resource for employers participating in the Program.

The hiring of unpaid Skillbridge interns is not a risk-free proposition, although in most instances the potential liabilities are no different from those that exist when an employer hires ordinary paid employees (and, in many cases, they are diminished). For purposes of wage-and-hour laws, employers have diminished risks of liability for not paying Skillbridge interns because the Defense Department incorporates the Department of Labor’s unpaid internship standards as requirements for Skillbridge program eligibility. Additionally, the common law rules of at-will employment generally apply to the relationship between the employer and the Skillbridge intern, who remains subject to possible recall by his or her chain of command.

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The article also addresses an employer’s potential liabilities to its Skillbridge interns under federal anti-discrimination law and state law governing premises liability. It then shifts focus, covering an employer’s potential liabilities to third parties because of its Skillbridge interns, under theories of both vicarious and direct liability. The article concludes that, as a general matter, a Skillbridge intern’s active military status has limited bearing on an employer’s potential risks, making the hiring of Skillbridge interns an attractive proposition.

Introduction

Unpaid interns have long been a presence in the workplace. Internships provide the intern with an opportunity to gain real-world experience and, occasionally, a leg up towards paid employment. The employer, in turn, obtains a modicum of free services while training potential future employees about its business and operations. Despite the mutual benefits to the arrangement, it is nevertheless unsurprising that internships are rarely of long duration, because it is still difficult to find workers who can afford to work for free long-term.¹

Since January 2014, private employers have had access to a previously untapped pool of talent for internship opportunities: active-duty servicemembers of the U.S. Armed Forces. Although veterans—that is, discharged former servicemembers—have always been a presence in the workplace, the Defense Department’s launch of the “Skillbridge” Career Skills Program five years ago has made it possible for actual serving soldiers and sailors to work in the private sector—without pay—as they transition from military careers to civilian employment.

The introduction of active-duty servicemembers into internships does not portend a sea change in workplace practices or employment law, but it does alter the internship paradigm somewhat. The typical intern—a college student on summer break—has been a person with no external source of pay or benefits and, commensurately, no external authority to be subject to. Obviously, this is not the case for active-duty service members. These differences raise previously unaddressed questions concerning the appropriate employment classification of military interns and the implications of that classification to other issues.

This article addresses these issues, focusing on internships in the for-profit sector, in particular private companies. We begin with the general concept of employment classification and then discuss how, if at all, it affects potential obligations and liability issues from the

standpoint of the employer. For the reasons discussed below, the hiring of interns is not a risk-free proposition, although in most instances the potential liabilities are no different from those that exist when the employer hires ordinary paid employees (and, in many cases, they are diminished). More importantly, no authority suggests that an intern’s status as an active-duty servicemember is relevant to the employer’s flexibility and discretion with respect to its management of the workplace.

I. The Defense Department’s “Skillbridge” Program.

In January 2014, the U.S. Department of Defense issued Instruction 1322.29, entitled “Job Training, Employment Skills Training, Apprenticeships, and Internships (JTEST-AI) for Eligible Service Members.”2 The Instruction authorizes the individual armed services to permit servicemembers nearing their discharge dates to spend their last months of active duty undertaking civilian-sector job training through various programs, including apprenticeships and internships. The Defense Department’s official program to implement the Instruction and facilitate successful transitions to civilian life came to be called “Skillbridge,” run under the auspices of the Undersecretary of Defense for Personnel and Readiness.3

Servicemembers are eligible to participate in Skillbridge if they have completed at least 180 continuous days on active duty and are within six months of discharge.4 Participation is voluntary, and, indeed, entry into the program must be servicemember-initiated.5 Both officers and enlisted personnel are eligible, but approval is required from the servicemember’s chain of command and can only be authorized when consistent with the needs of the service.6 A servicemember’s participation can be terminated by his or her chain of command if military needs require.7

Not all potential internship programs are eligible, and, in fact, pre-authorization is required.8 To be an eligible program, an internship

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2. U.S Dep’t of Def., Instruction 1322.29, Job Training, Employment Skills Training, Apprenticeships, and Internships (JTEST-AI) for Eligible Service Members (Jan. 24, 2014). The federal statutory authority for the Instruction was 10 U.S.C. § 1143(e) (2012), which states, “[t]he Secretary of a military department may carry out one or more programs to provide eligible members of the armed forces under the jurisdiction of the Secretary with job training and employment skills training, including apprenticeship programs, to help prepare members for employment in the civilian sector.”


5. Id. encl. 3, ¶ 1.a.

6. Id. encl. 3, ¶ 2.b.

7. Id. encl. 3, ¶ 2.c (“The approving authority may terminate the Service member’s participation in a JTEST-AI [program] based on mission requirements. Upon notification that their participation is terminated, a participating Service member must immediately withdraw from the program and report to their unit of assignment.”)

8. Id. encl. 4, ¶ 1.b.
must offer training at no or minimal cost to the servicemember, and there must be a “high probability” of post-service employment with the provider or another employer when the program is complete.9 Participating servicemembers continue to receive full military pay and benefits, and are not eligible to receive from the internship provider any wages, training stipends, or other form of financial compensation in exchange for work.10

Since the Defense Department issued Instruction 1322.29, and consistent with its directives to the individual service components, each of the military services has issued its own guidance on how to implement Skillbridge, including guidance for approval of specific career skills programs and accountability for the servicemembers who participate in them.11 In addition, the Army has published guidance authorizing soldiers to accept travel benefits—for example, free transportation and lodging—from potential civilian employers under certain circumstances.12

Despite this high-level guidance, there is no authoritative service-wide (or Defense Department-wide) directory of approved programs, and approval of individual servicemember participation in a particular internship remains very much a unit-level decision. Nevertheless, and despite the ad hoc nature of program selection and approval, the number of Skillbridge participants grows every year, with the likelihood that the number of participating employers will continue to grow as well. Although further guidance from the Defense Department and the individual services is expected as the program grows, employers nevertheless may have multiple questions and concerns about what it means to have an active-duty servicemember as an intern.

II. The Employment Classification of Skillbridge Interns.

A threshold administrative question presented by a company’s decision to offer internships to active-duty servicemembers is how to classify them for administrative and accounting purposes. Although the particular label that the employer applies is less important to the intern’s legal status than the actual activity that he or she undertakes in the

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9. Id. encl. 4, ¶ 1.a.
10. Id. encl. 4, ¶ 1.c.
workplace, the question whether a military intern should be classified as an intern versus an employee—or independent contractor, or something else entirely—can have important legal implications for the company.  

The principal legal import to employment classification is the application of federal and/or state wage and hour laws. If a worker properly may be classified as an intern—or “trainee,” or “volunteer,” or, really, anything other than an employee—the worker need not be compensated for time spent in the workplace. Because unpaid work is ordinarily a violation of the Fair Labor Standards Act, courts have had to develop legal tests to differentiate employees, who must be paid, from other types of persons who may be present in the workplace. These standards have been applied in cases brought by the U.S. Department of Labor, as well as in private lawsuits brought by interns and trainees who later claimed, after the fact, to have been de facto employees and thus entitled to back pay for work performed.

Although the intern-versus-employee issue has existed for some time, the legal standards governing the issue have recently changed. In January 2018, the Department of Labor announced a new test focusing on the question of the “primary beneficiary” of the internship. If the employer is the primary beneficiary—for example, because the intern’s


14. 29 U.S.C. §§ 201–19 (2012). To be subject to federal wage-and-hour law, a business must (i) have gross annual revenues in excess of $500,000; (ii) produce goods and services for interstate commerce; and (iii) use materials that have traveled in interstate commerce. Id. § 203(s)(1). Businesses that do not meet these minimum thresholds could still be subject to state wage-and-hour laws, to the extent such laws exist in the jurisdictions where they operate.

15. A seminal case on this issue is the U.S. Supreme Court’s decision in Walling v. Portland Terminal Co., 330 U.S. 148, 152–53 (1947). For a useful discussion of the types of persons who may be present in the workplace and performing services for an employer but who, nevertheless, may not be “employees,” see Lawyers All. for N.Y., The Volunteer Workforce: Legal Issues and Best Practices for Nonprofits 1–17 (Maria Cilenti, Elizabeth M. Guggenheimer & Rebecca Kramnik eds., 2007).


17. See, e.g., Benjamin v. B & H Educ. Inc., 877 F.3d 1139 (9th Cir. 2017); Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528 (2d Cir. 2015); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199 (11th Cir. 2015); Moore v. NBC Universal Inc., No. 1:13-cv-04634 (S.D.N.Y., filed July 3, 2013); Wang v. The Hearst Corp., Case No. 12-cv-793-HB (S.D.N.Y., filed Feb. 1, 2012); Bickerton v. Rose, Case No. 650780/2012 (N.Y. Sup. Ct., filed Mar. 24, 2012). Similar wage-and-hour cases have also been brought by other types of workers (e.g., independent contractors) on the ground that the nature of the workplace relationship was functionally that of employer-employee, usually because of the degree of control exercised by the defendant employer. See, e.g., DeGidio v. Crazy Horse Saloon & Rest., Inc., No. 4:13-cv-02136-BHH (D.S.C., filed Aug. 8, 2014).

services provide more value to the employer than the intern receives in terms of real world experience—the intern must be considered an employee and paid at least minimum wage. To make this determination, the Labor Department, consistent with guidance provided by the courts,19 considers the following seven factors:

1. whether there is an expectation of compensation;
2. the similarity of the internship training to that provided by educational institutions;
3. the extent to which the internship is tied to a formal education program, such as by the receipt of course credit;
4. whether the internship accommodates the intern’s academic commitments, that is, whether it corresponds to the academic calendar;
5. whether the duration of the internship is limited to the time required for job training;
6. whether the intern’s activities displace the work of paid employees; and
7. whether the intern is entitled to a job upon completion of the internship.20

These factors are not exclusive or exhaustive, and no single factor is determinative. As the Labor Department observed in its January 2018 announcement of the new standard, whether an intern should be considered an employee “necessarily depends on the unique circumstances of each case.”21

19. See, e.g., Benjamin, 877 F.3d at 1147-48; Glatt, 811 F.3d at 536; Schumann, 803 F.3d at 1210; Solis, 642 F.3d at 529; Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025-59 (10th Cir. 1993); McLaughlin v. Ensley, 877 F.2d 1207, 1209-10 (4th Cir. 1989); Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1127-28 (5th Cir. 1983); Donovan v. Am. Airlines, Inc., 686 F.2d 267, 271-72 (5th Cir. 1982).

20. DEPT OF LABOR FACT SHEET #71, supra note 18. One important caveat is that these standards apply to internships at for-profit employers. As the Labor Department has noted, FLSA has “an exception for individuals who volunteer their time, freely and without anticipation of compensation, for religious, charitable, civic, or humanitarian purposes to non-profit organizations.” Id. Thus, unpaid internships for non-profits are likely permissible even if the employer is the “primary beneficiary” in the relationship, on the theory that the intern is knowingly volunteering time. Non-profits are not entirely immune, however, as some of them operate ordinary commercial workplaces—such as Goodwill clothing stores—in which workers look less like volunteers and more like ordinary employees. See, e.g., Tony & Susan Alamo Found. v. Sec’y of Labor, 471 U.S. 290 (1985).

21. DEPARTMENT OF LABOR FACT SHEET #71, supra note 18. While states that have their own minimum wage laws are free to set their own standards to differentiate unpaid internships from paid employment, many states, such as California, have expressly stated that they look to federal standards for guidance. See, e.g., Letter from David Balter, Acting Chief Counsel, Cal. Div. Labor Standards Enf’t, to Joseph W. Ambash, Greenberg Traurig, LLP (Apr. 7, 2010), https://www.dir.ca.gov/dlse/opinions/2010-04-07.pdf.
In recent years, law firms have published guidance to employers on how to avoid liability amidst the growing trend of wage-and-hour lawsuits by interns. In general, their advice is tailored to the Labor Department’s preference for a nexus between the internship and the intern’s academic curriculum. They advise employers to:

- select interns on the basis of academic achievement, with a preference for applicants who will receive college credit for participating in the internship;
- require interns to sign a written agreement spelling out the expectations and objectives of the internship, while making clear that the internship is unpaid and that a future job is not guaranteed;
- create a formal internship program with scheduled start and end dates tied to the academic calendar, a program of written materials, and opportunities for mentorship and formal evaluation of the intern’s work product;
- focus the interns’ workplace tasks on opportunities to build transferable skills that are aligned with their academic focus and which can be used in multiple employment settings; and
- have the interns shadow employees to learn from them—such as by performing difficult tasks under the employees’ supervision—rather than having interns do routine tasks ordinarily done by regular employees (e.g., filing).22

Law firms are careful to note that these steps are not foolproof and that even a written agreement stating that the intern’s time will be unpaid will not bar the intern from later claiming entitlement to wages on the ground that “intern” was merely a label and that the intern’s activity in the workplace was functionally that of an employee.23

Notwithstanding the complexity of the above analysis, there is good news for employers in the case of Skillbridge interns. The risk of potential wage-and-hour liability is far lower for active-duty military interns than for other types, in large part because servicemembers are prohibited by the Defense Department from receiving any wages or other

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compensation in exchange for work while participating in a Skillbridge program.\textsuperscript{24} Consistent with this prohibition, the Defense Department expressly incorporates the Department of Labor’s standards for unpaid internships as requirements for program eligibility.\textsuperscript{25} Additionally, every servicemember’s participation in Skillbridge requires pre-approval by some element within the Defense Department,\textsuperscript{26} which should include review of the eligibility requirements. Although this may not be a complete defense in the unlikely event of a later challenge by the Department of Labor—or, even less likely, by the interns themselves\textsuperscript{27}—the pre-approval and oversight by the military gives the Skillbridge provider a level of certainty about the propriety of not paying its interns that is otherwise not present in the civilian sector.

Military sign-off may be particularly important to an employer if challenged by the Department of Labor on the ground that its internship program has a high pass-through rate to paid employment, contravening Labor Department guidance that, to qualify as unpaid, the internship should \textit{not} be a presumed conduit to a paid job. Although Defense Department standards similarly state that “[t]he intern is not necessarily entitled to a job at the conclusion of the internship,”\textsuperscript{28} they also state that Skillbridge internships must “offer a high probability of post-service employment with the provider or any other employer.”\textsuperscript{29} And courts have held that a mere “good chance” of future employment short of a promise does not qualify as “entitle[ment].”\textsuperscript{30} Therefore, reading the Department of Defense’s regulation as a whole suggests that a strong tendency to hire former interns is not in contravention of a legally compliant unpaid internship program.

\textsuperscript{24} U.S. Dep’t of Def., Instruction 1322.29, Job Training, Employment Skills Training, Apprenticeships, and Internships (JTEST-AI) for Eligible Service Members, encl. 4, \S 1.c (Jan. 24, 2014). (“Participating Service members are not eligible to receive from the [internship] provider wages, training stipends, or any other form of financial compensation for the time that the Service members spend participating in [the program].”).

\textsuperscript{25} Id. encl. 1, ref. (i), encl. 4, \S 3.a. Although the Defense Department’s Skillbridge eligibility standards cite to the Labor Department’s internship standard as it existed in January 2014—not the revised standard of January 2018—it seems highly unlikely that the Defense Department would not defer to the Labor Department’s new guidelines. If the Defense and Labor Departments were to have different standards for unpaid internships, it could lead to a situation in which the Labor Department tells the employer that it is required to pay wages to its intern, even as the Defense Department tells the intern that the intern is prohibited from receiving them.

\textsuperscript{26} Id. encl. 4, \S 1.b (“There must be a written authorization by the DoD Component concerned documenting Service member enrollment in an approved [program] before the start of the Service member’s participating in [the program].”).

\textsuperscript{27} It is the authors’ view that a post-hoc claim of employee status by a military intern is unlikely in light of the aforementioned Department of Defense regulations prohibiting servicemembers from accepting pay during Skillbridge internships. \textit{See id.} encl. 4, \S 1.c.

\textsuperscript{28} Id. encl. 4, \S 3.a.

\textsuperscript{29} Id. encl. 4, \S 1.a.

\textsuperscript{30} Axel v. Field Motorcars of Fla., Inc., 711 F. App’x 942, 948 n.6 (11th Cir. 2017).
But the most important fact from the standpoint of potential employer liability under the wage-and-hour laws is that a Skillbridge intern is not, in fact, unpaid. As noted above, Skillbridge interns retain full military benefits over the course of the internship. Although the payment comes from a source other than the civilian internship provider, Labor Department regulations on “joint employment” relationships make clear that when an employee’s work fulfills his or her obligations to multiple employers simultaneously, each of them may take credit for the others’ payments when considering minimum wage and overtime requirements. The Skillbridge intern’s military pay thus shields his or her civilian provider from potential wage-and-hour liability, an assurance that does not exist at all in the ordinary internship context.

III. At-Will Employment and Termination of the Skillbridge Internship.

As noted above, Skillbridge internships are authorized only when the needs of the service allow, and they can be terminated unilaterally by the servicemember’s chain of command if military exigencies require a return to duty. Although the likelihood of the military recalling the intern is probably low, employers contemplating hiring through the Skillbridge program are nevertheless well-advised to take note of it.

The fact that the military may prematurely end a Skillbridge internship raises (but does not answer) the question of what happens if the employer or the intern determines, for whatever reason, that the internship is not working out and should be ended. On that question, the authors believe that the right to terminate is governed by common-law principles of at-will employment rather than military regulations.

The common-law rule of the employer-employee (or principal-agent) relationship is that of “at-will” employment. That is, absent a contract of employment for a specific period of time or the accomplishment of a particular task (and such contracts are rare), either the employer or the employee may end the relationship at any time, for any reason or no reason at all. This is the default rule in nearly all fifty states.

31. 29 C.F.R. § 791.2 (“In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.”)


Putting aside federal and state anti-discrimination laws (which are discussed next), the major exception to the rule of at-will employment is the concept of “wrongful discharge,” which provides that even though an employee may be terminated for no reason, the employee should not be terminable for certain specific reasons that offend public policy. Because it is principally a judge-made doctrine, the tort of wrongful discharge varies considerably from state to state, but it is generally construed narrowly to avoid swallowing the background rule of at-will employment.

In the case of interns, the relationship with the employer is presumed to be temporary and thus even more tenuous than the ordinary at-will relationship that exists between an employer and its paid employees. Even Montana, the only state not to adhere to the background rule of at-will employment, allows termination at will during a new employee’s “probationary period.” Consistent with this, practice manuals addressing employment liability issues correctly assert that the at-will rule applies to interns as well. In addition, courts that have considered wrongful discharge claims brought by non-employee workers—principally, independent contractors—have generally held that a formal employment relationship is a prerequisite to suit. Indeed, given that the most common measure of harm in wrongful discharge
cases is back pay, one might reasonably wonder how an employer could be subject to any liability at all for terminating an intern with no claim to wages. From the standpoint of employer liability, therefore, there is limited risk to firing an intern, and indeed considerably less risk than to firing an actual paid employee.

In the context of a Skillbridge intern, the same rule applies. Although the Uniformed Services Employment and Reemployment Rights Act (USERRA) imposes certain obligations on civilian employers when their employees depart to go on active duty in the U.S. Armed Forces, these obligations do not extend to interns. Courts have held that the term “employee” as used in USERRA should be interpreted the same way as in the Fair Labor Standards Act, that is, to exclude unpaid volunteers except when their work is functionally that of an ordinary paid employee. Insofar as Skillbridge interns are concerned, therefore, their employers have no obligations beyond the generally applicable ones, and either the intern or the employer may terminate the internship at any time, for any reason, without liability to the other.

There is, of course, the possibility that one or the other might face consequences from the armed services for a firing or other early termination, but that seems extraordinarily remote. Civilian employers are not generally subject to the Uniform Code of Military Justice or Defense Department regulations, and, thus far, the Pentagon has not required, as condition of participating in Skillbridge, that employers notify the servicemember’s chain of command in the event of termination or other disciplinary issues. Absent such a development, there is no basis to conclude that an employer’s willingness to hire Skillbridge interns carries with it any narrowing of its discretion with respect to termination decisions, or any obligation to consult with the military before making such decisions. The only foreseeable consequence—and it is one remote one—is that an employer may have to deal with the possibility of a claim by the intern for wrongful discharge.

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39. See, e.g., Va. Code Ann. § 2.2-3903 (2017) (court may award up to twelve months’ back pay (with interest) in wrongful discharge cases).
40. See, e.g., Lawyers All. For N.Y., supra note 15, at 35 (“Because a volunteer does not receive a salary, he or she cannot make out a claim for damages or money losses based on termination of the relationship.”). This assumes, of course, that the internship meets the standard for unpaid work under the Labor Department’s “primary beneficiary” test.
42. See, e.g., Pfunk v. Cohere Commc’ns, LLC, 73 F. Supp. 3d 175, 186 (S.D.N.Y. 2014).
43. While the Servicemembers Civil Relief Act (SCRA) provides financial protection for active duty servicemembers through postponing or suspending certain civil obligations, e.g., rental payments, security deposits, civil judicial proceedings, etc., see 50 U.S.C. §§ 3901–4043 (2012), it does not appear to impose any specific obligations on servicemembers’ employers.
45. Nor is there presently any general obligation on the employer, either in Skillbridge regulations or anywhere else, to maintain general or routine communications.
that could result from a variety of situations, not just termination—is that bad experiences by Skillbridge interns could potentially result in withdrawal of the Defense Department’s approval of the employer’s internship program.

To be sure, quite unlike the employer, the Skillbridge intern is subject to military orders during the internship and could, at least in theory, be subject to discipline for quitting. And, despite the fact that the regulations expressly cover the possibility of a service-initiated termination, they provide no mechanism for servicemembers to quit the internship of their own volition (and, indeed, they are completely silent on what happens in that event). That said, it seems highly unlikely that a servicemember would be punished by the military simply for quitting a Skillbridge internship. Servicemembers are generally allowed to drop from career-advancing training programs without consequences other than a diminished likelihood of promotion, which would likely be irrelevant to someone who has already decided to transition to civilian life. It would be a very different matter, of course, if a servicemember were to quit the internship—or to be fired from it—without informing his or her chain of command or returning to duty, in which case the servicemember would potentially be subject to discipline for being absent without leave.46

IV. Potential Liabilities to the Skillbridge Intern.

The decision to hire a Skillbridge intern carries potential legal consequences that go beyond those provided by the wage-and-hour laws and the doctrine of wrongful discharge. In general, the potential liabilities that arise from employing interns are no greater than those that arise from hiring actual paid employees. In the few instances where there is a legal difference between employees and interns from the standpoint of employer liability, the risk to employers is generally lower in the case of interns because interns have fewer legal protections. And it does not appear to make any difference that, in the case of a Skillbridge intern, the intern would be an active-duty member of the U.S. Armed Forces.

A. Anti-Discrimination Laws

A major source of potential liability to employers are the civil rights laws banning discrimination in employment on the basis of

46. Under the Uniform Code of Military Justice, a servicemember shall be punished for absence without leave when the servicemember "without proper authority . . . absents himself or remains absent from his unit, organization or place of duty at which he is required to be at the time prescribed." 10 U.S.C. § 886 (2012).
personal characteristics such as race, religion, and sex. At the federal level, the best known are Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA). Although these federal laws apply only to businesses above a certain size—fifteen or more employees in the case of Title VII and the ADA, and twenty for the ADEA—many states and municipalities have their own anti-discrimination laws that apply to smaller businesses. State and local anti-discrimination laws also may differ from federal law in terms of the characteristics that they protect from workplace discrimination. These laws—both federal and state—apply to all aspects of employment activity, from hiring to firing and all benefits and conditions in between. And, as part and parcel of banning discrimination in the conditions of employment, they notably cover workplace harassment when it occurs on a discriminatory basis.

47. 29 U.S.C. § 630(b) (2012) (defining the threshold for the ADEA); 42 U.S.C. § 2000e(b) (2012) (providing the fifteen-employee threshold for Title VII); 42 U.S.C. § 12111(5) (2012) (setting the threshold for the ADA). The minimum-employee threshold is a gesture toward compliance with the constitutional requirement that an activity have some impact on interstate commerce—that is, above the merely local level—before it becomes subject to federal regulation. 2 EEOC Compl. Man. (BNA) § 2-III.B.1.a.i (“[I]t can be assumed that an employer having the requisite number of employees for the relevant time frame will also meet the commerce requirement.”). As discussed below, unpaid interns are not “employees” protected by the anti-discrimination laws, and, by the same token, they do not count toward the minimum-employee threshold to determine whether such laws apply to an employer in the first place. See, e.g., Pastor v. P’ship for Children’s Rights, No. 10-cv-5167, 2012 WL 4503415, at *1 (E.D.N.Y. Sept. 28, 2012), aff’d, 538 F. App’x 119 (2d Cir. 2013).

48. Virginia’s anti-discrimination statute, for example, applies to businesses employing “more than five but less than 15 persons,” Va. CODE ANN. § 2.2-3903(B) (2017), a size requirement rigorously enforced by courts. See, e.g., Wells v. BAE Sys. Norfolk Ship Repair, 483 F. Supp. 2d 497, 512 (E.D. Va. 2007), aff’d, 250 F. App’x 552 (4th Cir. 2007) (per curiam); Bullard v. Panasonic Corp., 418 F. Supp. 2d 802, 806 (E.D. Va. 2006), aff’d, 193 F. App’x 260 (4th Cir. 2006) (per curiam); Blankenship v. City of Portsmouth, 372 F. Supp. 2d 496, 501 (E.D. Va. 2005). Notably, in each of these cases, the employer escaped liability by having too many employees rather than too few.


50. Because an employee’s right to be free of harassment arises under the anti-discrimination laws, harassment of an indiscriminate nature—like the famous “bisexual harasser” or “equal-opportunity offender” of law-school hypotheticals—is not prohibited by federal law. See, e.g., Holman v. Indiana, 211 F.3d 399 (7th Cir. 2000); see also BARBARA T. LINDEMANN & DAVID D. KADUE, WORKPLACE HARASSMENT LAW ch. 8.II.D.9 (2012).
Importantly for present purposes, the protections of the anti-discrimination laws generally depend on an employer-employee relationship, and multiple federal courts have held that such a relationship does not exist where the would-be employee has agreed to work without pay.51 As a consequence, unpaid interns (and other types of volunteer workers) are not “employees” covered by Title VII or the other anti-discrimination laws, and thus they may not sue their employers under such laws for discriminatory treatment,52 which, as noted above, can encompass harassment.53

Employers should take notice, however, that the question whether a worker is “unpaid” is not as clear-cut as one might expect. Workers may be deemed employees for purposes of the anti-discrimination laws even though they receive no salary, so long as they receive “numerous job-related benefits.”54 Predictably, there has been no shortage of litigation over the types of benefits that will qualify. Pension benefits, group life insurance, and workers’ compensation have been held to elevate a volunteer worker to employee status.55 By comparison, work-study funding, academic credit, practical experience, and general enhancement of career prospects have been deemed not to suffice.56 In addition,


52. In this regard, the relevant inquiry is virtually the inverse of the inquiry under the Fair Labor Standards Act. Under the anti-discrimination laws, a court asks whether a worker is paid to determine whether the worker is an employee. Under the wage and hour laws, by contrast, a court asks whether the worker is functionally an employee to determine whether the worker must be paid.


55. See, e.g., id. at 473; Haavistola v. Cnty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221–22 (4th Cir. 1993); see also 2 EEOC Compliance Manual § 2-III.A.1.c.

56. See, e.g., Jacob-Mua v. Veneman, 289 F.3d 517, 521 (8th Cir. 2002) (student researcher obtaining research to be used for dissertation), abrogated on other grounds by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); York v. Ass’n of Bar of City of N.Y., 286 F.3d 122, 126 (2d Cir. 2002) (volunteer receiving “clerical support and networking opportunities”); O’Connor, 126 F.3d at 114 (intern receiving work-study funds); Lippold, 1998 WL 13854, at *2 (trainee teacher receiving stipend); Piotrowski v. Barat Coll., No. 93-C-6041, 1994 WL 594726, at *1 (N.D. Ill. Oct. 27, 1994) (nursing school student receiving practical experience plus tuition waiver); Beverley v. Douglas, 591 F.
there is some confusion as to whether benefits establishing an employer-employee relationship may be provided by someone other than the would-be employer.57

But the most important caveat is that an unpaid intern may be considered an employee and therefore covered by the anti-discrimination statutes if the intern’s work was—and this is often the case with internships—a gateway to a paid job.58 To make this assessment, courts and the Equal Employment Opportunity Commission examine, among other things, whether former volunteers are given preferential treatment for vacancies in the employer’s paid workforce, as well as the portion of the workforce that came through the volunteer route.59

Extending the protections of the anti-discrimination laws to unpaid interns in this scenario is fully consistent with other applications of those statutes, as ordinary job applicants have always been able to sue for discrimination (i.e., in hiring), despite the fact that they, like interns, have never been paid by the employer and are not “employees” in the ordinary sense.60

Supp. 1321, 1327–28 (S.D.N.Y. 1984) (intern claiming general enhancement of career opportunities); see also 2 EEOC Compl. Man. (BNA) § 2-III.A.1.e (asserting the standard to require “significant remuneration,” rather than merely the inconsequential incidents of an otherwise gratuitous relationship.) (quoting Haavistola, 6 F.3d at 222).

57. Compare, e.g., 2 EEOC Compl. Man. (BNA) § 2-III.A.1.c, n.73 (“Benefits may be provided by a third party, such as a state agency, so long as they are provided as a consequence of the volunteer service.”), and Pemrick v. Stracher, 67 F. Supp. 2d 149, 162 (E.D.N.Y. 1999) (summarizing case law) (“[W]here a so-called volunteer receives significant job-related benefits—even if those benefits are not obtained directly from the alleged employer—at the very least a fact question is created regarding [existence of] the employment relationship.”), with O’Connor, 126 F.3d at 116 n.2 (“We reject O’Connor’s claim that she was compensated [because] she received . . . federal work study funding for the hours of volunteer work performed . . . . Plainly, it was [third party]—not [defendant]—that made these payments to O’Connor.”), and Lippold, 1998 WL 13854, at *2 (“That [plaintiff] was paid by another, the state, for her services, does not make defendant [] her employer.”).

58. Mohr v. United Cement Masons’ Union Local 780, No. 15-cv-4581, 2016 WL 11263670, at *6 (E.D.N.Y. Nov. 7, 2016) (unpaid apprentice who is promised job assignment is an employee); Rafi v. Thompson, No. 2-2356, 2006 WL 3091483, at *1 (D.D.C. Oct. 30, 2006) (a “clear pathway to employment”); Pemrick, 67 F. Supp. 2d at 163 (“[T]here is a significant question of fact . . . in light of [defendant’s] alleged promise to obtain a state-funded position for Pemrick.”); 2 EEOC Compl. Man. (BNA) § 2-III.A.1.c. (“if the volunteer work is required for regular employment or regularly leads to regular employment with the same entity”).

59. 2 EEOC Compl. Man. (BNA) § 2-III.A.1.c.

60. Under Title VII, a complaint about discrimination in employment can be brought by any “person aggrieved” by such discrimination; the statute is not expressly limited to “employees.” See MERRICK T. ROSEIN, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 12.9 (2017) (“The proscribed discrimination reaches only activity occurring in the employment relation[ship], although applicants for employment are covered.”). In this vein, Title VII’s anti-discrimination provisions expressly extend to discrimination in job training and apprenticeship programs as well as applications for formal employment. 42 U.S.C. § 2000e-2(d) (2012); see also 2 EEOC Compliance Manual § 2-III.A (“Covered Individuals” includes “Applicants to, and participants in, training and apprenticeship programs”).
When it comes to Skillbridge interns, the one major difference between active-duty servicemembers and other interns (e.g., college students) is that the former are not, strictly speaking, “unpaid,” as they continue to draw full pay and benefits from the armed services. As noted above, this can be critical to employer liability under the anti-discrimination laws. That said, it is highly unlikely that their continued receipt of military pay will result in Skillbridge interns being deemed “employees” of their internship providers. Although some authorities hold that qualifying compensation can be paid by a third party, such compensation must be premised on the intern’s performance of work for the would-be employer. Benefits do not count toward an employment relationship if would-be employees are entitled to them whether or not they show up. In this regard, Skillbridge interns receive their military pay and benefits solely because of their status as servicemembers, not in exchange for anything they do for a civilian employer. Because a servicemember would be entitled to them regardless, they should make no difference to the servicemember’s status as an intern under the anti-discrimination laws.

In terms of potential liabilities by the employer, therefore, it should make no difference under the anti-discrimination laws that the intern is active-duty military. Although some federal and state laws—such as the aforementioned USERRA—prohibit employment discrimination against veterans, such laws are similarly intended to cover paid employment only, and thus they do not apply to unpaid internships. Moreover, such laws seem highly unlikely to apply to an employer who has deliberately sought out persons with military experience by embracing the Skillbridge program.

61. Indeed, the Army has for this reason stated that Skillbridge internships should not be considered “unpaid.” Army Directive 2015-12 (Implementation Guidance for Credentialing Program and Career Skills Program), encl. 4, ¶ 4.a (Mar. 11, 2015) (“Under this directive and the following criteria, these internships are not considered ‘unpaid’ as defined by the Labor Department’s Wage and Hour Division in Fact Sheet #71 . . . . The Soldier participant will receive full military pay and benefits for the duration of the internship and no compensation from the organization sponsoring the internship . . . .”).

62. 2 EEOC Compliance Manual § 2-II.A.1.c & n.73 (“Benefits may be provided by a third party . . . as long as they are provided as a consequence of the volunteer service.”).

63. See, e.g., United States v. City of New York, 359 F.3d 83, 92 (2d Cir. 2004) (noting that welfare recipients were employees under Title VII because “these benefits do not flow solely from their status as welfare recipients. The individual plaintiffs must perform useful work to receive any of the benefits”); cf. Johns v. Stewart, 57 F.3d 1544, 1558 (10th Cir. 1995) (public assistance recipients not employees under Fair Labor Standards Act because their “participation in . . . work projects is simply one component of their comprehensive assistance plans”).

64. The only other caveat in terms of the potential application of the anti-discrimination laws is the fact that the Americans with Disabilities Act does not depend on an employment relationship: it protects not merely employees, but also other persons who come to a place of public accommodation. 42 U.S.C. § 12182(a) (2012) (providing that no individual shall be discriminated against by any place of public accommodation). In theory, therefore, a disabled Skillbridge intern whose employer refused to provide the
B. Physical Injuries and Premises Liability

Another potential source of employer liability arises from the risk of physical injury to the intern based on hazards encountered in the workplace. In general, employers are protected from tort liability to their employees by state workers' compensation laws, which provide wage replacement and medical benefits to employees injured on the job and which, in turn, preclude such employees from bringing negligence claims for personal injuries.\(^{65}\)

Statutes and judicial decisions on the application of workers' compensation law to unpaid interns vary considerably from state to state. Many states treat unpaid interns as employees,\(^{66}\) causing employers to pay higher workers' compensation premiums, but, as noted above, relieving them of heightened risks from personal injury litigation. A minority of states exclude unpaid interns from workers' compensation,\(^{67}\) and, in such states, unpaid interns may bring tort claims against their employers to recover for personal injuries.\(^{68}\) This, it seems, is one of the few instances where it may actually be somewhat riskier to have an intern on premises than an actual paid employee.\(^{69}\)

necessary accommodation for handicapped access (for example), could potentially sue despite the intern's unpaid, non-employee status.


\(^{69}\) For the minority of states where such tort actions are allowed, the employer’s potential liability to the intern depends on state law and whether it classifies interns as licensees (e.g., friends and social visitors) or invitees (e.g., customers and visitors for
In the case of a Skillbridge intern, the rules are the same: no authority suggests that the intern’s military status has any bearing on common-law tort claims or state workers’ compensation law. In the minority of states where interns are not covered by workers’ compensation and thus are able to sue in tort for workplace personal injuries, the fact that a Skillbridge intern remains eligible to receive medical treatment free of charge at Defense Department facilities will not serve to offset any tort recovery for medical expenses.\textsuperscript{70}

As a final consideration on this subject, both Skillbridge interns and their employers should bear in mind that under Skillbridge, interns are subject to recall to active duty based on the needs of military service. Thus, any serious workplace injury—and certainly one that would render the servicemember potentially unfit for duty—should be reported to the servicemember’s chain of command as soon as possible. That said, none of the armed services appears to have issued a directive or regulation relating to injury notification in connection with the Skillbridge program.

V. Potential Liabilities to Others Because of the Skillbridge Intern

Potential liabilities to a Skillbridge intern, of course, hardly cover the full spectrum of risks that an employer runs by bringing someone new into the workplace. There are also multiple potential ways in which the employer could be liable to others because of the intern. As a general matter, an employer’s liability for the acts of its subordinates does not turn on labels like “employee” or “intern,” and thus an employer can still be liable for an intern’s mistakes just as it can for those of a paid employee.\textsuperscript{71} In this vein, the Skillbridge intern’s military status is again not relevant to potential liabilities under tort law or employment law, and thus there is no additional risk to the employer from retaining an intern who happens to also be an active-duty servicemember.

\textsuperscript{70} See Hudson v. Lazarus, 217 F.2d 344, 346–47 (D.C. Cir. 1954); Guyote v. Miss. Valley Gas Co., 715 F. Supp. 778, 781 (D. Miss. 1989); see also Restatement (Second) of Torts § 920A (Am. Law Inst. 1979) (“Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or a part of the harm for which the tortfeasor is liable.”). Nor will the federal government be a potential contributor to any tort recovery by the servicemember, even if one construes an on-the-job injury at a private employer to be a service-connected injury. See Feres v. United States, 340 U.S. 135, 144, 146 (1950) (noting that active duty servicemen cannot sue the United States for injuries arising out of activity incident to service).

\textsuperscript{71} See infra text accompanying notes 73–77.
A. Tort Liability and Respondeat Superior

The principle of tort law most important to potential employer liability is *respondeat superior*, or vicarious liability to the principal for the actions of the agent. This is a form of no-fault liability, meaning that the employer is liable for the agent’s wrongful actions even when the employer is personally blameless, solely because the employer is the master in a master-servant relationship. The policy rationales for this doctrine are that (1) it incentivizes businesses to supervise their workers; (2) it gives greater assurance of compensation to the victim; and (3) it causes the victim’s losses to be borne by the business that benefits from the activity giving rise to the injury.

For *respondeat superior* to apply, there must be, among other things, a master-servant relationship between the employer and its purported agent. This is a broader concept than a formal employer-employee relationship, and it generally turns on the degree of control that the employer exercises over the agent. Consistent with this, *respondeat superior* has been held to apply across a wide range of scenarios, including in cases of non-employee agents like independent contractors. There is no exception for unpaid agents, and, indeed,

72. In the case of a trucking company, for example, the employer may be liable for accidents caused by its drivers even where the employer itself has an immaculate policy of training and supervision. See, e.g., McHaffie v. Bunch, 891 S.W.2d 822, 824–26 (Mo. 1995) (en banc).

73. See, e.g., Kephart v. Genuity, Inc., 136 Cal. App. 4th 280, 291 (2006) (“The rule is based on the policy that losses caused by the torts of employees, which as a practical matter are certain to occur in the conduct of the employer’s enterprise, should be placed on the enterprise as a cost of doing business.”).

74. Although the elements are expressed differently from jurisdiction to jurisdiction, as a general matter, there must be (1) a foreseeable injury caused by the negligence or intent of the agent, (2) a master-servant relationship, and (3) wrongful actions by the agent while acting within the scope of duties. Riviello v. Waldron, 47 N.Y.2d 297 (1979); see N.X. v. Cabrini Med. Ctr., 97 N.Y.2d 247 (2002).

75. See Ware v. Timmons, 954 So.2d 545, 549 (Ala. 2006); Kerl v. Dennis Rasmussen, Inc., 273 Wis. 2d 106, 122–23 (Wis. 2004).

76. Although vicarious liability is generally much more limited in the case of independent contractors, it can still apply, such as when the independent contractor is hired to engage in particularly dangerous activities. See, e.g., Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 57 (Am. Law Inst. 2012) (“Except as stated in §§ 58–65, an actor who hires an independent contractor is not subject to vicarious liability for physical harm caused by the tortious conduct of the contractor.”); Restatement (Second) of Torts § 409 (Am. Law Inst. 1965) (“Except as stated in §§ 410–429, the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.”). And, of course, as recognized below in this article, employers may also be held directly liable in an independent-contractor scenario on theories of negligent hiring or supervision.

77. The sole federal statutory exception is the Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501–05 (2012), but that Act was designed to encourage volunteerism toward charitable activities, and it does not protect unpaid workers in for-profit settings from tort liability. Id. § 14505(6) (defining “volunteer” to include only individuals performing unpaid services for a nonprofit organization or a governmental entity).
there have been multiple cases in which the actions of volunteers have given rise to employer liability.\textsuperscript{78}

By the same token, employers whose interns cause harm to others have available to them the same defenses that apply when actual paid employees are involved. Of these, perhaps the most common is “frolic and detour,” that is, the idea that the agent had abandoned his or her duties at the time of the injury and thus was not subject to the control of the would-be principal.\textsuperscript{79} This defense has successfully been used in cases where the agent was an unpaid volunteer,\textsuperscript{80} just as it has in cases of ordinary paid employees.

\textit{Respondeat superior} is not the only way in which an employer may face liability for the actions of its agents. Liability may also lie in scenarios of \textit{direct} liability, in which the employer’s own fault contributed to the harm. Although a plaintiff who sues on such a theory must show that the employer was in the wrong—not merely that it was legally responsible for someone who was—there can be advantages to proceeding on this theory, either in lieu of or (more likely) in concert with a \textit{respondeat superior} theory.\textsuperscript{81} For one thing, a plaintiff who can prove that the employer’s own fault contributed to the injury can recover even without showing that the agent was acting within the scope of duties at the time of the injury.\textsuperscript{82}

The classic example of a direct-liability claim against an employer is negligent hiring, that is, the theory that the employer was wrong to hire the agent in the first place because the employer knew or should have known—perhaps because of previous instances of misconduct—that the agent would pose an unreasonable risk to persons whom he


\textsuperscript{79} See \textit{Resatement (Third) of Agency} § 7.07 (Am. Law Inst. 2006); see also, e.g., Behaney v. Travelers Ins. Co., 121 F.3d 838 (3d Cir. 1991).


\textsuperscript{81} See, e.g., Rockwell v. Sun Harbor Budget Suites, 925 P.2d 1175 (Nov. 1996) (allowing both of plaintiff’s claims for \textit{respondeat superior} and direct liability to proceed to trial). \textit{But see} City of Kingsland v. Grantham, 805 S.E.2d 116 (Ct. App. Ga. 2017) (direct liability claims of negligent entrustment, negligent hiring, and negligent supervision are duplicative of, and precluded by, the \textit{respondeat superior} claim where the employer admitted \textit{respondeat superior} liability).

\textsuperscript{82} See Plains Res. v. Gable, 682 P.2d 653, 662 (Kan. 1984) (“The application of the theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment.”).
or she would foreseeably encounter. Here again, plaintiffs have succeeded in such cases, even where the agent is an unpaid volunteer, because exposing a victim to an unreasonable risk is wrongful regardless of the agent’s formal employment classification.

B. Liability Under Employment Laws and Potential Hostile Work Environment Claims

An employer’s potential liability for the actions of its subordinates is not limited to tort scenarios. Employers can also be liable for an employee’s harassment of other employees—often referred to as creating a “hostile work environment”—even when the harassing employee is not senior in the corporate hierarchy to the co-worker victim. Because liability for harassment arises under the anti-discrimination laws, the harassment must be based on a discriminatory animus to give rise to liability; not all forms of unwelcome (or even offensive) conduct in the workplace are actionable.

To prevail against the employer on a hostile work environment claim, a plaintiff must show, among other things, a basis to attribute the hostile conditions to the employer. One way to do this—perhaps the most common way, except in circumstances where the employer itself is doing the harassing—is to show that the harassment is being carried out by persons whose behavior the employer has the ability to control. In the case of employees, this is obvious and uncontroversial. But employers have been held liable in scenarios much further afield, including in cases where the persons creating the hostile conditions were independent contractors or even customers of the employer. Although harassment cases based on the acts of interns or volunteers are hard to find, such a case is possible given that employers typically


86. To prevail on a workplace harassment claim under Title VII, for example, a plaintiff must show unwelcome conduct that is “based on his membership in a protected class,” such as conduct motivated specifically by bias. See, e.g., Smith v. First Union Nat’l Bank, 202 F.3d 234, 243 (4th Cir. 2000); Conner v. Schrader-Bridgeport Int’l, Inc., 227 F.3d 179, 192 (4th Cir. 2000).

87. Smith, 202 F.3d at 243; Conner, 227 F.3d at 192.

88. See Vance v. Ball State Univ., 570 U.S. 421, 446 (2013) (“[A]n employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment.”).

have much more control over interns than customers. For this reason, practice manuals addressing employment liability issues recommend ensuring that a business’s anti-harassment policies extend to volunteers in the workplace, as both potential victims of harassment and potential perpetrators of it.

C. Application to Skillbridge Interns.

In either the tort scenario or the workplace-harassment scenario, it does not appear to make any difference from the standpoint of employer liability that the negligent or harassing subordinate is a member of the armed forces. No potentially applicable federal or state law has any exemption for serving members of the military, nor are servicemembers in a civilian workplace governed by any higher (or lower) standard of behavior. There is thus no legal basis to be more concerned—or less concerned—about Skillbridge interns than any other type.

In this vein, however, employers hiring Skillbridge interns should not harbor illusions about using a servicemember’s military superiors as an external source of discipline in the event of workplace misconduct, whether negligent or intentional. As noted at the outset, Skillbridge was conceived as a program to facilitate transition out of the military and into civilian life. Notwithstanding the services’ aforementioned right to recall servicemembers to active duty, the armed forces generally regard Skillbridge participants as having moved on, and it is unlikely that those participants’ duty units can be counted on to police the behavior of persons who may be hundreds of miles away and whom they do not expect to see back in the ranks again.

VI. Conclusion

The Defense Department’s Skillbridge program holds great promise both for separating servicemembers and the military services themselves. For servicemembers, the opportunity to try one’s hand at a new career before the need for replacement income sets in holds the potential to improve the chances of a successful transition to civilian life. For the military services, the availability of this same opportunity will be a useful marketing tool when discussing expectations for post-service life with potential recruits. “Be All That You Can Be”—the familiar Army recruiting slogan from decades ago—is now one step closer to a direct conduit to a civilian career.

90. To be sure, an employer’s potential liability for subordinate actions under the anti-discrimination laws is not limited to the harassment scenario. An employer would certainly liable, for example, in the case of supervisory employee who promoted subordinates on discriminatory grounds. That said, it seems highly unlikely that an intern—particularly an unpaid one—would be in a position to take the sort of actions that could give rise to anti-discrimination liability other than in a harassment scenario.

91. See, e.g., LAWYERS ALL. FOR N.Y., supra note 15, at 56–63.
But the real beneficiaries of Skillbridge are the civilian employers who now have the opportunity to assess, for extended duration and essentially for free, potential new employees with far more real-world experience than typical college students or recent graduates. In years past, separating servicemembers and veterans were unlikely candidates for unpaid internships because they could ill afford months (or even weeks) without income, and hence they tended to look exclusively for paid positions. By fostering the transition to civilian life through an extended period of continued income and benefits, Skillbridge makes it possible for employers to undertake the same trial period with servicemembers that they have always had with college students.

The good news for civilian employers eager to avail themselves of Skillbridge interns is that the legal landscape attendant to hiring active-duty military for unpaid positions is less complicated than one might expect. As discussed herein, most issues relating to employment classification, right of termination, and potential liability are not made more complex merely because the intern is still on active duty, and the potential risks and concerns to employers are no greater than or different from those that already exist for unpaid civilian interns or even ordinary paid employees. The long and short of it is that any employer who has previously had success bringing veterans into its workforce—in any capacity, paid or unpaid—should have no qualms about hiring active-duty servicemembers through Skillbridge. There are risks, to be sure, but there are always risks, and the potential benefits are tremendous.