



3-27-2015

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Recommended Citation

Jamey Collidge, *"I Mean, You're Not Staff": The Employee Classification Circuit Split and Why the Southern District of New York's Totality of the Circumstance Test From *Glatt v. Fox Searchlight Pictures Inc.* Deserves a Lead Role*, 60 Vill. L. Rev. Tolle Lege 55 (2015).

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“I MEAN, YOU’RE NOT STAFF”: THE EMPLOYEE CLASSIFICATION
CIRCUIT SPLIT AND WHY THE SOUTHERN DISTRICT OF NEW
YORK’S TOTALITY OF THE CIRCUMSTANCES TEST FROM *GLATT* v.
FOX SEARCHLIGHT PICTURES INC. DESERVES A LEAD ROLE

JAMEY COLLIDGE*

“[T]hose of us who support individual liberty and believe internships—paid or unpaid—better the careers of those who choose to intern understand that this market will be best served by leaving it alone.”¹

I. A “FREE” EXPOSITION ON THE FAIR LABOR STANDARDS ACT

From late 2009 to early 2010, Eric Glatt and Alexander Footman served as production interns for Fox Searchlight Pictures (Searchlight) and performed what they considered menial yet “essential tasks.”² At forty years old and with an MBA in hand, Glatt hoped the internship would help him break into the film industry.³ Instead, Glatt and Footman took out the trash, gathered lunch orders, and manned phones—experiences perhaps evident of a lowly employee but falling far short of the educational opportunity both had hoped for.⁴ Adding to the confusion, Searchlight originally labeled Glatt as an accounting clerk, seemingly implying that Glatt was something more than an intern to begin with.⁵ In the end, Glatt and Footman watched Searchlight’s movie *Black Swan* reap more than \$300 million in box office earnings while they received nothing

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SUPERBAD (The Apatow Company 2007). I chose the quotation in the title because I felt this statement made by the character Fogell in the movie *Superbad* expertly represented the battle between employers and interns/potential employees, i.e., the employers telling the interns “you’re not staff.”

1. Vance Ginn & Carine Martinez-Gouhier, *Paid or Unpaid Internship? Let Individuals Decide*, FORBES (June 26, 2014, 8:29 AM), <http://www.forbes.com/sites/realspin/2014/06/26/paid-or-unpaid-internship-let-individuals-decide/> (advocating for proliferation of more internships and supporting notion that young adults should be free to pursue whatever opportunity, even unpaid internships, if they so choose).

2. See Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), <http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/> (discussing non-educational and demeaning tasks some unpaid interns are subjected to during their internships). For the purposes of this Note, the terms intern and extern will be used interchangeably.

3. See *id.* (exemplifying hopes of many entertainment industry interns before exposure to their actual tasks).

4. See Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all&_r=0 (listing menial yet essential tasks completed by Glatt and Footman).

5. See Sanburn, *supra* note 2 (explaining that job positions not labeled “intern” are typically evidence that position is more closely representative of full time employee position).

for their efforts.⁶

Surprisingly, the unpaid internship problem is not limited to college students; rather, it is pervasive among millennials, including those who have been out of school for many years.⁷ It is not just college students who complain now, but also members of the work force trying to better themselves in an environment that rewards paying one's dues and getting lucky.⁸ In 2010, the U.S. Department of Labor (DOL) created Fact Sheet #71 to set forth the current guidelines for classifying interns as trainees or employees, but these guidelines have become muddled with inconsistent application and are subjected to continuing criticism.⁹

This Note analyzes the three different tests used by courts to determine whether an intern is a trainee or an employee and advocates for the totality of the circumstances test as the unifying test courts should use to classify interns.¹⁰ Part II provides a background of the Fair Labor Standards Act

6. See Craig Durrant, Comment, *To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169, 170 (2013) (noting box office earnings brought in by *Black Swan*). Diana Wang, an intern with the fashion magazine *Harper's Bazaar*, found herself in a similar situation to that of Glatt and Footman. See Sanburn, *supra* note 2 (discussing Diana Wang's internship experience). During her internship, Wang worked up to fifty-five hours a week, often eating lunch at 4:00 PM and working until 10:00 PM without a dinner break. See *id.* (illustrating Wang's difficult working environment, especially for unpaid intern). These hours are comparable to those of a busy doctor or lawyer, or at least those of a paid employee making, if not overtime, at the very least a decent salary. See *id.* (noting Wang's hours would be difficult for paid employees and nearly impossible for unpaid interns). Wang also found herself placing routine shipping orders, lugging heavy bags across Manhattan on a daily basis, and managing at least eight other interns at any one time. See *id.* (listing other mundane tasks completed by Wang). These tasks seemingly indicate that Wang's position was deserving of an employee title. See *id.* (arguing in favor of classifying Wang an employee).

7. See Alex Williams, *For Interns, All Work and No Payoff: Millennials Feel Trapped in a Cycle of Internships with Little Pay and No Job Offers*, N.Y. TIMES (Feb. 14, 2014) <http://www.nytimes.com/2014/02/16/fashion/millennials-internships.html> (illustrating more examples of unconventional unpaid internships). It is important to note how pervasive the unpaid internship problem is among millennials. See *id.* (noting that unpaid internships affect former professionals as well as young adults). There are plenty more examples in addition to those above, including twenty-nine-year old Andrew Lang, who spent time delivering bottles of wine for Christmas parties in his three different internships with Hollywood production companies, and Lea, who spent time fetching coffee at an art gallery and clipping newspapers at a public relations agency. See *id.* (providing other examples of older millennials participating in poorly managed unpaid internships).

8. See *id.* (discussing internship framework in increasingly difficult job market).

9. See U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.htm> [hereinafter FACT SHEET #71] (providing guidelines for classifying interns). For a detailed discussion of the history of the Fair Labor Standards Act (FLSA), see *infra* notes 82–91 and accompanying text. For a discussion of the mechanics of the FLSA, see *infra* notes 92–105 and accompanying text. The inconsistent application of the FLSA standard is evidenced by three separate tests applied by courts. For a discussion and comparison of the tests, see *infra* notes 106–16 and accompanying text. Aside from the confusion surrounding the application of the FLSA to internships, there are many other criticisms of unpaid internships. For a discussion of those criticisms, see *infra* notes 56–81 and accompanying text.

10. See Petition for Writ of Certiorari at 14–21, *Kaplan v. Code Blue Billing & Coding, Inc.*, 134 S. Ct. 618 (2013) (No. 13-179), 2013 WL 4027034 (discussing three

(FLSA) and unpaid internships, an overview of how DOL Fact Sheet #71 works in practice, and insight from proponents and critics of unpaid internships.¹¹ Part III discusses and analyzes *Glatt v. Fox Searchlight Pictures Inc.*,¹² a groundbreaking case for interns.¹³ Lastly, Part IV offers support for the *Glatt* court's approach and explains why a totality of the circumstances test will bring consistency to the courts and best protect intern and employer interests alike.¹⁴

II. THE RISING ACTION: EVOLUTION OF THE FLSA AND THE INTERNSHIP DEBATE

“[I]n the wealthiest nation on Earth, no one who works full-time should have to live in poverty.”¹⁵ These words, spoken by President Barack Obama in 2013, emphasize the importance of the bill President Franklin Roosevelt signed into law over seventy years ago, which established “basic workers’ rights and [set] the groundwork for a middle class that thrived after World War Two.”¹⁶ The importance of the FLSA for employees cannot be overstated, but the FLSA only regulates those who fall under the “employee” label.¹⁷ This section will first explore the current unpaid internship debate by providing insight from both critics and supporters of such programs.¹⁸ Then, to fully understand the recent increase in lawsuits over unpaid internships, the history

different tests applied by circuit courts to determine whether interns are employees or trainees). The Eleventh Circuit applies an “economic realities” test; the Fourth, Fifth, and Sixth Circuits apply a “primary benefit” or “primary beneficiary” test; and the Tenth Circuit and lower courts in the Second Circuit apply a “totality of the circumstances” test. *See id.* (laying out in detail three tests used by courts to classify interns); *see also* Cody Elyse Brookhouser, Note, *Whaling on Walling: A Uniform Approach to Determining Whether Interns Are “Employees” Under the Fair Labor Standards Act*, 100 IOWA L. REV. 751, 768–72 (2015) (providing support for totality of circumstances approach as unifying test courts should use for classifying interns).

11. For an overview of the historical background and mechanics of the FLSA, see *infra* notes 82–105.

12. 293 F.R.D. 516 (S.D.N.Y. 2013).

13. For the facts, procedure, and a narrative analysis of *Glatt*, see *infra* notes 117–37 and accompanying text.

14. For further discussion advocating for the totality of the circumstances test, see *infra* notes 138–86 and accompanying text.

15. Danielle Gray et al., *Fair Labor Standards Act Anniversary Reminds Us Why We Need to Raise the Minimum Wage*, WHITE HOUSE BLOG (June 25, 2013, 3:00 PM), <http://www.whitehouse.gov/blog/2013/06/25/fair-labor-standards-act-anniversary-reminds-us-why-we-need-raise-minimum-wage> (quoting President Barack Obama) (remembering FLSA and discussing need to raise minimum wages to better fit in line with inflation).

16. *1938 President Roosevelt Signs the Fair Labor Standards Act*, MASS. AFL-CIO, <http://www.massafcio.org/1938-president-roosevelt-signs-fair-labor-standards-act> (last visited Feb. 26, 2015) (discussing importance of FLSA).

17. *See* Christopher Keleher, *The Perils of Unpaid Internships*, 101 ILL. B.J. 626, 628 (2013) (explaining how FLSA applies to employees and limitations of FLSA coverage). It is important to note that many decisions before *Glatt* placed interns in the “trainee” exception, thereby releasing companies from any obligation to pay their interns. *See id.* at 629 (discussing trainee exception and why trainees do not fall under FLSA).

18. For a discussion of the proponents and the critics of unpaid internships, see *infra* notes 21–81 and accompanying text.

and mechanics of the FLSA will be discussed.¹⁹ Lastly, a brief discussion of the three tests courts use to classify interns will be provided.²⁰

A. “*You Say Yes, I Say No*”²¹: *Proponents and Critics of Unpaid Internships*

As the job market continues to be limited, not only are more young adults seeking unpaid internships, but even those no longer in school have begun settling for unpaid internships out of necessity.²² Unpaid internships are most prevalent in the media, fashion, and entertainment industries, as well as in small businesses and government.²³ Unpaid internships have been the subject of increasing scrutiny in recent years, and in response, the DOL issued Fact Sheet #71.²⁴ Recently, unpaid internships have been called everything from indefensible, to illegal, to unethical.²⁵ Although public opinion has mostly criticized unpaid internships, some have defended the merits of these programs.²⁶

19. For a discussion of the history and mechanics of the FLSA, see *infra* notes 82–105 and accompanying text. Since the *Glatt* lawsuit and decision, there has been a spate of intern lawsuits across many different industries. See Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, PRO PUBLICA (Apr. 15., 2014), <http://projects.propublica.org/graphics/intern-suits> (providing continually updating list of recent unpaid internship lawsuits).

20. For a discussion of the three tests courts use to classify interns, see *infra* notes 106–16 and accompanying text.

21. THE BEATLES, HELLO, GOODBYE (EMI Studios 1967). The Beatles’ “song of duality” perfectly describes the dueling views on unpaid internships. See Dave Rybaczewski, “*Hello Goodbye*” *History*, BEATLES MUSIC HISTORY! (last visited Feb. 16, 2015), <http://www.beatlesebooks.com/hello-goodbye> (providing complete history of *Hello Goodbye*).

22. See *The Internship: Generation i*, ECONOMIST (Sept. 6, 2014), <http://www.economist.com/news/international/21615612-temporary-unregulated-and-often-unpaid-internship-has-become-route> (discussing history and rise of unpaid internships); see also Greenhouse, *supra* note 4 (noting how declining job market has led to equal climb in number of unpaid internship offerings). The rise in unpaid internships has been striking: “In 1976 more than half of American television newsrooms employed interns; by the 1990s nearly all did.” See *Generation i, supra* (providing examples showing increase in unpaid internships). Coupled with a struggling economy, the rise in young adults with bachelor’s degrees has led to a larger labor pool without accompanying growth in paying jobs. See *id.* (“In 1970 one in ten Americans over 25 had a bachelor’s degree; now a third do.”). In the journalism industry, today about 34% of internships are actually paid, down from 57% in 1997. See *id.* (detailing decline of paid, and rise of unpaid, internships).

23. See Durrant, *supra* note 6, at 174 & nn.39–40 (discussing necessity of interns in media and entertainment industries because of need for experience to gain jobs in those areas and how small businesses try to save money by using unpaid interns).

24. See *supra* note 9 and accompanying text (providing commentary on increasing scrutiny of unpaid internships and how this possibly forced DOL’s hand into issuing Fact Sheet #71).

25. See Eric M. Fink, *No Money, Mo’ Problems: Why Unpaid Law Firm Internships Are Illegal and Unethical*, 47 U.S.F. L. REV. 435, 441–56 (2013) (suggesting that unpaid internships are illegal due to exploitation and unethical because oftentimes internship positions are no different than paid employee positions); see also Keleher, *supra* note 17, at 626–27 (providing in-depth analysis of perils of unpaid internships); Peter D’Amato, *The Unpaid Internship Is Indefensible*, VITAE (Jan. 14, 2014), <https://chroniclevitae.com/news/271-the-unpaid-internship-is-indefensible> (discussing why unpaid internships have few, if any, defenses).

26. Although critics seemingly outweigh those in favor of unpaid internships, proponents of unpaid internships have been found across all positions, including students,

1. *Arguments in Favor of Unpaid Internships*

Proponents of unpaid internships claim that unpaid internships provide valuable work and educational experiences, that the opportunities allow students to make connections and become more attractive to future employers, and that paid jobs will become scarcer as unpaid internship programs are eliminated.²⁷

Critics focus heavily on the lack of compensation for interns; however, a 2010 study by Intern Bridge found that earning money was the eighth reason given by students for obtaining an internship.²⁸ The report found that gaining hands on experience in the field and becoming better prepared for employment in their field were the top two reasons students pursued internships.²⁹ Evidently, like employers, many students also value prior work experience and understand that skills gained through unpaid internships can be invaluable for future employment.³⁰

Although those with paid internships are more likely to receive a permanent employment offer subsequent to the internship, the experience gained through an unpaid internship should not be overlooked.³¹ Especially in

professors, and those who have participated in unpaid internships before. For a discussion of the benefits of unpaid internships, see *infra* notes 27–55 and accompanying text.

27. For a discussion of the benefits of unpaid internships, see *infra* notes 28–55 and accompanying text.

28. See Ginn & Martinez-Gouhier, *supra* note 1 (citing INTERN BRIDGE, 2010 INTERNSHIP SALARY REPORT 1, 9 (2010), available at <http://utsa.edu/careercenter/pdfs/2010%20salary%20report.pdf>) [hereinafter INTERN SALARY REPORT] (noting that money may not be as important to interns as believed). Intern Bridge is a college recruiting and research firm that surveyed more than 25,000 interns to compile its 2010 report. See *id.* (discussing parameters of Intern Bridge’s 2010 report). The report found that the first seven of thirteen ranked factors for why students chose to intern were “experiential based.” INTERN SALARY REPORT, *supra*, at 9 (listing top thirteen reasons students pursue internships). In order, before earning money, students sought internships:

1. To gain hands on experience in [their] field
2. To become better prepared for employment in [their] field
3. To learn new skills
4. To gain a realistic preview of the workplace
5. To make professional contacts
6. To explore a new organization
7. To explore a new industry
8. To earn money

See *id.* (emphasis added) (showing seven reasons students pursue internships before earning money).

29. See *id.*

30. See Maggie Driver, *Students Argue Unpaid Internships Can Still Be Beneficial*, DAILY WILDCAT (Sept. 23, 2013, 10:22 PM), <http://www.wildcat.arizona.edu/article/2013/09/students-argue-unpaid-internships-can-still-be-beneficial> (“Students who have had internships said experience is key, regardless of whether it’s a paid or unpaid internship.”). The director of the University of Arizona Career Services made the point that “[a] quality internship is still going to put students above and beyond’ . . . [because] employers are looking for career-related experience, which ranks those students higher than students without internship experience.” See *id.* (quoting Eileen McGarry) (arguing experience is most important benefit of internships and opportunity to gain valuable experience is independent of whether internship is paid or unpaid).

31. See *Class of 2013: Paid Interns Outpace Unpaid Peers in Job Offers, Salaries*,

“skill based fields such as technology or finance,” unpaid internships can allow students to gain practical, hands-on work experience while developing their talents in an area of interest.³² It is unrealistic to believe that all employers will pay temporary interns and also provide them with highly technical training.³³ Despite what critics argue, unpaid internships *can* provide tangible benefits without being exploitative.³⁴

Furthermore, unpaid internships provide valuable educational opportunities and provide interns with opportunities to explore new interests. Many internship programs under recent scrutiny treat interns essentially as employees and provide little to no educational value.³⁵ Besides work experience, the educational experience of an internship is perhaps its greatest asset.³⁶ Not only does the educational experience of internships better the interns, but interns can bring those experiences back to the classroom and enrich their peers as well.³⁷ Similarly beneficial, internships allow participants to explore and develop new

NAT'L ASS'N OF COLLS. & EMP'RS. (May 29, 2013), <https://www.naceweb.org/s05292013/paid-unpaid-interns-job-offer.aspx> [hereinafter NACE] (providing subsequent employment statistics for paid and unpaid internships). The survey found that 63.1% of paid interns “received at least one job offer. In comparison, only 37 percent of unpaid interns got an offer” *Id.* (comparing offer rates between interns who undertook paid versus unpaid positions). Although the 37% of unpaid interns who received at least one job offer is just above the 35.2% offer rate for those who had no internship, these statistics do not tell the entire story. *See id.* (theorizing unpaid internship offer rates do not give justice to benefits of unpaid internships). Various factors, including a poor fit or rejecting the offer—along with the fact that many unpaid internships are in government or non-profits, where immediate full-time positions are not available—give a much brighter outlook for these unpaid positions. *See* Ginn & Martinez-Gouhier, *supra* note 1, at 5 (supporting proposition that looking at offer rates of unpaid and paid internships alone does not always give accurate reflection of experience for intern).

32. *See* James Downey, *Weighing the Unpaid: Considering Unpaid Internships*, BUS. TODAY (Jan. 20, 2014), <http://www.businesstoday.org/articles/2014/01/weighing-the-unpaid-considering-unpaid-internships/> (supporting unpaid internships because such positions can provide substantial and meaningful practical experience).

33. *See* Edward L. Glaeser, *High Value in Unpaid Internships*, BOS. GLOBE (Oct. 31, 2013), <http://www.bostonglobe.com/opinion/2013/10/30/unpaid-internships-unpopular-solution-real-problem/KqHbPLxfgdjuhcvN0xL6XJ/story.html> (“At the same time, it’s unrealistic to think individual private businesses will provide new skills to temporary, not-yet-qualified workers simply out of public benevolence.”).

34. *See* Derek Thompson, *In Defense of Unpaid Internships*, ATLANTIC (May 10, 2012, 1:45 PM), <http://www.theatlantic.com/business/archive/2012/05/in-defense-of-unpaid-internships/257000/> (providing examples of tangible benefits of unpaid internships from actual participants in such programs).

35. For a discussion of intern positions that resembled employee positions but provided poor educational experiences, see Sanburn, *supra* note 2; *supra* notes 2–6 and accompanying text.

36. *See* Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), <https://www.insidehighered.com/views/2010/07/13/aoun> (“Educators are increasingly realizing that the integration of study and practice is a more powerful way to learn.”).

37. *See id.* (“[The interns] bring their experiences back to the classroom, enriching the curriculum for themselves and their peers. They gain knowledge that will serve them for a lifetime.”). When done correctly, an internship program can be an invaluable experience that helps the intern develop not only tangible skills but also intangibles such as “confidence, poise, adaptability, and the ability to work collaboratively.” *See id.* (discussing qualities unpaid internships can help students develop).

areas of interest and help students make more informed decisions about their career choices.³⁸

University of North Carolina senior Sydney Harris's experience with her unpaid internship embodies all that is positive about a well-run unpaid internship program.³⁹ Harris interned with the NBA's media department covering the 2013 NBA Finals, an enviable position in which the experience gained far outweighed the unpaid label.⁴⁰

Unpaid internships can also expose interns to, and help interns develop, new areas of interest and make more informed decisions about their career goals.⁴¹ For example, Chelsea Kelly found her unpaid internship to be extremely informative, providing her with "invaluable insight into how she hopes to use her art education."⁴² The benefits of educational experience and the opportunities to develop new skills should convince critics that unpaid internships should continue.⁴³

In a difficult job market, the experience gained from, and connections formed through, an unpaid internship can make interns more attractive to employers and could be the difference between merely being considered for a

38. See Downey, *supra* note 32 ("Unpaid internships give students the ability to pursue their interests in a given field and to develop their own skills."); see also William Frierson, *The Benefits of Unpaid Internships & How They Can Turn into a Full-Time Paid Job*, COLL. CAREER CONNECTOR (Sept. 17, 2013), <http://www.collegerecruiter.com/blog/2013/09/17/the-benefits-of-unpaid-internships-how-they-can-turn-into-a-full-time-paid-job/> (arguing unpaid internships give students "[a] better idea of whether [they have] chosen the right profession . . . [as] [f]irst-hand experience is irreplaceable"). These experiences may also help interns "discover hidden talents . . . [by] [a]ccepting challenges outside [their] designated skill area[, which is] always viewed favorably by management." See *id.* (noting other benefits unpaid internships may provide interns).

39. See Katie Hjerpe, *Students Weigh Benefits of Unpaid Internships*, DAILY TARHEEL (Mar. 18, 2014, 4:27 PM), <http://www.dailytarheel.com/article/2014/03/students-weigh-experiences-nances-in-unpaid-internships> (detailing Sydney Harris's NBA internship to show there are still some experiences paid internships cannot buy).

40. See *id.* ("Even if I get a job in the NBA post-graduation, there's a chance I'll never be media for the NBA Finals again' . . . 'You can't put a price on that experience.'" (quoting Sydney Harris)). Harris expressed further support for sophisticated unpaid internships because to her, "[j]ust because an internship isn't paid in money doesn't mean you're not going to get some sort of benefit out of it." See *id.* (quoting Harris) (supporting idea that unpaid internships can sometimes provide more meaningful experiences than paid positions).

41. See Frierson, *supra* note 38 (noting benefits of unpaid internships).

You might discover hidden talents. The well-kept secret about internships is there are often a lot of areas that need help in a company. You may, for example, discover that you were pretty good at making graphic designs when the marketing department asked to borrow you for their big event. Accepting challenges outside your designated skill area is always viewed favorably by management.

Id.

42. See Michael Koliner & Andi Crist, *The Pros and Cons of an Unpaid Internship*, CHI. ARTISTS RES. (Apr. 15, 2014, 1:56 PM), <http://www.chicagoartistsresource.org/articles/pros-and-cons-unpaid-internship?discipline=Literary> ("It was a really great learning experience. I learned a lot about the business side of art and it has changed my view about what I might want from the art world. I would like to pursue a Master's in business now." (quoting Chelsea Kelly)).

43. See *id.* (arguing that benefits of unpaid internships should cause critics to rethink their position that all unpaid internships should be eliminated).

full-time position and actually being hired for one.⁴⁴ Networking is one of the most important tools for opening up possible job opportunities down the road.⁴⁵ According to one professional business coach, “70–80% of all jobs are found through networking.”⁴⁶ Working for professionals, whether paid or not, can help build a network and open up potential employment opportunities down the road.⁴⁷

Furthermore, having an internship on a resume in today’s economy can provide a true benefit.⁴⁸ Many employers have stated that between two equally qualified candidates, the one with the internship will almost always win the job over the candidate without one.⁴⁹ In addition, some companies are much more likely to hire candidates who worked for them before as unpaid interns, which is yet another benefit of unpaid internships.⁵⁰

As previously discussed, unpaid internships can lead to great professional experiences.⁵¹ If unpaid internships are taken away, practical learning

44. See Alison Green, *Why Unpaid Internships Should Be Legal*, U.S. NEWS & WORLD REP. (July 1, 2013, 8:55 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2013/07/01/why-unpaid-internships-should-be-legal> (“In this job market, unpaid internship experience can be what makes the difference between getting interviews and job offers or remaining unemployed.”).

45. See Jonathan Farrington, *The Real Value of Networking*, ALLBUSINESS, <http://www.allbusiness.com/company-activities-management/sales-selling-sales/14316211-1.html> (last visited Feb. 16, 2015) (discussing idea of networking generally).

46. See *id.* (discussing benefits of networking). Farrington further supports networking as an important tool for individuals by asserting that “[n]etworking referrals will typically generate 80% more results than a cold call” and that “[e]very person you meet has 200–250 people with whom they connect who can potentially assist you.” *Id.* (noting positive correlation between networking and job opportunities). Unpaid internships are truly the “perfect forum for making contacts. Everyone notices the new person when you come in the office. Be . . . respectful and friendly to your co-workers and you will have a room full of people willing to help you when you apply for a full-time job.” Frierson, *supra* note 38 (discussing ways to stand out at one’s unpaid internship). Students seem to agree as making professional contacts was the fifth most reported reason that students seek internships. See INTERN SALARY REPORT, *supra* note 28, at 9 (noting that making professional contacts is important reason students pursue unpaid internships).

47. See Farrington, *supra* note 45 (supporting idea that networking can only help open future opportunities). Farrington is sure to temper expectations of immediate results, noting that “networking is a long-term commitment to knowing . . . what you may be able to do together that you couldn’t do . . . alone.” See *id.* (describing networking as long term commitment and explaining that students should not expect short term results). Although the idea of networking for long-term benefits may be off-putting, networking can lead to opportunities that may have never been found without doing so. See *id.* (ensuring students understand long term benefits of networking).

48. For a few brief points on the difficulties of the current job market and how internships can set applicants apart, see Aoun, *supra* note 36; Green, *supra* note 44.

49. See Hjerpe, *supra* note 39 (discussing value of unpaid internships and how employers value internships when evaluating potential job candidates).

50. See Downey, *supra* note 32 (supporting well-run unpaid internship programs). Although tangible benefits from unpaid internships are key, “companies may [also] see an applicant’s willingness to work unpaid as evidence of the interest and genuine ethic of the student.” See *id.* (listing intangible benefit of unpaid internships).

51. For a further discussion of the benefits of unpaid internships see *supra* notes 27–50 and accompanying text.

opportunities will disappear as well.⁵² After a major publisher discontinued its internship program last year, many companies are following suit, realizing the legal risks of unpaid internships.⁵³ Further, if employers are required to pay all interns, the reality is that employers likely “wouldn’t hire those interns at all,” as it is much easier to hire a few full-time employees than host several unpaid interns and spend money and time training them.⁵⁴ Although controversial, if companies continue to shut down unpaid internship programs, America’s young adults may become stuck needing experience to land a job but at a loss for where to find that experience to become qualified for a job.⁵⁵

2. *Arguments Against Unpaid Internships*

While there are advocates, there is also opposition to the concept of unpaid internships.⁵⁶ Critics of unpaid internships claim that unpaid internships may actually increase the unemployment rate while decreasing the effectiveness of internship programs, that unpaid internships financially harm interns and lead to lost opportunity costs, and that unpaid internships help promote socioeconomic inequality.⁵⁷

As paying job opportunities continue to stagnate, unpaid internships are becoming the only way for young people to get experience.⁵⁸ Forty-five percent of students would still choose a government or non-profit internship over a for-profit one.⁵⁹ Clearly, there is no shortage of potential interns willing

52. See Ginn & Martinez-Gouhier, *supra* note 1 (noting possible negative effects of allowing too much governmental control over unpaid internships).

53. See Susan Adams, *Why Condé Nast Felt It Had to Stop Using Interns*, FORBES (Oct. 24, 2013, 2:39 PM), <http://www.forbes.com/sites/susanadams/2013/10/24/why-conde-nast-felt-it-had-to-stop-using-interns/> (noting possibility that *Glatt* ruling will lead to companies retracting internship programs). Condé Nast is a publishing powerhouse, boasting titles such as *Vogue*, *The New Yorker*, and *Vanity Fair*. See *id.* The company chose to end its internship program after the recent spate of lawsuits rather than pay interns. See *id.* (discussing Condé Nast’s decision to end its internship program). Whatever Condé Nast’s motive may have been, and although its program faced heavier scrutiny than others, the closing of more and more unpaid opportunities could harm younger generations even more. See *id.* (detailing harm that may be brought to larger number of students if more companies close their internship programs). Daniel O’Meara, “chairman of the employment law division of Philadelphia-based Montgomery, McCracken, Walker & Rhoads,” has spoken with many companies about their unpaid internship programs, which have indicated that they will be ending their internship programs due to the increased risk of hosting such programs. *Id.* (showing other companies will choose closing internship programs over facing increased legal risks).

54. See Green, *supra* note 44 (analyzing realities that employers will be faced with should unpaid internships continue to be eliminated).

55. See *id.* (explaining harm in ending unpaid internships).

56. Compare *supra* notes 27–55 and accompanying text (discussing points advocates use to support unpaid internships), with *infra* notes 57–81 and accompanying text (discussing arguments critics make against unpaid internships).

57. For a discussion of the criticisms of unpaid internships, see *infra* notes 58–81 and accompanying text.

58. See Greenhouse, *supra* note 4 (“With job openings scarce for young people, the number of unpaid internships has climbed in recent years . . .”); see also Fink, *supra* note 25, at 436 & n.8 (linking increases in unpaid internships with decreases in available paying jobs).

59. See INTERN SALARY REPORT, *supra* note 28, at 9 (analyzing students’ willingness

to work for free to gain experience despite the lack of compensation.⁶⁰ With no shortage of a willing labor force and a continuing effort to cut costs, companies gladly turn to unpaid interns to fill needed spots.⁶¹ As companies benefit from paying fewer employees and working unpaid interns longer hours, there seems to be little incentive to stop this unethical practice.⁶²

The expansion of unpaid internships has also harmed the internship experience itself.⁶³ The proliferation of unpaid internships has led to less interaction with supervisors and less substantive internship experiences.⁶⁴ Not only does the opportunity for practical experience suffer, but with the over-hiring of free labor, chances to forge personal connections and networking opportunities suffer as well.⁶⁵

Another problem with these unpaid internships is that they can place significant financial strains on interns.⁶⁶ Between high apartment rental rates and the costs of traveling to and from work, the costs associated with these

to participate in unpaid internships).

60. *See id.* (noting that students are willing to work for experience over payment).

61. *See* KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, ECON. POL'Y INST., NOT-SO-EQUAL PROTECTION: REFORMING THE REGULATION OF STUDENT INTERNSHIPS 1, 4 (Apr. 9, 2010), available at http://epi.3cdn.net/f7d635c82f7380fff0_8sm6bx_rzk.pdf (discussing extent of FLSA's application to different employment areas and problems stemming from replacing regular workers with interns). Unpaid interns seem to be an easy way for companies to combat rising prices for health care coverage, transportation costs, and other benefits that employers often provide. *See id.* ("Replacement of full-time workers with unpaid interns has also likely been fueled by the rising cost of providing health care and other employee benefits.").

62. *See* Sanburn, *supra* note 2 (providing discussion of Diana Wang, Eric Glatt, and Alex Footman's internship experiences). The cases of Diana Wang, Eric Glatt, and Alex Footman all prove this point. *See id.* Rather than their respective companies paying employees to take out the trash, take lunch orders, or carry bags around Manhattan, they gave those tasks to the lowly unpaid interns. *See id.* (recounting duties carried out by Wang, Glatt, and Footman during their internships). If the intern manual of John Boehner, the Speaker of the United States House of Representatives, has any similarities to those across America, it also appears that many unpaid interns will continue to stay quiet about their actual duties at their internships. *See Generation i, supra* note 22 ("DON'T talk to the press. Have a good attitude. Always say yes. You are not here to change the world.").

Although little to no empirical evidence exists concerning the effect unpaid internships actually have on employment rates, the vast amounts of anecdotal evidence lend strongly to the theory that a rise in unpaid internships stems from a lack of availability of paying jobs. The actual economic impact of unpaid internships is, however, outside the scope of this Note.

63. *See* Timothy Noah, *The Unpaid Internship Racket*, MSNBC (Sept. 13, 2013, 8:47 AM), <http://www.msnbc.com/msnbc/the-unpaid-internship-racket> (recognizing negative effects stemming from rise of unpaid internships and effects on internship experience itself).

64. *See id.* (discussing further downsides of expanding unpaid internship programs). The field of journalism exemplifies this problem perfectly; however, it is likely that internship experiences are increasingly less valuable in many industries. *See id.* (noting internship experiences are deteriorating across all fields). As Timothy Noah explains, journalism interns hardly even write anymore. *See id.*

65. *See id.* ("Who can remember names in that sea of young faces? It was different when there were only one or two.").

66. This hypothetical example does not attempt to balance financial detriments against substantive experiences of the internship. It merely serves to demonstrate the costs one undertakes when accepting an unpaid internship.

opportunities can act as serious deterrents for potential participants.⁶⁷

For example, take a new summer intern working near Union Station in Washington, D.C., who lives in Fairfax, Virginia. The metro trip will cost \$58 per week, totaling \$580 for the ten week internship.⁶⁸ With high gas prices, driving will not provide financial relief. Even if the student does not have to pay for living expenses, the student will likely spend much more than just the \$580 for transportation over the summer.⁶⁹

Due to the time spent commuting and working, the student has significant opportunity costs.⁷⁰ Supposing the student instead found a paid internship or job at ten dollars an hour near home or school, the student could have made around \$3,200.⁷¹ Taking into account the cost of transportation and other expenses, the unpaid internship could actually end up costing the student closer to \$4,000–\$5,000.⁷² The financial detriments may become even worse when considering each student's specific situation.⁷³

Critics also claim that unpaid internships favor wealthier students because not all students can take on the costs associated with unpaid internships or have families to financially support them during an unpaid opportunity.⁷⁴ Further, many students are financially burdened by student loans, with the average student-loan debt in 2012 at \$29,400.⁷⁵ In addition, around 71% of all students

67. See, e.g., *Apartments for Rent in Foggy Bottom, Neighborhood of Washington, District of Columbia*, APARTMENT GUIDE, <http://www.apartmentguide.com/neighborhoods/District-of-Columbia/Washington/Foggy-Bottom/> (last visited Feb. 17, 2015) (presenting apartments for rent in Foggy Bottom area). Although the student may find a sublet or rent an apartment with other interns, the costs of rent for ten weeks will likely be substantial.

68. See *Trip Planner*, WASH. METRO. AREA TRANSIT AUTH., http://www.wmata.com/rider_tools/tripplanner/tripplanner_form_solo.cfm. (last visited Feb. 27, 2015) (listing Metro fare rates).

69. Assuming the student participates in social activities in the evenings and on weekends, transportation costs may only be a small amount compared to the costs of other activities.

70. An opportunity cost commonly means “the value of the next-highest-valued alternative use of that resource. See David R. Henderson, *Opportunity Cost*, CONCISE ENCYCLOPEDIA ECON., LIBRARY OF ECON. & LIBERTY (2d ed. 2008), available at <http://www.econlib.org/library/Enc/OpportunityCost.html>. In the hypothetical, the student's next-highest-valued use of time and energy would likely be a paying internship or job.

71. Assume the student worked the same amount of time as in the unpaid internship example. The student would have worked eight hours a day, four days a week. This would come to \$320 a week, totaling \$3,200 after ten weeks before tax.

72. Although this may be a drastic jump, the student's opportunity costs must be considered when determining how much a student truly is financially harmed by an unpaid internship. Other fees may include: possible small rent payments to the relative, food and drink costs, entertainment costs, possible work expenses, etc.

73. For a real life picture of what unpaid internships can look like and the lengths some students are forced to go through, see Durrant, *supra* note 6, at 179–81 & nn.59–63 (citing Emma Jacobs, *Do Unpaid Internships Make Sense for Students?*, NEWSWORKS (July 6, 2012), <http://www.newsworks.org/index.php/local/business-a-economy/41042-do-unpaid-internships-make-sense-for-students>) (describing incredible lengths one student went to for her unpaid internship).

74. See EDWARDS & HERTEL-FERNANDEZ, *supra* note 61, at 4 (noting difficulties faced by students with lesser means when considering unpaid internships).

75. See *Quick Facts About Student Debt*, INST. FOR COLL. ACCESS & SUCCESS (Mar. 2014), http://projectonstudentdebt.org/files/pub/Debt_Facts_and_Sources.pdf (providing

graduating from four-year undergraduate colleges had some student-loan debt.⁷⁶

As previously mentioned, moving to a new city for the duration of an unpaid internship can be very expensive.⁷⁷ Students wishing to avoid additional debt or students without supplemental income from parents are further incentivized by paying jobs, regardless of the educational experience the job may provide.⁷⁸

Another type of internship that favors wealthier students is a “pay for internships,” which companies such as University of Dreams offer for students who are willing to pay more than \$9,000 to be placed in a highly regarded, unpaid internship.⁷⁹ These programs help wealthier students place in highly regarded internship positions and significantly lessen competition by weeding out highly qualified students who cannot afford to pay an internship placement company.⁸⁰

As more companies downsize or stagnate their hiring due to economic troubles, a generation of students unable to afford unpaid internships, yet unable to find paying work, may continue to become a troubling reality.⁸¹

B. *Flashback: The Then and Now*

In the first half of the twentieth century, President Franklin D. Roosevelt played Robin Hood for the working laborer in a sea of big business.⁸² The

sheet that gives basic information about student loans and associated debts).

76. *See id.* (showing percentage of students who graduate with some debt).

77. For an example of the financial detriments an intern may face during an unpaid internship, *see supra* notes 68–76 and accompanying text.

78. *See Durrant, supra* note 6, at 181 (noting that unpaid internships do nothing to dispel debt and thus students with lesser means are swayed towards paid opportunities). Interestingly, even with paid internships, students from lower-income houses are on average paid a lower salary. *See* INTERN SALARY REPORT, *supra* note 28, at 10 (noting average paid internship salaries for four different salary ranges).

79. *See* Gerry Shih, *Unpaid Work, but They Pay for Privilege*, N.Y. TIMES (Aug. 9, 2009) http://www.nytimes.com/2009/08/09/business/09intern.html?_r=0 (discussing University of Dreams and paying for unpaid internship opportunities in general).

80. *See id.* (summarizing general unfairness associated with University of Dreams and similar internship finding programs).

81. *See* Noah, *supra* note 63 (describing social problems associated with creating internship framework that favors wealthier families).

82. *See generally* Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T OF LABOR, <http://www.dol.gov/dol/aboutdol/history/flsa1938.htm> (providing general background about creation and implementation of FLSA). In getting the FLSA passed, President Roosevelt faced incredible obstacles, including a continually bickering Congress, a nation going through the Great Depression, and an uncooperative Supreme Court. *See id.* (recognizing difficulties Roosevelt faced on his journey to pass FLSA). The Supreme Court took an early stance, showing its disdain for any laws governing minimum wage or hours requirements, when it struck down New York’s Bakershop Act in 1895. *See* David Kestenbaum, *The Birth of the Minimum Wage in America*, NAT’L PUB. RADIO (Jan. 17, 2014, 3:33 AM), <http://www.npr.org/blogs/money/2014/01/16/263129670/the-birth-of-the-minimum-wage-in-america> (listing Supreme Court decisions opposing better wage and hour requirements prior to 1937). The Bakershop Act would have limited hours and placed sanitation requirements on bakeries. *See id.* However, the Supreme Court ruled that the law was unconstitutional because it infringed upon individual rights to

FLSA arose from the depths of the Great Depression, a time when some laborers worked incredibly long hours under terrible conditions for often little to no pay.⁸³ After a long fight, Roosevelt led America away from the country's previous adherence to child labor, long hours, and poor pay.⁸⁴ Although June 25, 1938 does not have the legacy of a more infamous day under Roosevelt's tenure as president, the day marked a significant change in American labor standards.⁸⁵

The FLSA strives to rid those industries engaged in commerce of labor conditions detrimental to the maintenance of the "minimum standard of living necessary for health, efficiency, and general well-being of workers . . . without substantially curtailing employment."⁸⁶ The FLSA sets forth three main objectives:

- (1) to establish a minimum wage floor,
- (2) to encourage limits on the number of weekly hours covered by employees work through overtime provisions, and
- (3) to discourage oppressive use of child labor.⁸⁷

This Note focuses on how the FLSA defines "employee" and "employ," as how an intern is classified can turn on the definition of these two terms.⁸⁸

Today, for an intern to fall within the FLSA minimum wage requirement, the intern must be an employee of the employer.⁸⁹ The FLSA defines an

enter into contracts. *See* Grossman, *supra* (analyzing Supreme Court holding in *Lochner v. New York*, 198 U.S. 45 (1905)).

83. *See* Natalie Bacon, Note, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71"*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 70 (2011) (discussing history and development of FLSA).

84. *See* Grossman, *supra* note 82 (discussing Roosevelt's 1936 presidential election and America's subsequent change in attitude towards labor laws). Roosevelt made higher labor standards a cornerstone of his 1936 presidential campaign, and, after his landslide victory in which he won the Electoral College 523 to 8, he considered America to be fully supportive of his goals. *See id.*

The original bill, introduced to Congress in 1937, passed through the Senate, however it was held up in the House Rules Committee; another Congressional session had passed, but a labor bill was yet to be made into law. *See id.* (providing background on 1937 Congress and difficulties Roosevelt faced trying to get his bill passed into law). Undeterred, Roosevelt called a special session of Congress on November 15, 1937, to further push the bill, however shortly before Christmas the House "unexpectedly sent the bill back to the Labor Committee." *Id.* (discussing another of many roadblocks to passing FLSA). After even more turbulence through 1938, enough concessions were made on both sides, and the Fair Labor Standards Act was signed by Roosevelt on June 25, 1938, and came into effect on October 24, 1938. *See id.* (discussing last push by Roosevelt to finally get FLSA enacted into law).

85. *See* Durrant, *supra* note 6, at 172 ("President Franklin Delano Roosevelt called [the FLSA] 'the most farsighted program for the benefit of workers ever adopted.'").

86. *See id.* (alteration in original) (quoting 29 U.S.C. § 202) (summarizing goals of FLSA).

87. *Compensation Policies—Fair Labor Standards Act*, CUMBERLAND UNIV. (Jan. 17, 2012), http://www2.cumberland.edu/communications/CU%20Policy%20and%20Procedure%20Website/zav_HR—134.htm (describing three main objectives of FLSA).

88. *See infra* notes 90–91 and accompany text.

89. *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT

“employee” as one who works for an employer, i.e., an employment relationship exists.⁹⁰ The FLSA goes on to define “employ” very broadly as to “suffer or permit to work.”⁹¹

Less than ten years after the FLSA was passed, in *Walling v. Portland Terminal Co.*,⁹² the Supreme Court tempered this broad interpretation of “employ” by reasoning that it “was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.”⁹³ The limitation placed on the term “employ” by the *Walling* Court serves two competing, yet necessary, purposes.⁹⁴

First, it protects the employer from having to pay workers whose work might only serve the worker’s own interest, even though the worker gains valuable training from the employer.⁹⁵ On the other hand, the Act ensures that those whose work is tied to an expectation of compensation will not be forced to work for less than the required minimum wage.⁹⁶ So, if an intern classifies as an “employee” under the FLSA, the intern-employee is entitled to a minimum wage, as of today, not less than \$7.25 an hour.⁹⁷

In 2010, in what many believed to be a warning to employers, the DOL issued Fact Sheet #71 in response to the growing criticism of unpaid internships.⁹⁸ Fact Sheet #71 brought some clarity to the employee-trainee debate by defining the factors set forth in *Walling*:

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

(FLSA) (May 2014), available at <http://www.dol.gov/whd/regs/compliance/whdfs13.pdf> [hereinafter FACT SHEET #13] (defining employee-employer relationship).

90. See *id.* (detailing when workers are employees).

91. See FACT SHEET #71, *supra* note 9 (providing definition of “employ”). Anyone who falls under the FLSA must be paid in accordance with the federal wage requirements. See *id.* (explaining what it means to label interns employees).

92. 330 U.S. 148 (1947).

93. *Id.* at 152 (restricting broad definition of employ to limit its reach from covering anyone who works).

94. See *id.* (noting two important purposes of limiting definition of “employ”).

95. See *id.* (detailing what limits are on broad definition of “employ” and why such limits are necessary to protect employers from having to pay every worker they employ).

96. See *id.* (explaining that one goal of FLSA is ensuring those falling under “employee” classification are paid in accordance with wage requirements).

97. See U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET #14: COVERAGE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (June 2009), available at <http://www.dol.gov/whd/regs/compliance/whdfs14.htm> (listing wage and overtime requirements for employees under FLSA).

98. See Bacon, *supra* note 83, at 76 (citing KRAMER LEVIN, *Department of Labor Puts Unpaid Internships Under the Spotlight*, EMP. L. UPDATE 2 (Aug. 2010), available at <http://www.kramerlevin.com/files/Publication/c76bff6b-a66a-42ae-af75-05744efcb71c/Presentation/PublicationAttachment/ac20d6c9-a830-4744-994e-05b28791c47b/EmploymentLawAugust2010.pdf>) (“It is believed that the DOL issued Fact Sheet #71 as a ‘clear warning signal’ to for-profit employers hiring unpaid interns to be aware of and to comply with the law.”).

3. The intern does not displace regular employees, but works under close supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁹⁹

The FLSA has a few additional working parts.¹⁰⁰ First, due to concessions the opposition forced Roosevelt to make when trying to pass the FLSA, the Act's reach applies only to "for-profit, private-sector businesses."¹⁰¹ For FLSA purposes, interns working at non-profit organizations, or at government agencies or offices, are considered volunteers and are not subject to FLSA wage requirements.¹⁰²

Furthermore, according to Fact Sheet #71, all six factors must be met for the intern to fall within the trainee exception.¹⁰³ Fact Sheet #71 is not

99. See FACT SHEET #71, *supra* note 9 (listing and explaining six criteria that must be applied when classifying interns as employees or trainees). The *Walling* Court considered many of the same factors that Fact Sheet #71 contains today; in fact the court in *Glatt v. Fox Searchlight Pictures Inc.* stated that "the DOL factors have support in *Walling*." *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013) (discussing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149–50 (1947)) (acknowledging similarities between six criteria in Fact Sheet #71 and those used in *Walling*).

The *Walling* Court considered the following factors when it determined whether the plaintiffs were employees: (1) the training benefited the trainees as the training was practical and required to be considered for a job; (2) the trainees first observed the regular employees and were only "gradually permitted to do actual work under close scrutiny;" (3) the activities of the trainees did "not displace any of the regular employees," and any work the trainees did was closely supervised by a regular employee; (4) the trainees work did not "expedite the company business," and sometimes even impeded it; (5) the successful completion of the training program resulted in the trainee's name being placed on a list from which the company could draw for employment if needed, thus permanent employment was not guaranteed; and (6) no form of payment was included or expected during the training program and it was found that the employer never "undertook to pay, or the trainees [n]ever expected to receive, any remuneration for the training period" See *Walling*, 330 U.S. at 149–150 (detailing Court's test used in holding that interns were trainees and not employees).

100. See FACT SHEET #71, *supra* note 9 (explaining notes in Fact Sheet #71 that provide additional considerations when applying test to classify interns).

101. See EDWARDS & HERTEL-FERNANDEZ, *supra* note 61, at 2 (explaining reach of FLSA). For a brief recount of the difficulties Roosevelt faced in his effort to bring the FLSA to reality, see Grossman, *supra* note 82.

102. See EDWARDS & HERTEL-FERNANDEZ, *supra* note 61, at 3 (noting FLSA is limited because it does not apply to interns working in non-profits or government agencies). Interns working in those sectors are labeled as volunteers and are considered to be donating their time as these industries often have insufficient funds to adequately pay interns. See *id.* (providing reason why non-profits and government agencies are exempted from the FLSA). This exception, however, should be scrutinized because interns in these industries are often "just as likely to find internships where they simply perform administrative or other work that replaces full-time workers." *Id.* (explaining pervasiveness of poorly run internship programs across all industries).

103. See FACT SHEET #71, *supra* note 9 (explaining FLSA requirement that all six

controlling, however, and in interpreting the factors, the *Glatt* court used a holistic approach rather than requiring that all six factors be met.¹⁰⁴ Although requiring all six factors appears to favor the intern, supplemental language contained in Fact Sheet #71 confuses the process and makes it more difficult for courts to classify interns as employees in practice.¹⁰⁵

C. Tests Used to Classify Interns

Courts typically use one of three tests to classify interns: (1) the economic realities test, (2) the primary beneficiary test, or (3) a totality of the circumstances test, based on Fact Sheet #71.¹⁰⁶

Courts applying the economic realities test typically look to a number of factors that focus on the economic relationship, rather than the educational or training relationship, of the parties.¹⁰⁷ The DOL formally lays out the factors of the economic realities test in Fact Sheet #13.¹⁰⁸ Fact Sheet #13 specifically states that the test is best used to determine whether a worker is an employee or an independent contractor.¹⁰⁹ According to the DOL, independent contractors are those who are in business for themselves and are economically

factors of Fact Sheet #71 must be met to label interns “trainees”).

104. See *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 525 (S.D.N.Y. 2013) (“‘Employment’ under the FLSA is ‘to be determined on a case-by-case basis by review of the totality of the circumstances.’” (quoting *Barfield v. N.Y. Health & Hosps. Corp.*, 537 F.3d 132, 141–42 (2d Cir. 2008))); see also *Petition for Writ of Certiorari*, *supra* note 10, at 19 (describing Tenth Circuit and lower courts’ position and comparing it to Second Circuit’s take on FLSA fact sheet, i.e., “totality of the circumstances” approach).

105. See EDWARDS & HERTEL-FERNANDEZ, *supra* note 61, at 3 (explaining difficulties involved with actual application of the Fact Sheet); see also Durrant, *supra* note 6, at 176–77 (discussing problems with applying FLSA in practice). Perhaps the biggest problem with Fact Sheet #71 is its deference to academically centered internships, a potentially misleading factor that in reality likely has little dispositive effect on the actual quality of one’s unpaid internship. See *id.* (analyzing trap courts may fall into if courts find internships centered around academic experiences as sufficient to classify interns as trainees). This Note will focus on proponents and critics of unpaid internships generally, rather than flaws of the Fact Sheet itself; for an in-depth look at flaws of the Fact Sheet, see Durrant, *supra* note 6, at 177 (providing informative breakdown of the Fact Sheet and its observable flaws).

106. See *Petition for Writ of Certiorari*, *supra* note 10, at 14–21 (providing basic breakdown of three tests used to classify interns).

107. See, e.g., *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1312 (11th Cir. 2013) (listing six factors courts consider in applying economic realities test). The Eleventh Circuit applied six factors for the economic realities test:

- (1) the nature and degree of the alleged employer’s control as to the manner in which the work is to be performed;
- (2) the alleged employee’s opportunity for profit or loss depending upon his managerial skill;
- (3) the alleged employee’s investment in equipment or materials required for his task, or his employment of workers;
- (4) whether the service rendered requires a special skill;
- (5) the degree of permanency and duration of the working relationship; [and]
- (6) the extent to which the service rendered is an integral part of the alleged employer’s business.

Id.

108. See FACT SHEET #13, *supra* note 89 (listing six factors of economic realities test when determining employment relationship).

109. See *id.* (“Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?”). The phrase “independent contractor” appears nineteen times in the document. See *id.*

independent.¹¹⁰ Interns and employees, on the other hand, are subject to their employer's discretion and are economically dependent.¹¹¹

The primary beneficiary test weighs the benefits to the intern against the benefits to the employer.¹¹² When applying that test, courts have considered different factors, such as whether the intern displaces paid employees and whether the internship has educational value to the intern.¹¹³ Although there is some debate, it is generally accepted that the primary beneficiary test draws support from *Walling*, and often the test applies factors considered in *Walling*.¹¹⁴

The totality of the circumstances test is based upon Fact Sheet #71. As previously discussed, Fact Sheet #71 requires all six factors to be met for an intern to be labeled an employee.¹¹⁵ Courts applying the totality of the circumstances test apply the six factors of Fact Sheet #71, but consider each factor in favor of either the employer or intern.¹¹⁶

III. CLIMAX OF THE DEBATE: THE SOUTHERN DISTRICT OF NEW YORK COURT CASTS INTERNS AS EMPLOYEES FOR PURPOSES OF THE FLSA IN *GLATT V. FOX SEARCHLIGHT PICTURES INC.*

The United States District Court for the Southern District of New York's decision in *Glatt* is widely recognized as the first time a court granted employee status to an intern, and it marked an important turn in intern labor law.¹¹⁷ The decision not only impacts future intern lawsuits, but it should also finally give

110. *See id.* ("On the other hand, independent contractors are workers with economic independence who are in business for themselves.")

111. *See id.* ("[O]r, like most, is economically dependent on an employer who can require (or allow) employees to work *and* who can prevent employees from working.")

112. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (en banc) ("By focusing on the benefits flowing to each party, the test readily captures the distinction the FLSA attempts to make between trainees and employees."); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) ("[T]he general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor.")

113. *See* Petition for Writ of Certiorari, *supra* note 10, at 17 (noting factors considered when applying primary beneficiary test).

114. *See id.* (discussing similarity between factors used in primary beneficiary test and those noted in *Walling*); *see also Laurelbrook*, 642 F.3d at 529 ("[I]n our view, [the *Walling*] decision rested upon whether the trainees received the primary benefit of the work they performed."); *Ensley*, 877 F.2d at 1209 (drawing support from *Walling* and reasoning that "the proper legal inquiry in this case is whether Ensley or the new workers principally benefited from the weeklong orientation arrangement"). *But see Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 531 (S.D.N.Y. 2013) ("While some Circuits have applied a 'primary beneficiary' test, it has little support in *Walling*.")

115. For further discussion of Fact Sheet #71 requiring all six factors, see *supra* note 103 and accompanying text.

116. *See* Petition for Writ of Certiorari, *supra* note 10, at 19–21 (discussing totality of circumstances test generally).

117. *See* Sam Hananel, *Unpaid Internships in Jeopardy After Court Ruling*, ASSOCIATED PRESS (June 13, 2013, 4:27 PM), <http://bigstory.ap.org/article/unpaid-internships-jeopardy-after-court-ruling> (discussing importance of *Glatt* decision and possible ramifications on unpaid internships moving forward).

courts a clear test to use to classify interns.¹¹⁸

A. *Facts and Procedure*

Alexander Footman and Eric Glatt worked as unpaid production interns on the film *Black Swan*.¹¹⁹ During their internship, rather than gaining substantive experience, the two performed only menial tasks, such as taking out the trash and gathering lunch orders.¹²⁰ The director and producer of the movie incorporated a company, Lake of Tears, Inc., to produce the movie, but soon after entered into a production agreement with Searchlight, a subsidiary of Fox Entertainment Group, Inc. (FEG).¹²¹ Glatt and Footman sued Searchlight and FEG, contending that the companies violated the FLSA by classifying them as unpaid interns rather than employees and moved for summary judgment on that issue.¹²² Although Glatt and Footman technically worked for Lake of Tears, the court found that the law allowed for joint employer liability, which would also hold Searchlight liable for any breaches under the FLSA.¹²³ Then, the Southern District of New York applied the totality of the circumstances test and held that Glatt and Footman were employees under the FLSA.¹²⁴

B. *The U.S. District Court for the Southern District of New York's Decision in Glatt*

The court first had to determine whether Searchlight was a joint employer of Glatt and Footman.¹²⁵ The court reasoned that the level of control is fundamental to determining whether one is a joint employer.¹²⁶ Following Second Circuit precedent, the court used both a “formal control test” and a “functional control test” to find Searchlight a joint employer of Glatt and

118. *See Glatt*, 293 F.R.D. at 531–32 (supporting totality of the circumstances approach and Fact Sheet #71 when determining how to classify interns).

119. *See id.* (noting Glatt and Footman’s intern positions).

120. *See Sanburn*, *supra* note 2 (noting tasks completed by Glatt and Footman during their internship).

121. *See Glatt*, 593 F.R.D. at 522 (describing how Searchlight became involved with movie *Black Swan*). Darren Aronofsky directed the movie, and Scott Franklin produced it. *See id.* (announcing director and producer of *Black Swan* and noting that both gave Searchlight hiring and firing power, power to set budgets, and to monitor progress of film).

122. *See id.* (discussing Glatt and Footman’s claim against Searchlight).

123. *See id.* at 525 (“The law allows for the possibility of joint employers, and ‘all joint employers are responsible, both individually and jointly, for compliance with all the applicable provisions of the [FLSA].’” (alteration in original) (quoting 29 C.F.R. § 791.2(a))).

124. *See id.* at 534 (“Considering the totality of the circumstances, Glatt and Footman were classified improperly as unpaid interns and are ‘employees’ covered by the FLSA . . .”).

125. *See id.* at 525 (determining whether Searchlight was joint employer of Glatt and Footman).

126. *See id.* (“‘When it comes to employer status under the FLSA, control is key.’” (quoting *Lopez v. Acme Am. Env'tl. Co.*, No. 12-Civ.-511(WHP), 2012 WL 6062501, at *3 (S.D.N.Y. Dec. 6, 2012))).

Footman.¹²⁷ The court reasoned that the final determination boiled down to control, and clearly Searchlight had both formal and functional control over Glatt and Footman.¹²⁸

Having found Searchlight an employer of Glatt and Footman, the court then had to determine whether each were employees under the FLSA.¹²⁹ The defendants urged the court to apply the primary beneficiary test; however, the court found that test to be subjective and unpredictable.¹³⁰ Instead, the court chose to apply the six factors of Fact Sheet #71, which were set forth in *Walling*.¹³¹

Before applying the factors, the court rejected the DOL's requirement that each factor in Fact Sheet #71 be met and used a totality of the circumstances approach.¹³² Analyzing the six factors, the court found that Glatt and Footman received no formal training or education during the internship, nor did either receive any benefit from the internship beyond what any other employee would receive.¹³³ Furthermore, the duties performed by each were those that would have otherwise been performed by a paid employee; Searchlight even conceded that it received an immediate advantage from both Glatt and Footman's work.¹³⁴ The court found that neither Glatt nor Footman believed they were

127. *See id.* at 525–26 (laying out formal and functional control tests). The court chose to apply the formal control test adopted by the Second Circuit; the test measures the level of formal control an employer has over an employee. *See id.* at 526 (stating basic idea of formal control test).

128. *See id.* at 529–30.

The fact that all four formal control factors weigh in favor of finding Searchlight was a joint employer is sufficient to find Searchlight was Plaintiffs' employer even if no functional control factors were satisfied. That conclusion is bolstered by the finding that Searchlight also exercised significant functional control. And in the end, it is all about control.

Id.

129. *See id.* at 531 (beginning discussion of *Walling* and Fact Sheet #71).

130. *See id.* at 532 (noting problems with using primary beneficiary test when determining how to label interns). The court went on to reason that such a test would lead to unpredictable rulings, especially when one intern had a better experience than another intern in the same internship. *See id.* at 532 (discussing problems with primary beneficiary test).

131. *See id.* at 531–34 (discussing *Walling* and six factors of Fact Sheet #71). For a list of the six factors of the Fact Sheet and a discussion of *Walling* and the *Glatt* court's support of that case, *see supra* note 99 and accompanying text.

132. *See Glatt*, 293 F.R.D. at 534 (considering Fact Sheet factors in totality of circumstances approach).

133. *See id.* at 532–33 (analyzing first two factors of Fact Sheet #71). The court reasoned that any education or training Glatt and Footman received was merely a function of being preset. *See id.* (discussing first factor: “[t]raining [s]imilar to an [e]ducational [e]nvironment”). Although Glatt and Footman received some benefits, such as a resume boost and job references, these were not academic or vocational benefits that the factor intended to address; furthermore, paid employees received those same benefits. *See id.* at 533 (discussing second factor: “[w]hether the [i]nternship [e]xperience is for the [b]enefit of the [i]ntern.”).

134. *See id.* (discussing third and fourth factors of Fact Sheet). During their internships, Glatt and Footman performed basic duties including picking up paychecks for others, obtaining signatures, and organizing filing cabinets. *See id.* at 533 (analyzing third factor of Fact Sheet: “[w]hether the [p]laintiffs [d]isplaced [r]egular [e]mployees”). Glatt's supervisor even admitted that “[i]f Mr. Glatt had not performed this work, another member of my staff would have been required to work longer hours to perform it, or we would have

entitled to a job.¹³⁵ Lastly, although both understood they would not receive payment, the court disregarded that factor because they cannot waive their right to receive a wage.¹³⁶ Having analyzed the six factors of the Fact Sheet, the court held that Glatt and Footman were employees under the FLSA and thus entitled to pay.¹³⁷

IV. THE DENOUEMENT: *GLATT* PLAYS AN INTEGRAL ROLE IN INTERN CLASSIFICATION AND PRODUCES A LOGICAL APPROACH FOR OTHER COURTS

As previously discussed, when determining the status of an intern, courts apply either (1) the economic realities test, (2) the primary beneficiary test, or (3) the totality of the circumstances test.¹³⁸ The totality of the circumstances test, which considers Fact Sheet #71, is the best way to determine this designation.¹³⁹

The economic realities test used by the Eleventh Circuit has no basis in *Walling* and has little applicability to the educational experience.¹⁴⁰ The primary beneficiary test suffers from “subjective and unpredictable” application.¹⁴¹ A totality of the circumstances approach will bring continuity to the courts, helping to more accurately classify deserving interns as

needed a paid production assistant or another intern to do it.” *See id.* (alteration in original) (internal quotation marks omitted) (supporting fact that Glatt and Footman merely displaced paid employees, thus failing third factor). The court also found that, regardless of how menial Glatt and Footman’s work was, it was nevertheless essential. *See id.* (asserting Glatt and Footman’s tasks replaced paid employees and provided immediate benefit to Searchlight).

135. *See id.* at 534 (discussing fifth factor of Fact Sheet: “[w]hether [p]laintiffs [w]ere [e]ntitled to a [j]ob at the [e]nd of [t]heir [i]nternships”).

136. *See id.* (“But this factor adds little, because the FLSA does not allow employees to waive their entitlement to wages.”). By allowing such an act, employers could force employees into “volunteering” their time for certain jobs for which they would normally be entitled to wages. *See id.* (noting problems with allowing employees to waive entitlement to wages).

137. *See id.* (holding Glatt and Footman were improperly classified as interns).

138. *See* Petition for Writ of Certiorari, *supra* note 10, at 14–21 (identifying three different tests courts apply when determining if interns are trainees or employees).

139. *See* Brookhouser, *supra* note 10, at 771 (“Given the vast possibilities of internship fact patterns that the courts can expect, the totality of the circumstances test is most beneficial to employers and interns alike. While a uniform, totality approach is not a cure-all, with uniformity comes clarity.”).

140. *See* Scantland v. Jeffrey Knight, Inc., 721 F.3d 1308, 1312 (11th Cir. 2013) (discussing factors used in applying economic realities test); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 523 (6th Cir. 2011) (en banc) (reasoning that economic realities alone are not enough to determine employment status and applying economic realities test to independent contractors); Petition for Writ of Certiorari, *supra* note 10, at 15–16 (noting two main problems with economic realities test); Jessica L. Curiale, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1543 (2010) (“The economic realities test, however, has not been widely applied in the internship/trainee context.”).

141. *See* *Glatt*, 293 F.R.D. at 532 (“While some Circuits have applied a ‘primary beneficiary’ test, it has little support in *Walling* Moreover, a ‘primary beneficiary’ test is subjective and unpredictable.”); *see also* Brookhouser, *supra* note 10, at 29–37 (discussing general downsides to primary beneficiary test and giving support for totality of the circumstances approach).

employees.¹⁴²

A. *The Economic Realities Test Is Better Suited for Classifying Independent Contractors and Lacks Support in Walling*

The economic realities test stems from court precedent.¹⁴³ Almost all cases applying the economic realities test, however, deal with facts involving independent contractors; this is true even in the Eleventh Circuit.¹⁴⁴ Courts applying this test typically look to a number of factors focused on the economic relationship, rather than the educational or training relationship, of the parties.¹⁴⁵ Focusing on economic factors makes the economic realities test better suited to classify independent contractors and has little application to the intern context, and thus the *Glatt* court correctly disregarded this test.¹⁴⁶

1. *The Economic Realities Test Is Better Suited for Classifying Independent Contractors*

According to the DOL, “independent contractors are workers with economic independence who are in business for themselves.”¹⁴⁷ Interns and employees, on the other hand, are subject to their employer’s discretion and are economically dependent.¹⁴⁸ The DOL formally lays out the factors of the

142. See *Glatt*, 293 F.R.D. at 525 (“[T]he remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have ‘the widest possible impact in the national economy.’” (quoting *Herman v. RSR Sec. Servs.*, 172 F.3d 132, 139 (2d Cir. 1999))). Compare *Brookhouser*, *supra* note 10, at 29 (advocating for totality of circumstances test as used in *Glatt* to be uniform approach for classifying interns), with Gregory S. Bergman, Note, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL’Y 551, 585–88 (2014) (arguing on behalf of totality of circumstances approach for classifying interns, yet in context of primary beneficiary test).

143. See *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 299–301 (1985) (distinguishing *Walling* and supporting economic realities test); *Scantland*, 721 F.3d at 1311–12 (listing six factors used when applying economic realities test).

144. See, e.g., *Tony and Susan Alamo Found.*, 471 U.S. at 299–301 (discussing when individuals work for enterprise but are not considered ‘employee’); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982) (applying economic realities test generally to determine whether employer-employee relationship exists); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311–15 (5th Cir. 1976) (applying economic realities test to determine validity of independent contractor status applied by various corporations to women operators of laundry pick-up stations); *Scantland v. Jeffrey Knight, Inc.*, No. 8:09-CV-1985-T-17TBM, 2012 WL 1080361, at *4–6 (M.D. Fla. Mar., 29 2012) (applying economic realities test to relationship between individual technical installers and contracting company), *rev’d and rem’d*, 721 F.3d 1308 (11th Cir. 2013).

145. See *Scantland*, 721 F.3d at 1312 (listing six factors courts consider in applying economic realities test).

146. See *Petition for Writ of Certiorari*, *supra* note 10, at 16 (“Moreover, the economic realities test . . . has little applicability to the intern or extern context, which necessarily arises within an educational or learning experience.”). For examples and a discussion of the economic realities test being applied to independent contractor cases, see *supra* notes 143–46 and *infra* notes 147–59.

147. FACT SHEET #13, *supra* note 89 (defining independent contractor). For a general discussion of the economic realities test, see *supra* notes 106–10 and accompanying text.

148. See FACT SHEET #13, *supra* note 90 (defining employee).

economic realities test in Fact Sheet #13.¹⁴⁹ Fact Sheet #13 *specifically states* that the test is best used to determine whether a worker is an employee or an independent contractor.¹⁵⁰

As previously mentioned, nearly all cases that apply the economic realities test involve facts discussing independent contractors.¹⁵¹ Even in *Kaplan*, when the Eleventh Circuit applied the economic realities test to facts involving the classification of interns for the first time, the court still chose to support its reasoning by applying Fact Sheet #71 as well.¹⁵²

The economic realities test fails to consider the sufficiency of the educational experience for the intern.¹⁵³ Fact Sheet #13 is better suited for the professional landscape because it focuses on factors related to possible profits and losses by the contractor and compares the contractor's investment in equipment with that of the employer.¹⁵⁴ These two factors imply a business relationship involving an exchange of payment and services between two economically independent entities; the economic realities test is difficult to apply to the educational training experience because an internship is designed to provide an educational experience rather than solely an economic exchange.¹⁵⁵

Furthermore, the fourth factor of Fact Sheet #13 considers the "worker's skill and initiative."¹⁵⁶ This factor implies that courts should distinguish between one's independent business and dependent business judgment and skills when classifying a worker.¹⁵⁷ This factor applies poorly to interns, because interns, by their very nature, are unlikely to have independent skills in

149. *See id.* (providing factors).

150. *See id.* (providing factors to determine whether employee is independent contractor or employee).

151. *See generally* *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1316 (11th Cir. 2013) (applying economic realities test to independent contractors); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 523 (6th Cir. 2011) (en banc) (applying economic realities test to distinguish between employee and independent contractor); *Petition for Writ of Certiorari*, *supra* note 10, at 15 (stating that economic realities test mostly applied to cases with independent contractors).

152. *See Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831, 834 (11th Cir. 2013) ("This conclusion is also supported by guidance from the Department of Labor's Wage and Hour Administrator."); *Petition for Writ of Certiorari*, *supra* note 10, at 14 (noting this to be Eleventh Circuit's first time applying economic realities test to intern scenario).

153. *See* *Petition for Writ of Certiorari*, *supra* note 10, at 26–27 ("[T]he economic realities test does not determine to whom the *primary* benefit flows—economic or otherwise—nor does it evaluate the quality or sufficiency of the educational experience.")

154. *See id.* at 16 (discussing economic realities test's inapplicability to intern or extern experience).

155. *See Purdham v. Fairfax Cnty. Sch. Bd.*, 637 F.3d 421, 433–34 (4th Cir. 2011) ("[E]conomic realities test 'is not as useful when attempting to distinguish volunteers from employees, where there is no economic relation to measure.'" (quoting *Todaro v. Twp. of Union*, 27 F. Supp. 2d 517, 534–35 (D.N.J. 1998))). "[T]he 'economic reality test' is inapplicable in trying to distinguish an employee from a volunteer where no payments at all are made between the parties." *Id.* at 433 (alteration in original) (quoting *Rodriguez v. Twp. of Holiday Lakes*, 866 F. Supp 1012, 1020 (S.D. Tex. 1994)).

156. *See* FACT SHEET #13, *supra* note 89 ("Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment.")

157. *See id.* (analyzing fourth factor of Fact Sheet #13).

the field and will almost always be dependent on their employer.¹⁵⁸ Thus, the Fact Sheet #13 factors focus more on economic relationships between businesses and contractors who are on more equal footing, and it gives no deference to the educational value an internship may provide, regardless of whether it is paid or unpaid.¹⁵⁹

2. *The Economic Realities Test Has No Support in Walling and Does Not Apply to Interns*

The *Glatt* Court correctly noted that the economic realities test does not have a basis in *Walling*.¹⁶⁰ Furthermore, the economic realities test does not adequately address the intern context.¹⁶¹ The economic-focused factors of the economic realities test bear little resemblance to the factors in *Walling*, which considered items like the level of supervision and whether the trainees replaced regular employees.¹⁶² This lack of basis in *Walling*, coupled with the practical implementation of the economic realities test, has been applied in almost all circuits and demonstrates why that test is not the best for determining the status of an intern as a trainee or employee.¹⁶³

B. *The Primary Beneficiary Test Is Subjective and Unpredictable*

The primary beneficiary test weighs the benefits of the internship to the intern against the benefits to the employer.¹⁶⁴ When applying this test, courts have considered different factors, such as whether the intern displaces paid

158. See Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184, 199 (2013).

159. See *Purdham*, 637 F.3d at 433. In *Purdham*, the court wrote: Other courts have looked to the economic realities test in the FLSA context in determining whether an individual is an employee or a volunteer. However, they have concluded that the test “is best suited to determine whether, as a matter of economic reality, an individual is in business for himself or herself as an independent contractor, or is an employee of another.”

Id. (citation omitted) (quoting *Krause v. Cherry Hill Fire Dist.* 13, 969 F. Supp. 270, 274 (D.N.J. 1997)); see also *Petition for Writ of Certiorari*, *supra* note 10, at 26–27 (explaining why economic realities test is better suited for independent contractor-employer relationship).

160. See *Petition for Writ of Certiorari*, *supra* note 10, at 16 (“Indeed, the Eleventh Circuit’s economic realities test is not derived from *Portland Terminal* which is the applicable authority governing the ‘trainee’ exception to the FLSA.” (citation omitted)). As discussed above, the factors listed in Fact Sheet #71 are essentially a re-creation of those listed in *Walling*.

161. See *Petition for Writ of Certiorari*, *supra* note 10, at 31 (arguing that economic realities test conflicts with court’s precedent in *Walling*).

162. See *id.* (analyzing difference between economic realities test and factors set forth in *Walling*).

163. See *id.* at 31–32 (arguing against applying economic realities test in trainee exception cases). For further discussion of how the economic realities test best applies to independent contractor cases, see *supra* notes 147–63 and accompanying text.

164. For a general discussion of the primary beneficiary test, see *supra* notes 112–14 and accompanying text.

employees and whether the internship has educational value.¹⁶⁵ Although there is some debate, it is generally accepted that the primary beneficiary test draws support from *Walling*, and often the test applies the factors considered in *Walling*.¹⁶⁶

Even if the primary beneficiary test has a basis in *Walling*, the *Glatt* court correctly disregarded it because it is “subjective and unpredictable.”¹⁶⁷ Although considering which party benefited most from the relationship is important, *Glatt* noted that this should only be one factor in a totality of the circumstances approach.¹⁶⁸ Furthermore, *Glatt* noted that by limiting the inquiry to one specific factor, interns in the same internship program might be classified differently.¹⁶⁹ For policy reasons, a test that leaves employers at a loss for how to determine ahead of time whether they need to pay their interns, yet subsequently exposes employers to litigation, is completely unfair.¹⁷⁰

C. *And the Winner for Best Test Goes to . . . The Totality of the Circumstances Test*

A totality of the circumstances approach based on Fact Sheet #71 will best keep employer interests in mind and will most consistently identify when interns must be paid.¹⁷¹ The economic realities test is too focused on business relationships between independent parties, whereas the totality of the circumstances approach better evaluates the intern-employer relationship in an

165. See Petition for Writ of Certiorari, *supra* note 10, at 17 (noting factors considered when applying primary beneficiary test).

166. See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (en banc) (noting that primary beneficiary test draws on factors from *Walling*); Petition for Writ of Certiorari, *supra* note 10, at 17–19 (discussing similarity between factors used in primary beneficiary test and those noted in *Walling*). Additionally, the *Laurelbrook* court stated “in our view, [the *Walling*] decision rested upon whether the trainees received the primary benefit of the work they performed.” *Laurelbrook*, 642 F.3d at 526. Drawing support from *Walling*, one court reasoned that “the proper legal inquiry in this case is whether Ensley or the new workers principally benefited from the weeklong orientation arrangement.” *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989). *But see Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 531 (S.D.N.Y. 2013) (“While some Circuits have applied a ‘primary beneficiary’ test, it has little support in *Walling*.”).

167. See *Glatt*, 293 F.R.D. at 532 (“Moreover, a ‘primary beneficiary’ test is subjective and unpredictable.”).

168. See *id.* (noting that test to classify interns should not be rooted in one factor); *Ensley*, 877 F.2d at 1212 (Wilkins, J., dissenting) (“[T]he majority opinion focuses its inquiry on one of the underlying factors and recharacterizes it as the ‘proper legal inquiry’ in the case. The determination of whether Ensley or the trainees principally benefited from the training program is but one factor to be considered in determining the legal question of whether Ensley’s trainees were employees.”).

169. See *Glatt*, 293 F.R.D. at 532 (“[T]he very same internship position might be compensable as to one intern, who took little from the experience, and not compensable as to another, who learned a lot.”).

170. See *id.* (“Under this [primary beneficiary] test, an employer could never know in advance whether it would be required to pay its interns.”).

171. See *Brookhouser*, *supra* note 10, at 140 (advocating for totality of circumstances approach to bring consistency to courts).

educational and learning context.¹⁷² Many interns provide work that, in reality, will economically benefit their workplace; but it may not be fair to label every intern an employee.¹⁷³

Furthermore, Fact Sheet #71 considers factors like whether training exists that would be similar to an educational environment, a much more important factor to consider in an intern-employer relationship than whether the intern is economically and skillfully dependent on the employer.¹⁷⁴ An intern, by the very nature of the position, is likely someone who desires an educational experience and to learn new skills, and a totality of the circumstances approach best acknowledges those considerations.¹⁷⁵

Even those courts that consider the economic realities of the relationship draw on factors from *Walling*, like whether the service arrangement contemplated compensation, and whether the employer received “immediate advantage” from the services performed.¹⁷⁶ Explicitly claiming to use an economic realities test yet in reality applying the Fact Sheet #71 factors can only lead—and has only led—to confusing application by the courts. Basing a test on the economic realities of the relationship alone may lead to conclusory classifications rather than accurate decisions regarding whether the intern is a trainee or employee; thus, applying Fact Sheet #71 in a totality of the

172. Compare FACT SHEET #13, *supra* note 99 (laying out economic realities test in framework of employee-independent contractor relationship), with FACT SHEET #71, *supra* note 9 (laying out six-factor test adapted from *Walling*, yet considering educational learning experience internships are supposed to provide).

173. See Adams, *supra* note 53 (“[T]here is always going to be some benefit to the company.” (quoting Lyle Zuckerman, Partner at Vedder Price)); Sanborn, *supra* note 2 (describing how companies filled entry level positions with interns). Indeed, many interns perform duties that may economically benefit their workplace. It would be unfair, however, to make every employer have to pay interns, especially when the internship itself benefits the interns significantly. This is even truer in government and non-profit internships. Although some of these internships may be run ineffectively, the ones that are terrific educational experiences will suffer if they are forced to pay interns, but cannot afford to. Thus, using the economic realities test in the intern context could close off highly-regarded educational learning opportunities to students simply because they do work that economically benefits their workplace.

174. See Curiale, *supra* note 140, at 1542–43 (discussing economic realities test, which focuses on level of economic dependence between intern and employer).

175. See Magaldi & Kolisnyk, *supra* note 158, at 199 (discussing nature of interns as inherently dependent upon their employers).

176. See *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp 504, 531–33 (S.D.N.Y. 1998) (“Two important elements in determining the ‘economic reality’ of an employment situation are whether there was an expectation or contemplation of compensation and whether the employer received an immediate advantage from any work done by the individuals.”). These considerations are strikingly familiar; in fact, the first element is essentially the sixth factor of Fact Sheet #71 and the second element is nearly identical to the fourth factor of Fact Sheet #71. Compare *Archie*, 997 F. Supp at 531–33 (noting similarity between factors that became Fact Sheet #71 factors and those applied when determining the economic realities of employment situation), with FACT SHEET #71, *supra* note 9 (providing Fact Sheet #71 factors).

circumstances approach is better suited to the intern context.¹⁷⁷

Other courts have held that the ultimate inquiry should aim to assess who received the primary benefit of the relationship.¹⁷⁸ Declaring this factor to be dispositive fails to take into consideration the entire internship experience.¹⁷⁹ A test that takes into account all of the factors in Fact Sheet #71 will better guide employers in creating complying internship programs, while still adequately protecting interns.¹⁸⁰ Although not perfect a perfect approach by any means, the numerous variations in internship programs support full consideration of all Fact Sheet #71 factors rather than simply classifying interns based solely upon who primarily benefited from the relationship.¹⁸¹

Additionally, in reality, Fact Sheet #71 and the primary beneficiary test are one in the same.¹⁸² Each test draws support from *Walling*.¹⁸³ Furthermore, in

177. See Petition for Writ of Certiorari, *supra* note 10, at 26 (“[T]o say that ‘economic realities govern’ is merely a conclusion and does not provide a test that guides the lower courts.”).

178. See, e.g., *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 (6th Cir. 2011) (“[I]n our view, [the *Walling*] decision rested upon whether the trainees received the primary benefit of the work they performed.”); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) (“[T]he proper legal inquiry in this case is whether Ensley or the new workers principally benefited from the weeklong orientation arrangement.”); *Bergman*, *supra* note 146, at 588 (“I also advocate that the dispositive inquiry to determine if the unpaid intern is an employee should be whether the unpaid intern or the employer is the primary beneficiary of the unpaid intern’s work.”).

179. See *Brookhouser*, *supra* note 10, at 30 (discussing problems with using primary beneficiary as dispositive factor to determine status of interns). *Brookhouser* illustrates this conclusion with an example in which an intern spends a morning learning from regular employees, but spends all afternoon performing free labor in which the intern displaces regular employees. See *id.* (illustrating internship in which primary beneficiary test would fail in classifying intern as employee). In this scenario, the intern might receive educational instruction in the morning, and, although the intern then performs menial tasks in the afternoon, a slight benefit in the relationship in favor of the intern makes the relationship one of trainee-employer rather than employee-employer. See *id.* at 30–31 (using extreme example, but sufficiently exemplifying issue with making primary beneficiary test dispositive).

180. See *id.* at 34–37 (discussing general merits of totality of circumstances approach).

181. See *id.* at 34 (“Given the vast possibilities of internship fact patterns that the courts can expect, the totality of the circumstances test is most beneficial to employers and interns alike.”).

182. See *Nance v. May Trucking Co.*, No. 3:12-cv-01655-HZ, 2014 WL 199136, at *5 (D. Or. Jan. 15, 2014) (“The difference between the DOL test proposed by Defendant and the Fourth Circuit primary beneficiary test proposed by Plaintiffs is one of form, rather than substance.”).

183. Compare *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993) (en banc) (“The six criteria in the Secretary’s test were derived almost directly from *Portland Terminal* and have appeared in Wage and Hour Administrator opinions since at least 1967.”), and *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D 516, 532 (S.D.N.Y. 2013) (“By contrast, the DOL factors have support in *Walling*.”), with *Ensley*, 877 F.2d at 1209 & n.2 (noting court’s reliance on precedent to establish its use of primary beneficiary test), and Petition for Writ of Certiorari, *supra* note 10, at 32 (“[I]t is clear that a primary benefit test in which all the facts, including the relative benefit flowing to each party . . . ‘readily captures the distinction the FLSA attempts to make between trainees and employees’ and is the most consistent with this Court’s precedent in *Portland Terminal*.” (quoting *Laurelbrook*, 642 F.3d at 529)).

practice, both the totality of the circumstances test and the primary beneficiary test take into consideration factors of the other test, essentially conflating the two and confusing how courts actually apply each test.¹⁸⁴ A totality of the circumstances approach best captures the multiple factors considered in *Walling* without making one single factor determinative.¹⁸⁵ Although the totality of the circumstances approach may not be perfect, it best captures the *Walling* factors and give courts the most consistent test to determine an unpaid intern's status; after all, "with uniformity comes clarity."¹⁸⁶

V. IMPACT: A STANDING OVATION OR A TOUGH CROWD?

Over seventy-five years ago, President Roosevelt vowed to level the playing field for workers by passing the FLSA. But, as the cases interpreting Fact Sheet #71 demonstrate, courts are still deciding how to interpret the law.¹⁸⁷ Courts are now faced with the difficult task of preserving the internship experience, while ensuring interns who act as employees are paid.¹⁸⁸ Of course, unpaid internships come with advantages as well as disadvantages; but, in a world where seventy-five percent of employers desire candidates with relevant work experience, the unpaid internship is too crucial of a practical experience to simply eliminate.¹⁸⁹ The *Glatt* decision has forced unpaid internships into the spotlight, and the courts should take this opportunity to finally adopt the totality of the circumstances approach to consistently classify interns.¹⁹⁰

The importance of having a consistently applied test to classify interns should not be taken lightly.¹⁹¹ In the past, courts trying to classify interns have applied different tests to the same set of facts and reached different

184. See *Nance*, 2014 WL 199136, at *5 (declaring that Fact Sheet #71 test and primary beneficiary test are same in substance and "have origins in *Portland Terminal*"); Petition for Writ of Certiorari, *supra* note 10, at 36 (noting primary beneficiary test applies relevant factors addressed in *Walling*); see also *Laurelbrook*, 642 F.3d at 530–32 (analyzing primary beneficiary test by applying factors from *Walling* and Fact Sheet #71); *Glatt*, 293 F.R.D. at 533 (using primary beneficiary of intern-employer relationship as one factor in Fact Sheet #71 test); FACT SHEET #71, *supra* note 9 (incorporating primary beneficiary of intern-employer relationship into Fact Sheet #71).

185. See *Glatt*, 293 F.R.D. at 532 (supporting applying totality of circumstances test and rejecting holding one single factor as dispositive); *Brookhouser*, *supra* note 10, at 29 (advocating for consistent application by courts of totality of circumstances test). *But see Bergman*, *supra* note 142, at 587.

186. See *Brookhouser*, *supra* note 10, at 34 (advocating for totality of circumstances test as best way to bring consistent rulings to courts).

187. For a discussion of the history of the FLSA, see *supra* notes 83–92 and accompanying text (discussing importance to Roosevelt of bringing better rights to workers).

188. For a discussion of how the courts can best address these difficulties through a totality of the circumstances test, see *supra* notes 171–86.

189. See *Auon*, *supra* note 36 (noting that 75% of employers prefer candidates with relevant work experience).

190. For a further discussion of why the courts should adopt the totality of the circumstances test, see *supra* notes 171–86 and accompanying text.

191. See *Brookhouser*, *supra* note 10, at 35–38 (pushing for all courts to adopt totality of circumstances approach to bring fairness to both employers and interns).

conclusions.¹⁹² Such inconsistencies further support the notion that a uniform test is necessary to ensure that both unpaid interns and employers are consistently protected.¹⁹³

Without a uniform test, even employers who desire to maintain a program in line with Fact Sheet #71 may be at a loss for how to do so.¹⁹⁴ The uncertainty regarding how to host a compliant unpaid internship has caused, and will likely continue to cause, more companies to eliminate their internship programs entirely.¹⁹⁵ Closing internship programs will only continue to harm the workforce by placing more qualified individuals into a dwindling labor market.¹⁹⁶ In a down economy, employers will find it increasingly easier to hire a few employees rather than spending copious amounts of money and time training a group of unpaid interns.¹⁹⁷

It is crucial for courts to choose a unifying test, and the totality of the circumstances approach will help courts consistently classify interns and

192. See Petition for Writ of Certiorari, *supra* note 10, at 27–28 (citing *McLaughlin v. Ensley*, 877 F.2d 1207, 1208–11 (4th Cir. 1989)) (summarizing fact that all three tests were applied at different times and reached multiple conclusions). In *Ensley*, the district court applied Fact Sheet #71, while the Fourth Circuit held that the district court should have applied the primary beneficiary test. See *Ensley*, 877 F.2d at 1209–10 (summarizing how different courts apply different tests to same set of facts). Both the district and circuit courts focused on the same facts, namely “the very limited and narrow kinds of learning that took place” See *id.* at 1208–10 (illustrating how both courts came to different rulings based on same facts).

193. See Petition for Writ of Certiorari, *supra* note 10, at 30 (“[A] consistent test should be applied throughout the country so the FLSA’s coverage concerning minimum wage and overtime pay is not dictated by the circuit in which an intern or extern works.”).

194. See Curiale, *supra* note 140, at 1546 (identifying that compliance with FLSA standards is nearly impossible without uniform test to classify interns).

195. See Adams, *supra* note 53 (detailing why Condé Nast closed down its internship program); Vickie Elmer, *Some Companies Would Rather Get Rid of Interns than Pay Them*, QUARTZ (May 7, 2014), <http://qz.com/206301/this-summers-budget-dilemma-is-whether-to-pay-interns-or-just-get-rid-of-them/> (commenting on fact that companies are closing their internship programs rather than paying them); see also Rachel Feintzeig & Melissa Korn, *Colleges, Employers Rethink Internship Policies*, WALL ST. J. (Apr. 22, 2014, 6:21 PM), <http://www.wsj.com/articles/SB10001424052702304049904579517671151334870> (“Jay Zweig, a Phoenix-based managing partner at Bryan Cave LLP, said he is aware of ‘dozens’ of companies that have walked away from unpaid-internship programs, dropping students entirely rather than creating paid positions.”).

196. For further discussion of how unpaid internships are helping to increase unemployment rates, see *supra* notes 56–62 and accompanying text.

197. See *Kaplan v. Code Blue Billing & Consulting, Inc.*, No. 11-81049-CV, 2012 WL 8969063, at *6 (S.D. Fla. Mar. 12, 2012), *cert. denied*, 134 S. Ct. 618 (2013) (illustrating burdens of hosting internship programs). Between training interns and having to provide constant instruction, the threat of legal recourse should make it an easy decision for more companies to eliminate their internship programs. See *id.* (“[I]t really slowed me down . . . [E]very time they found out . . . the information that I asked them to find out, we had to go over it and tell them how to proceed from there. And then, if they didn’t understand something, I had to go through the whole explanation.” (quoting testimony of Linda M. Yon, the owner, president, and registered agent of Defendant Code Blue Billing & Consulting, Inc.)).

provide employers with a clear path for hosting compliant programs.¹⁹⁸ If done correctly, unpaid internship programs can be true assets, preparing students for later full-time employment while allowing interns to explore new and exciting opportunities.¹⁹⁹ After all, would you not rather be an unpaid intern covering the NBA Finals than a paid intern filling out spreadsheets in a cubicle all summer?²⁰⁰

198. See Brookhouser, *supra* note 10, at 37 (“With this decreased uncertainty and fear, employers will likely have fewer reservations about keeping their unpaid internship positions.”).

199. See Downey, *supra* note 32 (discussing advantages of unpaid internships).

200. See Hjerpe, *supra* note 39 (detailing Sydney Harris’s excitingly unique, and well-run, internship experience covering NBA Finals).

