2016

Waging the War Against Unpaid Labor: A Call to Revoke Fact Sheet #71 in Light of Recent Unpaid Internship Litigation

Rachel P. Willer
University of Richmond

Follow this and additional works at: http://scholarship.richmond.edu/law-student-publications
Part of the Labor and Employment Law Commons

Recommended Citation

This Response or Comment is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Student Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.
WAGING THE WAR AGAINST UNPAID LABOR: A CALL TO REVOKE FACT SHEET #71 IN LIGHT OF RECENT UNPAID INTERNSHIP LITIGATION

In the pilot of her television show *Girls*, Lena Dunham satirizes unpaid internships by depicting the protagonist, Hannah Horvath, asking her employer to pay her after more than a year of unpaid work.1 Her employer responds with a quip about the competitive nature of her internship at a New York publishing firm and distinguishes her from another employee who the firm hired after a year of interning.2 While flagrant violations of U.S. labor laws are breezed over as a matter of comedic relief in today's media, they represent very real controversies for nearly a million unpaid interns every year.3

Internships have become more pervasive than ever before as increasing numbers of students and young professionals seek to gain the experience necessary for their dream job. Whether paid or unpaid, most internships are necessary, and even a rite of passage, for college students and recent graduates.4 The expansion of internship positions is largely attributed to the economic recession, which made internships essential for most students and recent graduates to gain relevant work experience in their prospective career field.5 Although recent studies show that employers

---

2. Id.

1361
primarily seek interns and co-op students to identify and develop talent for full-time employment, other prevalent reasons for conducting these programs include providing supplemental staffing on projects and coverage for absent employees. Beyond private surveys, the U.S. government does not track unpaid internship statistics. Vulnerable and exploited unpaid interns have responded with frustration by bringing suits seeking declaration of employment status under the Fair Labor Standards Act ("FLSA" or "the Act").

The Supreme Court has yet to articulate a bright-line test for determining employment status under the FLSA. Courts apply a variation of one of three major tests to assess whether an unpaid intern qualifies as an employee subject to the Act. First, the totality of the circumstances test balances all the factors surrounding the working relationship to determine whether the worker is an employee. This analysis may require the employer to satisfy all elements of a six-factor test developed by the Department of Labor's Wage and Hour Division ("Wage and Hour Division"). Second, the economic realities test examines whether the worker relies on the employer to obtain an economic benefit. Finally, the primary beneficiary test examines which party receives the primary benefit of the working relationship. Because circuit courts use varying tests to know if they are reluctance, if they are reluctant, suits and liability.

Part I of this analysis was to describe recent judicial decisions abandoning the tests favor of a more test, articulated in Searchlight Pictures v. Schumann v. Co., which contemporary and while promoting internships in the voluntary compliance of the Department and promulgation of policy statements, incorporates voluntary action would I

---


8. Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 381 (2d Cir. 2015); see also Bennett, supra note 4, at 304–05.


use varying tests to determine employee status, employers struggle to know if their interns are covered by the FLSA, and, consequently, if they must receive pay under the FLSA’s minimum wage requirement. As a result of this circuit split, some employers are reluctant to offer internship opportunities for fear of lawsuits and liability for minimum wage back pay.

Part I of this comment provides an overview of prevailing agency and judicial interpretations of unpaid internships. Part II describes recent internship litigation and the trend towards courts abandoning the Wage and Hour Division’s six-factor test in favor of a more expansive primary beneficiary test. Part III suggests that Fact Sheet #71 is an outdated model that is inapplicable to contemporary internships. The Wage and Hour Division’s six-factor test lacks the “force of law” and should not warrant undue judicial deference. Alternatively, the primary beneficiary test, articulated in the Second Circuit’s holding in Glatt v. Fox Searchlight Pictures, Inc. and the Eleventh Circuit’s holding in Schumann v. Collier Anesthesia, P.A., encompasses a more contemporary and flexible approach that protects employee interests while promoting the existence of post-graduate and academic internships in the modern, competitive job market. Consistent with its authority under the Administrative Procedure Act (“APA”), the Department of Labor (“DOL”) should revoke Fact Sheet #71 and promulgate a binding legislative rule, after notice and comment, incorporating employer and employee interests. The Agency action would remedy the circuit split and provide employers interested in offering internship programs greater predictability regarding compliance with the FLSA.

13. See discussion infra Part III.C.
15. As discussed infra Part II.B, the Department of Labor Fact Sheet #71 factors are not entitled to Chevron deference because they were promulgated in a guideline letter by the Wage and Hour Division. United States v. Mead Corp., 533 U.S. 218, 234 (2001) (quoting Christensen v. Harris Cty., 529 U.S. 576, 587 (2000)) (“[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines . . . are beyond the Chevron pale.”).
16. 791 F.3d 376 (2d Cir. 2015).
17. 803 F.3d 1199 (11th Cir. 2015).
I. PREVAILING AGENCY AND JUDICIAL INTERPRETATIONS OF UNPAID INTERNSHIPS

A. The Fair Labor Standards Act

The Fair Labor Standards Act of 1938 \(^{18}\) requires, with certain exceptions, that employers pay employees engaged in commerce at least a minimum wage and time-and-a-half more for working more than forty hours in a workweek. \(^{19}\) Congress enacted it as a remedial and humanitarian measure to stabilize the economy and protect the common labor force in the wake of the Great Depression. \(^{20}\)

At its core, the FLSA may be described as “a comprehensive legislative scheme” established to prevent the production of goods under labor conditions that are “detrimental to the maintenance of the minimum standards of living necessary for health and general well-being.” \(^{21}\) Specifically regarding wage protections, the FLSA intends “to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.” \(^{22}\)

An employee cannot waive his right to minimum wage or overtime pay because such a waiver “would ‘nullify the purposes’ of the [FLSA] and thwart the legislative policies it was designed to effectuate.” \(^{23}\)

Historically, judges who interpret the definitions and scope of the FLSA have read the statute broadly. \(^{24}\) For instance, the FLSA defines “employ” as “any...”

Congress explicitly enforcing the FLSA, the Secretary of Labor. \(^{27}\) The FLSA fine and delimit administrative, broad authority, violating employment across the DOL fails to “uspect to unpaid young American forceable by prh...” Misclassif

---

22. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947); see also Brooklyn Sav. Bank v. O’Neil, 324 U.S. 697, 707 n.18 (1945) (stating that Congress enacted the FLSA “to aid the unprotected, unorganized and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage”).
defines "employ" as "to suffer or permit to work" and defines "employee" as "any individual employed by an employer." The plain text of the statutory definitions "leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded."

Congress expressly delegated the tasks of implementing and enforcing the FLSA and developing regulations to the Secretary of Labor. The FLSA grants the Secretary broad authority to "define and delimit the scope of [pay requirements] for executive, administrative, and professional employees." As part of this broad authority, the Secretary oversees internal investigations of violating employers. Wage and Hour Division investigators stationed across the United States enforce the FLSA. In reality, the DOL fails to "use its full authority to enforce the FLSA with respect to unpaid internships," causing "a detrimental impact on young Americans." Thus, as an alternative, the Act is also enforceable by private employee lawsuits, which, if litigated successfully, may result in awards of back pay and liquidated damages. Misclassifying an employee can be quite serious and costly;

26. United States v. Rosenwasser, 323 U.S. 361, 361-63 (1945) ("No reason is apparent why piece workers who are underpaid or who work long hours do not fall within the spirit or intent of [the FLSA], absent an explicit exception as to them."). In fact, Congress is aware of the judiciary's broad standard. See, e.g., H.R. REP. No. 1366, at 10 (1966) ("In keeping with the broad statutory definitions of the coverage phrases used, the courts have repeatedly expressed and adhered to the principle that the coverage phrases should receive a liberal interpretation.").
29. See, e.g., Fortman, supra note 6 ("In a 2013 investigation, [the Wage and Hour Division] found more than $37,000 in back wages due to 38 employees working as unpaid interns for a snowboard company in Waterbury, [Vermont].").
31. Bennett, supra note 4, at 308.
32. See 29 U.S.C. § 216(b) (2012). But see Mich. Corr. Org. v. Mich. Dep't of Corr., 774 F.3d 895, 901–02 (6th Cir. 2014) (holding that wage and hour protections for workers are not a fundamental right under the Constitution, and thus a "State does not violate the Privileges or Immunities Clause by denying the minimum-wage or overtime-pay requirement established by Congress in the FLSA").
33. 29 U.S.C. § 216(b). High settlement deals, including plaintiff attorney's fees, have been awarded in recent cases. See, e.g., Vin Gurrieri, Sony Settles Interns' Wage Suit, Dodges Another, LAW360 (Jan. 7, 2016, 6:15 PM), https://www.law360.com/newyork/arti
thus, it is imperative that private employers understand agency and judicial interpretations of key FLSA terminology.  

Although the FLSA does not specifically address internships or unpaid labor in the private sector, the DOL has defined an internship as a formal program that provides a practical learning experience for beginners in an occupation or profession and lasts for a limited amount of time. Therefore, according to the DOL, an internship can be unpaid only if the employer is a non-profit organization or if the internship satisfies the agency's guiding interpretative rule announced Fact Sheet #71.  

The DOL announced in its fact sheet that, based on Supreme Court precedent, a six-factor test would be used to determine whether an internship qualified for exemption from FLSA requirements. B. Walling v. Portland Terminal Co.  

Merely nine years after the passage of the FLSA, the Supreme Court was asked to expand the FLSA's definition of employment to protect unpaid laborers. Walling v. Portland Terminal Co. is widely regarded as the seminal case for interpreting and applying the definitions of “employee” and “employ” in the FLSA.

---

35. See FACT SHEET #71, supra note 10.  
37. FACT SHEET #71, supra note 10. However, federal circuit courts have begun to deviate from the DOL fact sheet in favor of other tests. See discussion infra Part II.E.  
38. FACT SHEET #71, supra note 10.  
40. See Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1202 (11th Cir. 2015); Natalie Bacon, Comment, Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71," 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 78 (2011) (“It is widely accepted and unquestioned that Portland Terminal is the case from which the rules governing unpaid interns come.”).
The suit involved a group of trainee railroad workers whose completion of a seven-to-eight-day training course was a condition of their employment at the railroad. During the training period, trainees operated under supervision, learning the routine activities by observation and then gradually performing the actual work under close scrutiny. Trainees did not receive any form of pay or allowance. The railroad company never hired workers who failed to complete the program; however, upon completion of the program, the railroad company offered some of the trainees jobs as yard brakemen. Only the brakemen whom the railroad company hired would receive a retroactive allowance of $4 per day of training.

The main issues in *Portland Terminal* were whether all of the prospective yard brakemen “trainees” qualified as “employees” under FLSA and whether all the trainees deserved minimum wage compensation for participating in the training program. To resolve the former, the Court examined several factors. The Court recognized that the unpaid railroad brakeman trainees were not employees under the Act, and thus they were beyond the reach of the FLSA’s minimum wage provision. In coming to this conclusion, the Court identified four points: (1) the trainees did not displace any regular employees; (2) the trainees’ work did not expedite the company business, and in fact impeded productivity; (3) the trainees were not guaranteed a job, though they became eligible for employment if they successfully completed the program; and (4) the trainees were not paid, and did not expect to be paid, for the time spent training.

The Court reasoned that under the purpose of the FLSA, the broad definition “to suffer or permit to work” was “obviously not intended to stamp all persons as employees who . . . might work for their own advantage on the premises of another.” With these
factors, the Supreme Court christened the law's first interpretive internship regulation under the FLSA in 1947.

C. Post-Portland Terminal Department of Labor Internship Interpretation

In the wake of this decision, many courts applied nuanced interpretations of the Portland Terminal factors to suits brought under the FLSA regarding unpaid labor. As employment capacities evolved, the Wage and Hour Division developed a six-factor test, mirroring the Portland Terminal factors, to determine whether the FLSA applied to certain persons and whether those persons qualified as employees. In 1996, the Wage and Hour Division announced in its trainee guidelines that trainees or students are not employees under the FLSA if all six criteria apply. The criteria are:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school.
2. The training is for the benefit of the trainees or students.
3. The trainees or students do not displace regular employees, but work under their close observation.
4. The employer that provides the training derives no immediate advantage from the activities of the trainees or students, and on occasion his/her operations may actually be impeded.
5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.
6. The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

As evident by the language of the criteria, the factors allude to an academic, educational environment, even analogizing the experience to a vocational school. While the trainee guidelines

---

50. See, e.g., Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) ("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.").
52. Id.
53. Id.
54. See id.
first interpretive

Internship

plied nuanced in-
to suits brought
ployment capaci-
loped a six-factor
rs, to determine
whether those
age and Hour Di-
: trainees or stu-
x criteria apply.\textsuperscript{52}

operation of the
ld be given in a
students.
employees, but
s no immediate
ments, and on oc-
itled to a job at
nderstand that the
me time spent in

factors allude to
alogizing the ex-
ainee guidelines

55. See infra Parts IIA and II.B discussing the differences between Glatt and Schu-
mann.
56. FACT SHEET #71, supra note 10.
57. Compare 1996 Opinion Letter, supra note 51 (applying the six-factor test to trainees and students), with FACT SHEET #71, supra note 10 (applying the six-factor test to interns).
58. FACT SHEET #71, supra note 10.
60. FACT SHEET #71, supra note 10.
61. Id.
63. See FACT SHEET #71, supra note 10. But see Capell, supra note 34 ("It is best prac-
tice for companies that only operate within the jurisdiction of the Second Circuit and/or Eleventh Circuits to [disregard the DOL guidelines and] follow the 'primary beneficiary'
encourages the employer to structure the internship program around a "classroom or academic experience as opposed to the employer's actual operations." Encouragement to "provide[ ] the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation." Additionally, interns may not be used "as substitutes for regular workers or to augment [the employer's] existing workforce." The level of supervision over the intern may determine whether the individual is entitled to compensation. If an intern is supervised at the same level as the employer's regular workforce, an employment relationship would likely be established. Finally, the internship should last for a fixed duration and should not serve as a "trial period" for individuals seeking employment at the conclusion of the internship period. As unpaid internships become more common in the contemporary job market, many public and private institutions have called for reform of Fact Sheet #71's six factors from a rigid framework to a more flexible rubric.

E. Federal Circuit Court Split

While the Supreme Court in Portland Terminal and the Wage and Hour Division in its two interpretive opinions helped to clarify the definition of employee under the FLSA, federal courts have still struggled to interpret the Act consistently. Federal circuit courts remain divided as to the proper test for classifying academic and post-graduate interns. Most federal courts apply a variation of one of three major tests: the totality of the circumstances test, the economic realities test, and the primary beneficiary test. The totality of the circumstances test balances all the factors surrounding the working relationship to determine whether the worker is an employee or an intern. Whether the working relationship is an employment relationship holis upon the circumstances. Presenting a test that relies on this economic relationship, the economic realities test "balances all the factual considerations." 

While the Tenure of the employment relationship is a test for classifying trainees. The economic realities test helps to determine whether the trainees were "probationary workers of the anticipated employer."
Internships continues to gcdorlaw.com/2015/02/11/ nework/.

WAGING THE WAR AGAINST UNPAID LABOR

The economic realities test examines whether the worker relies on the employer to obtain an economic benefit. The primary beneficiary test examines which party receives the primary benefit of the working relationship.

1. Totality of the Circumstances Test

The totality of the circumstances test analyzes the employment relationship holistically, examining all of the facts and circumstances. Presently, the Tenth Circuit remains the only circuit that relies on this approach to interpret the FLSA. It considers the economic relationship, the Fact Sheet #71 factors, and other factual considerations with varying deference.

While the Tenth Circuit previously applied various factors to employment determinations under the FLSA, it announced its application of a totality of circumstances test in Reich v. Parker Fire Protection District. In Parker Fire, the Tenth Circuit was asked to determine whether firefighter trainees were employees during training time at the fire academy. The court rejected an all-or-nothing application of the six factors, acknowledging that these factors were important but not determinative whether the trainees were employees. Instead, the court reasoned that a strict application of all of the factors was not supported by the Court's decision in Portland Terminal. Although the firefighters anticipated employment at the completion of the training, the

72. See discussion infra Part I.E.1.
73. See discussion infra Part I.E.2.
74. See discussion infra Part I.E.3.
75. See Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993).
77. See Parker Fire, 992 F.2d at 1025–27.
78. See, e.g., Marshall v. Regis Educ. Corp., 686 F.2d 1324, 1326–27 (10th Cir. 1981) ("[T]he determination of employment under the FLSA ought not depend on isolated factors but upon the circumstances of the whole activity.").
79. 992 F.2d at 1027.
80. Id. at 1025.
81. Id. at 1026–27 (classifying the factors as "relevant but not conclusive to the determination of whether ... firefighter trainees were employees under the FLSA").
82. Id.
Tenth Circuit explained that one factor was not dispositive.83 The court concluded that the firefighters were not employees under the FLSA and thus were not entitled to minimum wage or overtime compensation.84

2. Economic Realities Test

The economic realities test represents one of the more traditional tests that courts employ to decide whether an intern qualifies as an employee under the FLSA.85 This test “requires a court to examine the circumstances of the whole activity rather than isolated factors in determining whether or not a given individual is an ‘employee’ within the meaning of 29 U.S.C.A. § 203(e)(1).”86 Proponents for the test argue that using labels and analyzing employer intent “is meaningless, unless it mirrors the economic realities of the relationship.”87 This case-by-case, fact-specific test enables courts to exercise great discretion by analyzing the scenario as a whole.

Nearly forty years after Portland Terminal, the Supreme Court introduced the economic realities test in Tony & Susan Alamo Foundation v. Secretary of Labor.88 The petitioner was a nonprofit religious organization that derived its income largely from the operation of commercial businesses staffed by the Foundation’s “‘associates,’ most of whom were drug addicts, derelicts, or criminals before their conversion and rehabilitation by the Foundation.”89 The Court distinguished the unpaid associates at issue from the unpaid associates at issue in Tony & Susan Alamo Foundation, holding that the latter were not employees under the FLSA because they were not training for a profession.90

Though Tony v. Secretary of Labor shows that the economic realities test is not dispositive, courts have continued to employ the test.91 In September 2015, the Supreme Court held that under the economic realities test, courts are not required to determine “primary beneficiary” status.

3. Primary Beneficiary

The majority of the Court held that the “primary beneficiary” of the unpaid trainees was the trainees, not the employer.92

90. See id. at 300–01.
91. Id. at 306.
92. See Jessica L. Chappell, Tony & Susan Alamo Foundation v. Secretary of Labor (FLSA) (May 2014), a six-factor “economic realities” test.
93. Compare Schumann, supra note 92, with id. at 306 (changing their test for employment (chir. 2011) (“[T]he proper question in the relationship.”); Solis v. Ensley, 677 F.3d 1204 (8th Cir. 2012) (“[T]he proper question is whether [the employer] required to do were ‘primary beneficiary’ of the relationship.”); Donovan v. Laurelbrook Sanitarium & Sch., Inc., 842 F.2d 518, 522–23 (6th Cir. 1988) (holding that the primary beneficiary was the underserved child).
from the unpaid railroad trainees in *Portland Terminal*. The Court held that the Foundation's associates were employees under the FLSA because they worked "in contemplation of compensation.'

Though *Tony & Susan Alamo Foundation* announced the economic realities test in conjunction with the *Portland Terminal* factors, courts have shied away from applying a strict economic realities test as it relates to internship relationships. Until September 2015, the Eleventh Circuit similarly applied the economic realities test, coupled with the factors listed in Fact Sheet #71. Consistent with modern trends, the Eleventh Circuit abandoned the economic realities test in favor of the more contemporary "primary beneficiary test."

3. Primary Beneficiary Test

The majority of circuits concentrate on evaluating the "primary beneficiary" of the internship or training program to determine if participants are employees under the FLSA. The primary bene-

---

90. See *id.* at 300-01.
91. *Id.* at 306.
94. *See* Schumann, 803 F.3d at 1214-15.
95. See, e.g., *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 383 (2d Cir. 2015) ("[T]he proper question is whether the intern or the employer is the primary beneficiary of the relationship."); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) ("We hold that the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship."); Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005) (holding that students were not employees because the chores they were required to do were "primarily for the students" and not the school's benefit); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) ("[T]he proper legal inquiry in this case is whether the employer or the trainees principally benefited from the weeklong training arrangement."); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271-72 (5th Cir. 1982) (anal-
venue test focuses on the benefits flowing to each party and ultimately examines whether the employer or the worker receives the primary benefit of the working relationship. If the employer receives the primary benefit, the worker qualifies as an employee under the FLSA; however, if the worker receives the primary benefit, the worker is not entitled to minimum wage and overtime compensation.

Historically, several courts applied the primary beneficiary test in the context of unpaid trainees. Recently, the Second and Eleventh Circuits extended the test specifically to unpaid interns in post-graduate and higher education settings. The application of the primary beneficiary test to both post-graduate and academic internships has new implications for hundreds of thousands of students and employers in the United States.

II. MODERN LITIGATION CHALLENGING POST-GRADUATE AND ACADEMIC INTERNSHIPS

A. Glatt v. Fox Searchlight Pictures, Inc.

On July 2, 2015, the Second Circuit departed from the Wage and Hour Division’s six factors in favor of the primary beneficiary test. College graduate plaintiffs Eric Glatt and Alexander Footman worked in New York for Searchlight as unpaid interns during the production phase of the film Black Swan. During production, Glatt’s responsibilities on the production of the film included obtaining documents for personnel files, picking up paychecks for coworkers, tracking and reconciling purchase orders, and traveling to the set for managers’ signatures. After production, Glatt accepted a post-production internship where he performed other “laborer letters, organizing running errands.” Glatt’s in the production that included “assisting in taking out trash, writing scripts, mostly involved key man received tasks such as resume library, how a production would be paid for their work, they would not be employees.”

Glatt and Footman of New York of granted their motion. In its opinion, the courts had rejected in favor of the prisoners that these facts were the applicable Portland Termita.
performed other “basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands.” Footman’s responsibilities were similar to Glatt’s in the production of Black Swan, with additional duties that included “assembling office furniture, arranging travel plans, taking out trash, taking lunch orders, answering phones, watermarking scripts, and making deliveries.” While their work mostly involved low-level administrative tasks, Glatt and Footman received tangible benefits from their time at Searchlight, “such as resume listings, job references, and an understanding of how a production office works.” Glatt and Footman were not paid for their work and both testified that they had understood they would not be receiving wages when they accepted their positions.

Glatt and Footman filed their complaint in the Southern District of New York on September 28, 2011, and the district court granted their motion for summary judgment on June 11, 2013. In its opinion, the district court acknowledged that some circuit courts had rejected the Wage and Hour Division’s six-factor test in favor of the primary beneficiary test. However, the court reasoned that these factors were entitled to Chevron deference and were the applicable standard because the test had support in Portland Terminal. “[T]he district court concluded that Glatt

104. Id.
105. Id.
106. Id.
107. Id. at 534.
108. See Class Action Complaint, supra note 102. The complaint was part of a larger class action lawsuit against multiple divisions of Fox Entertainment Group.
109. See Glatt, 293 F.R.D. at 517.
110. Id. at 531.
111. Id. at 532 (explaining the DOL factors should be given Chevron deference “because they were promulgated by the agency charged with administering the FLSA and were a reasonable application of it”). However, as explained in Part III, agency interpretation not enacted pursuant to Administrative Procedure Act procedures, including Fact Sheet #71, “are beyond the Chevron pale.” United States v. Mead Corp., 533 U.S. 218, 234 (2000); see infra Part III.
112. Glatt, 293 F.R.D. at 532. Although Portland Terminal was decided over sixty years before the release of Fact Sheet #71, the Glatt lower court found that some of the DOL features mirrored the language of the Portland Terminal opinion. See id. at 531–32. Compare Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947) (noting that the FLSA “cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction”), with FACT SHEET #71, supra note 10 (noting that “[t]he internship experience is for the benefit of the intern”).
and Footman had been improperly classified as unpaid interns rather than employees and granted their partial motion for summary judgment.”

On appeal, plaintiffs urged the Second Circuit “to adopt a test whereby interns will be considered employees whenever the employer receives an immediate advantage from the interns’ work.” Defendants urged the court to adopt a “more nuanced primary beneficiary test” whereby “an employment relationship is created when the tangible and intangible benefits provided to the intern are greater than the intern’s contribution to the employer’s operation.” The DOL, as amicus curiae in support of the plaintiffs defending Fact Sheet #71, argued that its views on employee status were entitled to deference because of its delegated authority to administer the FLSA and that the six factors come directly from Portland Terminal. The Second Circuit agreed with the defendant employer in that it must look to whether “the tangible and intangible benefits provided to the intern are greater than the intern’s contribution to the employer’s operation.” It highlighted the “two salient features” of the primary beneficiary test: (1) “it focuses on what the intern receives in exchange for his work” and (2) it “accords courts the flexibility to examine the economic reality as it exists between the intern and the employer.” In its decision, the court reflected on the limitations of comparing the characteristics of the modern internship to the specific facts at issue in Portland Terminal. The court emphasized that Portland Terminal was sixty-eight years old, and the analogy between railroad trainees did not necessarily reflect “the role of internships in today’s economy.”

B. Schumann v. Collier Anesthesia, P.A.

Recently, the Eleventh Circuit joined the Second Circuit in adopting this updated and more flexible test to determine when an internship is properly treated as an employment relationship. In Schumann v. Collier Anesthesia, P.A., a former student registrant of the University of Florida pharmacy master’s degree program, brought a Title II claim under the FLSA. To become a pharmacist, a master’s degree including the completion of one year of internship, which includes at least an additional year of pharmacy practice experience, is required. The twenty-five plaintiffs in the case alleged that they were not paid for the hours worked during the terminal year and that they had profited from their employers’ use of their services in certified registered nurse anesthetists (CRNAs) and in the administration of the anesthesia practice at a hospital in Tallahassee.

The Eleventh Circuit agreed with the Second Circuit’s updated test. The Eleventh Circuit agreed with the Second Circuit’s updated test, which emphasized that the “primary beneficiary test best reflects the economic realities of the relationship between intern and employer.” The court noted that the DOL had deferred to the Second Circuit’s decision in Portland Terminal, and that the Sixth Circuit had similarly deferred to the Second Circuit’s decision in Glatt v. Collier Anesthesia, P.A., 791 F.3d 376, 380 (2d Cir. 2015). The court cited the Eleventh Circuit’s reasoning in Scalf v. Collier Anesthesia, P.A., 901 F.3d 1202 (11th Cir. 2018), which held that the primary beneficiary test best reflected the economic realities of the relationship between intern and employer. The court noted that the primary beneficiary test best reflects the economic realities of the relationship between intern and employer. The court emphasized that the DOL’s views on employee status were entitled to deference because of its delegated authority to administer the FLSA and that the six factors come directly from Portland Terminal.
as unpaid interns due to a personal motion for summary judgment.”

The court “to adopt a test whenever the employer would provide to the trainees’... the employer’s... a more nuanced... that... provided to the employer... the employer’s... the trainees’ views on employee... the delegated authority... factors come directly from... the employee in that... the nondelegable benefits provided... the employer... the trainees’... two salient features... focuses on what... at issue... like trying to use a fork to eat soup.”

Second, the Eleventh Circuit in Collier Anesthesia P.A. v. Schumann, 803 F.3d 1199 (11th Cir. 2015), held that the trainee guideline... in Portland Terminal was sixty-six... trainees did not...

The Second Circuit in Wolford v. Collier Anesthesia P.A., 791 F.3d 376 (2d Cir. 2015), held that the trainee guideline... in Portland Terminal was sixty-six... trainees did not...
some deference, “no circuit has adopted it wholesale and has deferred to the test’s requirement that ‘all’ factors be met for a trainee not to qualify as an ‘employee’ under the FLSA.”

Glatt and Schumann illustrate that the working test for postgraduate and academic internships is evolving to the primary beneficiary test. Fact Sheet #71 is flawed as it does not consider the importance of internships to the American economy. The current disagreement among the circuits in applying a consistent test to post-graduate and academic internships calls for agency action.

III. THE DEPARTMENT OF LABOR SHOULD REVOKE FACT SHEET #71 AND PROMULGATE A LEGISLATIVE RULE REFLECTING THE REALITIES OF CONTEMPORARY INTERNSHIPS

A. Fact Sheet #71 Stretches the Portland Terminal Standard Too Far

As illustrated by modern internship litigation and the divide amongst the circuits, major shifts in the economic and employment landscapes highlight several outdated aspects of Portland Terminal. In 1947, the year the Court decided Portland Terminal, the unemployment rate rested at a modest 3.9%. Among adults twenty-five to twenty-nine years of age, the median number of years of education hovered around 7.7 years of elementary school. Americans today face a markedly different employment environment. As of September 2015, the unemployment rate rested at 5.1% after being above 9.5% for much of 2009, a period that economists classified as part of the Great Recession. Educational attainment between twenty-five to twenty-nine years of age, high school diploma or lower, secondary education, wage and hour Department of Labor, Fact Sheet #71, at 1209. Emplo... need to gain experience, the paradigmatic internships[] are required to be consecutively, in many circumstances, decre... soup.”

B. The United States of America

Internships are an integral part of contemporary internships, yet internship programs across the country are distinguishable from each other. Internships in the United States of America are a critical component of the nation’s workforce. While the number of college graduates has increased in the past sixty years, the number of available internships has decreased accordingly. As of September 2015, the number of unemployed Americans stood at 5.1%, a period that economists classified as part of the Great Recession. Educational attainment between twenty-five to twenty-nine years of age, the median number of years of education hovered around 7.7 years of elementary school. Among adults twenty-five to twenty-nine years of age, the median number of years of education hovered around 7.7 years of elementary school. Americans today face a markedly different employment environment. As of September 2015, the unemployment rate rested at 5.1% after being above 9.5% for much of 2009, a period that economists classified as part of the Great Recession. Educational attainment between twenty-five to twenty-nine years of age, the median number of years of education hovered around 7.7 years of elementary school. Among adults twenty-five to twenty-nine years of age, the median number of years of education hovered around 7.7 years of elementary school. Americans today face a markedly different employment environment. As of September 2015, the unemployment rate rested at 5.1% after being above 9.5% for much of 2009, a period that economists classified as part of the Great Recession.
WAGING THE WAR AGAINST UNPAID LABOR

Education attainment rates have also drastically changed during the past sixty years. In 2014, approximately 91% of individuals between twenty-five and twenty-nine years old had received at least a high school diploma or its equivalent. The rise of post-secondary education continues to steadily increase as well. The Wage and Hour Division governs a different employment market than existed in the years after Portland Terminal. Merely substituting “intern” and “internship” for the Portland Terminal terms “trainee” and “training” was a superficial effort to modernize an outdated test and define the scope of employment in the context of contemporary internships.

Contemporary internships, unlike railroad training programs, are distinguishable from educational programs. In the realm of post-graduate internships, young professionals are caught in a “Catch-22.” Employers require experience, yet recent graduates need to gain experience in some fashion for those positions. Additionally, in many fields, “[l]onger-term, intensive modern internships[] are required to obtain academic degrees and professional certification and licensure.” As the Eleventh Circuit eloquently stated, comparing a semester-long professional licensure program to a week-long railroad training program is “like trying to use a fork to eat soup.”

B. The United States Needs a Standard to Encourage Growth of Internships in the Job Marketplace

Internships are a priority for employers and young professionals, yet internship hiring rates have plateaued and, in some circumstances, decreased. A recent study unveiled that “91% of employers think that students should have between one to two...
internships before they graduate [college], yet 50% [of those employers] haven’t hired any interns in the past six months.”144 “Furthermore, 87% of companies think that internships should last at least three months for students to gain enough experience when most internships last around two months.”144

As the Eleventh Circuit noted in Schumann, “modern internships can play an important—indeed critical—role in preparing students for their chosen careers.”145 A contemporary standard requires harmonizing post-graduate and academic interns’ concerns in preventing worker exploitation and advancing tangible and intangible benefits while simultaneously enabling an employer to obtain a modest benefit from the intern’s presence. Considering the strong and legitimate interests involved, the Second and Eleventh Circuits’ standard of focusing on the “benefits to the student while still considering whether the manner in which the employer implements the internship program takes unfair advantage of or is otherwise abusive towards the [intern]” strikes that balance.146

Don Schawbel, the Founder of Millennial Branding and a Generation Y expert, best summarized the dynamic between contemporary employers and interns:

The expectation that having an internship can lead to a job no longer exists. Employers should hire their interns into full-time positions to save recruiting and training costs. Students should strive to have as many internships as possible before graduation and not rely on a single employer for a job offer.”147

To attain this dynamic in the marketplace, employers must understand how to comply with the FLSA, and unpaid interns must be protected from potential exploitation. This necessary notice can be obtained by the DOL’s promulgation of a new rule.

---

144. Id.
145. Schumann, 803 F.3d at 1211.
146. Id. at 1211; Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 384 (2d Cir. 2015).
147. See Schawbel, supra note 143.

C. DOL Should Revise Legislative Rule

Rather than waiting to one of many pending lawsuits to contemporary internships can play an important role in preparing students for their chosen careers rarely146 and work experience. As the Circuit noted, 87% of companies think that internships should last at least three months for students to gain enough experience when most internships last around two months. It is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships. Rather, it is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

The DOL should adopt a rule that the primary beneficiary of the internship program is the intern. Such a rule would reflect the tangible and intangible benefits that can arise against the employer. Employers should not exploit the student or pay nothing. Rather, employers should have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

To attain this dynamic in the marketplace, employers must understand how to comply with the FLSA, and unpaid interns must be protected from potential exploitation. This necessary notice can be obtained by the DOL’s promulgation of a new rule.

148. See Robin Feldman, supra note 143, at 1211 (noting that the DOL can interpret the coverage phrases in the FLSA). Rather than waiting to one of many pending lawsuits to contemporary internships can play an important role in preparing students for their chosen careers rarely146 and work experience. As the Circuit noted, 87% of companies think that internships should last at least three months for students to gain enough experience when most internships last around two months. It is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships. Rather, it is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

The DOL should adopt a rule that the primary beneficiary of the internship program is the intern. Such a rule would reflect the tangible and intangible benefits that can arise against the employer. Employers should not exploit the student or pay nothing. Rather, employers should have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

To attain this dynamic in the marketplace, employers must understand how to comply with the FLSA, and unpaid interns must be protected from potential exploitation. This necessary notice can be obtained by the DOL’s promulgation of a new rule.

148. See Robin Feldman, supra note 143, at 1211 (noting that the DOL can interpret the coverage phrases in the FLSA). Rather than waiting to one of many pending lawsuits to contemporary internships can play an important role in preparing students for their chosen careers rarely146 and work experience. As the Circuit noted, 87% of companies think that internships should last at least three months for students to gain enough experience when most internships last around two months. It is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships. Rather, it is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

The DOL should adopt a rule that the primary beneficiary of the internship program is the intern. Such a rule would reflect the tangible and intangible benefits that can arise against the employer. Employers should not exploit the student or pay nothing. Rather, employers should have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

To attain this dynamic in the marketplace, employers must understand how to comply with the FLSA, and unpaid interns must be protected from potential exploitation. This necessary notice can be obtained by the DOL’s promulgation of a new rule.

148. See Robin Feldman, supra note 143, at 1211 (noting that the DOL can interpret the coverage phrases in the FLSA). Rather than waiting to one of many pending lawsuits to contemporary internships can play an important role in preparing students for their chosen careers rarely146 and work experience. As the Circuit noted, 87% of companies think that internships should last at least three months for students to gain enough experience when most internships last around two months. It is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships. Rather, it is highly unusual for an employer to have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

The DOL should adopt a rule that the primary beneficiary of the internship program is the intern. Such a rule would reflect the tangible and intangible benefits that can arise against the employer. Employers should not exploit the student or pay nothing. Rather, employers should have a strong legitimate interest in the FLSA’s coverage of unpaid internships.

To attain this dynamic in the marketplace, employers must understand how to comply with the FLSA, and unpaid interns must be protected from potential exploitation. This necessary notice can be obtained by the DOL’s promulgation of a new rule.

148. See Robin Feldman, supra note 143, at 1211 (noting that the DOL can interpret the coverage phrases in the FLSA).
yet 50% [of those em-
ployees] six months.”

"Fur-

Nernships should last at least a
ough experience when

"m is, "modern intern-
ial—role in preparing
temporary standard re-
em interns’ concerns
ancing tangible and in-
thibing an employer to

Second and last, the “benefits to the
manner in which the
ram takes unfair ad-
the [intern]” strikes

Brandenburg and a Gen-
amic between contem-

lead to a job no longer
full-time positions to
uld strive to have as
m and not rely on a

, employers must un-
unpaid interns must
This necessary notice of a new rule.

C. DOL Should Revoke Fact Sheet #71 and Promulgate a
Legislative Rule Tailored to Contemporary Internships

Rather than waiting for the Supreme Court to grant certiorari
to one of many pending unpaid internship suits, the DOL should
revoke Fact Sheet #71 and promulgate a legislative rule tailored
to contemporary internships. The Supreme Court grants certiora-
rarely and would struggle to announce a rule tailored to post-
graduate and academic internships in a single opinion. Addition-
ally, it is highly unlikely that Congress could effectively amend
the FLSA to address the unpaid internship problem. As the Act’s
legislative history indicates, the FLSA was drafted broadly on
purpose. Narrowing the scope of the definition of “employee”
would detract from the drafters’ intent. Moreover, Congress
vested the DOL with authority to promulgate binding rules inter-
preting the FLSA’s broad definitions. Therefore, it is in the best
position to clarify the applicable standard for post-graduate and
academic internships.

The DOL should promulgate a rule mirroring the contemporary
primary beneficiary test. The rule must require a weighing of
the tangible and intangible benefits that the student receives
against the manner in which the employer implements the in-
ternship program; specifically, it must focus on whether the em-
ployer takes unfair advantage of, or is otherwise abusive towards,
the student or post-graduate intern. Rather than the all-or-
nothing approach of Fact Sheet #71, the rule should articulate
guiding factors similar to those outlined in Glatt and Schu-
mann. These factors may include, but would not be limited to:

1. The extent to which the intern and the employer clearly un-
derstand that there is no expectation of compensation. Any prom-
ise of compensation, express or implied, suggests that the intern
is an employee.

148. See Robin Feldman, Plain Language Patents, 17 TEX. INTELL. PROP. L.J. 289, 303
n.81 (2009) (noting that the Court grants certiorari in only about 1% of cases).
149. H.R. REP. No. 1366, at 10 (1966) ("In keeping with the broad statutory definitions
of the coverage phrases used, the courts have repeatedly expressed and adhered to the
principle that the coverage phrases should receive a liberal interpretation.").
151. See Schumann, 803 F.3d at 1211-12.
152. See supra notes 76-77 and accompanying text.
153. See Schumann, 803 F.3d at 1211-12; Glatt v. Fox Searchlight Pictures, Inc., 791
F.3d 376, 384 (2d Cir. 2015).
2. The extent to which the internship provides training that would be similar to that available in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern’s formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern’s academic commitments by corresponding to the academic calendar.

5. The extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial training.

6. The extent to which the intern’s work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.\(^{154}\)

This proposed legislative rule safeguards against intern exploitation while granting academic and post-graduate interns the opportunity to gain experience that will further their careers. The proposed rule must explicitly prohibit taking unfair advantage of the student or post-graduate intern because of the evidence of internship abuse in the private sector.\(^{155}\) In the wake of remedying the unregulated nature of contemporary internships, preventing further exploitation must be a paramount concern.\(^{156}\) Additionally, by recognizing intangible benefits to the internship and structuring the factors to apply to academic and post-graduate internships, the DOL will encourage internship growth, which will in turn enable the intern to gain necessary experience.\(^{157}\)

---

154. Schumann, 803 F.3d at 1211-12; Glatt, 791 F.3d at 384.
155. See Thompson, supra note 3.
156. Many courts have begun to recognize internship exploitation. See, e.g., Schumann, 803 F.3d at 1211 (“[W]e recognize the potential for some employers to maximize their benefits at the unfair expense and abuse of student interns.”).
This legislative rule will put employers on notice to better predict their compliance with the broad and vague language of the FLSA and will eliminate judicial deference to non-binding interpretive rules. Employers expect recent graduates to have had internships, however many of these same employers are reluctant to offer internship opportunities for fear of lawsuits and liability for minimum wage back pay. Despite their unease, employers have an interest in hiring interns. "Employers may like the opportunity, or feel pressure to have an internship program, to have first choice among highly qualified" future applicants.

Additionally, there is a "growing unease" and in some circumstances, an "outright disdain" among employers for agencies' success in obtaining judicial deference for their regulatory interpretations." In Auer v. Robbins, for example, the Supreme Court even deferred to agency interpretations expressed for the first time in an agency amicus brief, so long as the interpretation was not "plainly erroneous." Relying on interpretative rules or even interpretations embedded in amicus briefs will only perpetuate the stagnant rate at which employers hire interns. This proposed legislative rule sufficiently narrows the requirements of unpaid internship programs in the public sector and puts employers on notice of their legal obligations.

While efficiency and the lengthy process of notice-and-comment rulemaking have been legitimate concerns of the APA, critics
would likely agree that passing a legislative rule under the APA and amending it subject to the prescribed rulemaking process serves as a better alternative to passing merely interpretative rules, which may be amended at any time without notice and comment. The Supreme Court recently held that the APA expressly exempts federal agencies, like the DOL, from formal notice-and-comment rulemaking requirements when they make changes to interpretative rules. Interpretative rules, like Fact Sheet #71, may be issued, amended, or repealed at will and without notice to the affected industries. In order to maintain consistency and agency authority, the DOL has an interest in promulgating this binding legislative rule.

CONCLUSION

Currently, the legal standard determining whether an intern is protected by the FLSA is controverted and blurry at best. Fact Sheet #71 is an outdated model that is incompatible with contemporary academic and post-graduate internships. The Wage and Hour Division governs a different employment market than that which existed in the years after Portland Terminal, and it must revoke its all-or-nothing approach to conform with the contemporary role internships play in today’s economy.

The DOL is equipped to remedy the circuit split on internships by promulgating a legislative rule after notice and comment. The rule should mirror the contemporary primary beneficiary test, as articulated in Glatt v. Fox Searchlight Pictures, Inc. and Schumann v. Collier Anesthesia, P.A. As opposed to an abstract interpretative rule, the proposed rule must require a weighing of the tangible and intangible benefits that the intern receives against the manner in which the employer implements the internship program, specifically, whether the employer takes unfair advantage of, or is otherwise abusive towards, the student or post-graduate intern.

165. See Perez v. Mortgage Bankers Ass’n, 135 S. Ct. 1199, 1203 (2015) (announcing the Court’s decision to unanimously strike down the D.C. Circuit’s Paralyzed Veteran doctrine, and holding that because an agency is not required to use the APA notice-and-comment procedures to issue an initial interpretative rule, it is also not required to use those procedures when it amends or repeals that interpretative rule).
Internships can provide students with invaluable practical experience and skills and provide employers with the opportunity to give back and potentially develop prospective talent for their industry. Harmonizing these two important interests effectively ensures the availability of both opportunities in today's job market.

Rachel P. Willer *

---

* J.D. Candidate 2017, University of Richmond School of Law. B.A., 2012, American University. I would like to thank the University of Richmond Law Review staff and editors, especially Glenice Coombs, Reilly Moore, and Jason Hodge, for their assistance. I would also like to thank Professor Ann Hodges for her valuable insight, my parents, Kathryn and James Willer, for their unconditional support and love, and my grandfather, Robert L. Sullivan, for encouraging me to pursue a career in law.