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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

1. *Girls: Pilot* (HBO television broadcast Apr. 15, 2012).

2. *Id.*

3. As discussed *infra* note 7, although the United States government does not track unpaid internship statistics, “[e]stimates put the number of unpaid interns every year between 500,000 and one million.” Derek Thompson, *Work Is Work: Why Free Internships Are Immoral*, THE ATLANTIC (May 14, 2012), <http://www.theatlantic.com/business/archive/2012/05/work-is-work-why-free-internships-are-immoral/257130/>.

4. Andrew Mark Bennett, *Unpaid Internships & The Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 296 (2011).

5. Press Release, Soc’y for Human Res. Mgmt., Internships on the Rise Since Recession, SHRM SURVEY FINDS (Nov. 6, 2013), <http://www.shrm.org/about/pressroom/pressreleases/pages/2013internships.aspx>; Laura Fortman, *When Experience Pays: Paid vs. Unpaid Internships*, U.S. DEPT LAB. BLOG (Apr. 11, 2014), <https://blog.dol.gov/2014/04/11/wh-en-experience-pays-paid-vs-unpaid-internships/>.

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.⁶ Beyond private surveys, the U.S. government does not track unpaid internship statistics.⁷ 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.⁸ 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.⁹ 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”).¹⁰ Second, the economic realities test examines whether the worker relies on the employer to obtain an economic benefit.¹¹ Finally, the primary beneficiary test examines which party receives the primary benefit of the working relationship.¹² Because circuit courts

6. PHIL GARDNER ET AL., COLLEGIATE EMP’T RESEARCH INST. AND MICH. STATE UNIV. CAREER SERVS. NETWORK, RECRUITING TRENDS 2012–2013, at 33 (42d ed. 2012), <http://www.ceri.msu.edu/wp-content/uploads/2012/11/FRecruiting-Trends-2012-2013.pdf> (discussing a survey of nearly 2250 full-time recruiters and internship program representatives regarding their plans to engage college students in pre-professional practices).

7. Neither the Wage and Hour Division nor the Bureau of Labor Statistics keeps track of the number of paid or unpaid internships. Kate Harrison, *Why Interns Are Your New Best Friends*, FORBES (July 11, 2012, 3:13 PM), <http://www.forbes.com/sites/kateharrison/2012/07/11/why-interns-are-your-new-best-friends/>; see also Blair Hickman, *What We Learned Investigating Unpaid Internships*, PROPUBLICA (July 23, 2014, 8:00 AM), <http://www.propublica.org/article/what-we-learned-investigating-unpaid-internships> (“Exhaustive data on interns doesn’t exist.”).

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

9. See discussion *infra* Part I.E.1.

10. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (Apr. 2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter FACT SHEET #71]. See *infra* Part I.D for a discussion of these factors.

11. See discussion *infra* Part I.E.2.

12. See discussion *infra* Part I.E.3.

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.¹³ 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.¹⁴

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.¹⁵ Alternatively, the primary beneficiary test, articulated in the Second Circuit's holding in *Glatt v. Fox Searchlight Pictures, Inc.*¹⁶ and the Eleventh Circuit's holding in *Schumann v. Collier Anesthesia, P.A.*,¹⁷ 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.

14. See Harrison Thorne, *Intern Protection Laws May Be Hurting Interns*, JURIST (Sept. 15, 2015, 8:00 AM), <http://jurist.org/dataline/2015/09/harrison-thorne-intern-protection.php>.

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 1938¹⁸ requires, with certain exceptions, that employers pay employees engaged in commerce at least a minimum wage and time-and-a-half 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

18. 29 U.S.C. §§ 201–219 (2012).

19. See WAGE & HOUR DIV., U.S. DEP’T OF LABOR, HANDY REFERENCE GUIDE TO THE FAIR LABOR STANDARDS ACT 12 (Nov. 2014), <http://www.dol.gov/whd/regs/compliance/wh1282.pdf>.

20. See H.R. REP. NO. 1366, at 10 (1966); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1003 (1999); Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage*, DEP’T OF LAB., <http://www.dol.gov/general/aboutdol/history/flsa1938> (last visited Apr. 15, 2016).

21. *United States v. Darby*, 312 U.S. 100, 109 (1941).

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”).

23. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (quoting *Brooklyn Sav. Bank*, 324 U.S. at 707).

24. See, e.g., *Falk v. Brennan*, 414 U.S. 190, 205 n.3 (1973); *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597–98 (1944); *Bureerong v. Uvawas*, 922 F. Supp. 1450, 1466 (C.D. Cal. 1996).

defines “employ” as “to suffer or permit to work” and defines “employee” as “any individual employed by an employer.”²⁵ 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.”²⁶

Congress expressly delegated the tasks of implementing and enforcing the FLSA and developing regulations to the Secretary of Labor.²⁷ The FLSA grants the Secretary broad authority to “define and delimit the scope of [pay requirements] for executive, administrative, and professional employees.”²⁸ As part of this broad authority, the Secretary oversees internal investigations of violating employers.²⁹ Wage and Hour Division investigators stationed across the United States enforce the FLSA.³⁰ 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.”³¹ Thus, as an alternative, the Act is also enforceable by private employee lawsuits,³² which, if litigated successfully, may result in awards of back pay and liquidated damages.³³ Misclassifying an employee can be quite serious and costly;

25. 29 U.S.C. §§ 203(e)(1), 203(g) (2012).

26. *United States v. Rosenwasser*, 323 U.S. 360, 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.”).

27. Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974) (codified at 29 U.S.C. § 202 (2012)); *see also* *Beck v. City of Cleveland*, 390 F.3d 912, 918 (6th Cir. 2004) (“Under the FLSA, the Secretary possesses the authority to issue rules and regulations to implement the Act.”).

28. *Auer v. Robbins*, 519 U.S. 452, 456 (1997).

29. *See, e.g.*, Fortman, *supra* note 5 (“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].”).

30. *Fair Labor Standards Act Advisor: Enforcement Under the Fair Labor Standards Act*, U.S. DEP’T OF LAB., <http://webapps.dol.gov/elaws/whd/flsa/screen74.asp> (last visited Apr. 15, 2016).

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.³⁴

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.³⁵ Therefore, according to the DOL, an internship can be unpaid only if the employer is a non-profit organization³⁶ or if the internship satisfies the agency's guiding interpretative rule announced in Fact Sheet #71.³⁷ 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.³⁸

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.*³⁹ is widely regarded as the seminal case for interpreting and applying the definitions of "employee" and "employ" in the FLSA.⁴⁰

cles/743874/sony-settles-interns-wage-suit-dodges-another (reporting that Sony Music Entertainment paid \$67,000 to settle claims made by a putative group of former unpaid interns); Aaron Vehling, *NBCUniversal Gets Nod for \$6.4M Unpaid Intern Deal*, LAW360 (June 3, 2015, 2:47 PM), <https://www.law360.com/articles/663278/nbcuniversal-gets-nod-for-6-4m-unpaid-intern-deal> (reporting that NBCUniversal Inc. paid \$6.4 million to settle claims made by class of 8000 former interns); Daniel Wiessner, *Sirius XM Will Settle Unpaid Intern Lawsuit for \$1.3 Million*, REUTERS (Aug. 3, 2015, 2:24 PM), <http://www.reuters.com/article/sirius-xm-interns-idUSL1N10E1HT20150803> (reporting that Sirius XM Radio paid up to \$1.3 million to settle claims made by class of 1800 former interns).

34. See Julie M. Capell, *Drafting Effective Unpaid Internship Agreements*, LAW360 (Jan. 13, 2016, 11:05 AM), <http://www.law360.com/articles/745648/drafting-effective-unpaid-internship-agreements>.

35. See FACT SHEET #71, *supra* note 10.

36. 29 U.S.C. § 203(e)(5) (2012).

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.

39. 330 U.S. 148 (1947).

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, 73 (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.⁴¹ During the training period, trainees operated under supervision, learning the routine activities by observation and then gradually performing the actual work under close scrutiny.⁴² Trainees did not receive any form of pay or allowance.⁴³ 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.⁴⁴ Only the brakemen whom the railroad company hired would receive a retroactive allowance of \$4 per day of training.⁴⁵

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.⁴⁶ 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.⁴⁷ 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.⁴⁸

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.”⁴⁹ With these

41. *Portland Terminal*, 330 U.S. at 149.

42. *Id.*

43. *Id.* at 150.

44. *Id.* at 149–50.

45. *Id.* at 150.

46. *Id.*

47. *Id.* at 153.

48. *Id.* at 150.

49. *Id.* at 152.

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.⁵⁰ 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.⁵¹ 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.⁵² 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.⁵³

As evident by the language of the criteria, the factors allude to an academic, educational environment, even analogizing the experience to a vocational school.⁵⁴ 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.").

51. Wage & Hour Div., U.S. Dep't of Labor, Opinion Letter on Fair Labor Standards Act (May 8, 1996) [hereinafter 1996 Opinion Letter].

52. *Id.*

53. *Id.*

54. See *id.*

seem to carve out standards for academic internships, the evolution of unpaid labor for post-graduates created the new internship frontier, which calls for modernized regulation.⁵⁵

D. Department of Labor Fact Sheet #71

Following its opinion letter applying the *Portland Terminal* factors to unpaid trainees and students, the Wage and Hour Division released Fact Sheet #71 in April 2010.⁵⁶ Fact Sheet #71 again interpreted the *Portland Terminal* precedent and applied its trainee guidelines rule to internship labor.⁵⁷ The fact sheet announced a six-factor test for “determin[ing] whether interns must be paid the minimum wage and overtime under the [FLSA] for the services that they provide to ‘for-profit’ private sector employers.”⁵⁸ This six-factor test is virtually identical to that for trainees, aside from the substitution of the terms “intern” and “internship” for the terms “trainee” and “training.”⁵⁹ Under this test, an employment relationship will be found unless all six factors are met.⁶⁰ The Agency explains that this narrow exclusion from the definition of employment is necessary because of the FLSA’s “very broad” definition of “employ.”⁶¹ Most internship programs do not meet the above criteria; therefore, “given the DOL’s strict enforcement of these guidelines, many interns are actually considered employees for purposes of the FLSA, contrary to what employers expect.”⁶²

The DOL offers some practical advice for structuring internship programs so that interns are not employees subject to the FLSA’s minimum wage and overtime requirements.⁶³ The agency

55. See *infra* Parts II.A and II.B discussing the differences between *Glatt* and *Schumann*.

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.

59. Compare 1996 Opinion Letter, *supra* note 51, with FACT SHEET #71, *supra* note 10.

60. FACT SHEET #71, *supra* note 10.

61. *Id.*

62. Joseph U. Leonoro, *Unpaid Interns and the Fair Labor Standards Act*, NAT’L L. REV. (June 22, 2015), <http://www.natlawreview.com/article/unpaid-interns-and-fair-labor-standards-act>.

63. See FACT SHEET #71, *supra* note 10. *But see* Capell, *supra* note 34 (“It is best practice 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.”⁶⁴ Employers are encouraged to “provide[] the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer’s operation.”⁶⁵ Additionally, interns may not be used “as substitutes for regular workers or to augment [the employer’s] existing workforce.”⁶⁶ The level of supervision over the intern may determine whether the individual is entitled to compensation.⁶⁷ If an intern is supervised at the same level as the employer’s regular workforce, an employment relationship would likely be established.⁶⁸ 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.⁶⁹ 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.⁷⁰

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.⁷¹ 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

test.”).

64. FACT SHEET #71, *supra* note 10.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. See Jeanne M. Christensen, *The Law Governing Unpaid Internships Continues to Evolve in New York*, WIGDOR LLP (Feb. 11, 2015), <http://www.wigdorlaw.com/2015/02/11/the-law-governing-unpaid-internships-continues-to-evolve-in-new-york/>.

71. See discussion *infra* Parts I.E.1–3.

worker is an employee.⁷² The economic realities test examines whether the worker relies on the employer to obtain an economic benefit.⁷³ The primary beneficiary test examines which party receives the primary benefit of the working relationship.⁷⁴

1. Totality of the Circumstances Test

The totality of the circumstances test analyzes the employment relationship holistically, examining all of the facts and circumstances.⁷⁵ Presently, the Tenth Circuit remains the only circuit that relies on this approach to interpret the FLSA.⁷⁶ It considers the economic relationship, the Fact Sheet #71 factors, and other factual considerations with varying deference.⁷⁷

While the Tenth Circuit previously applied various factors to employment determinations under the FLSA,⁷⁸ it announced its application of a totality of circumstances test in *Reich v. Parker Fire Protection District*.⁷⁹ In *Parker Fire*, the Tenth Circuit was asked to determine whether firefighter trainees were employees during training time at the fire academy.⁸⁰ The court rejected an all-or-nothing application of the six factors, acknowledging that these factors were important but not determinative of whether the trainees were employees.⁸¹ Instead, the court reasoned that a strict application of all of the factors was not supported by the Court's decision in *Portland Terminal*.⁸² 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).

76. John P. Furfaro & Risa M. Salins, *Unpaid Intern Update: Significant Rulings from Two Circuit Courts*, 254 N.Y. L.J. 65 (Oct. 2, 2015), <https://www.skadden.com/sites/default/files/publications/070101503Skadden.pdf>; see also *Parker Fire*, 992 F.2d at 1027 (applying the totality of the circumstances test to firefighter trainees).

77. See *Parker Fire*, 992 F.2d at 1025–27.

78. See, e.g., *Marshall v. Regis Educ. Corp.*, 666 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

83. *Id.* at 1029.

84. *See id.*

85. *See Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985) (“The test of employment under the Act is one of ‘economic reality’”); *see also Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982) (“It is well-established that the issue of whether an employment relationship exists under the FLSA must be judged by the ‘economic realities’ of the individual case.”); *Weisel v. Sing. Joint Venture, Inc.*, 602 F.2d 1185, 1189 (5th Cir. 1979) (applying the economic realities test).

86. Deborah F. Harris, *When Is Individual in Training an “Employee” for Purposes of § 3(e)(1) of the Fair Labor Standards Act (29 U.S.C.A. § 203(e)(1))*, 50 A.L.R. FED. 632 § 5 (2016).

87. *See Reich v. Shiloh True Light Church of Christ*, 895 F. Supp. 799, 815 (W.D.N.C. 1995). *But see Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522–23 (6th Cir. 2011) (“To state that economic realities govern is no more helpful than attempting to determine employment status by reference directly to the FLSA’s definitions themselves.”).

88. 471 U.S. at 301.

89. *Id.* at 292.

from the unpaid railroad trainees in *Portland Terminal*.⁹⁰ The Court held that the Foundation's associates were employees under the FLSA because they worked "in contemplation of compensation."⁹¹

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.⁹² Until September 2015, the Eleventh Circuit similarly applied the economic realities test, coupled with the factors listed in Fact Sheet #71.⁹³ Consistent with modern trends, the Eleventh Circuit abandoned the economic realities test in favor of the more contemporary "primary beneficiary test."⁹⁴

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.⁹⁵ The primary bene-

90. See *id.* at 300–01.

91. *Id.* at 306.

92. See Jessica L. Curiale, Note, *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."); see also WAGE & HOUR DIV., U.S. DEPT' OF LABOR, FACT SHEET #13: AM I AN EMPLOYEE?: EMPLOYMENT RELATIONSHIP UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (May 2014), <http://www.dol.gov/whd/regs/compliance/whdfs13.pdf> (announcing a six-factor "economic realities" test used to distinguish independent contractors from employees under the FLSA).

93. Compare *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1214–15 (11th Cir. 2015) (changing their test to the primary beneficiary test), with *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App'x 831, 833 (11th Cir. 2013), and *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982).

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) ("[W]e 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) (analogizing the facts of the case to those at issue in *Portland Terminal* and noting that *Portland Terminal* turned on the determination that the training "most greatly benefit[ed] the

ficiary 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.⁹⁶ 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.⁹⁷

Historically, several courts applied the primary beneficiary test in the context of unpaid trainees.⁹⁸ Recently, the Second and Eleventh Circuits extended the test specifically to unpaid interns in post-graduate and higher education settings.⁹⁹ 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.¹⁰⁰

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.¹⁰¹ 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*.¹⁰² 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.¹⁰³ After production, Glatt accepted a post-production internship where he

trainees").

96. See *Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d at 526.

97. See *id.* at 528.

98. See, e.g., *Ensley*, 877 F.2d at 1210 (applying the test to snack food distribution trainees); *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir. 1983) (applying the test to manufacturer trainees).

99. See discussion *infra* Part II.

100. See Thompson, *supra* note 3.

101. *Glatt v. Fox Searchlight Pictures*, 791 F.3d 376, 383 (2d Cir. 2015).

102. Class Action Complaint at 4, *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 11 Civ. 6784) [hereinafter Class Action Complaint].

103. *Glatt*, 293 F.R.D. at 533.

performed other “basic administrative work such as drafting cover letters, organizing filing cabinets, making photocopies, and running errands.”¹⁰⁴ 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, water-marking scripts, and making deliveries.”¹⁰⁵ 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.”¹⁰⁶ 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.¹⁰⁷

Glatt and Footman filed their complaint in the Southern District of New York on September 28, 2011,¹⁰⁸ and the district court granted their motion for summary judgment on June 11, 2013.¹⁰⁹ 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.¹¹⁰ However, the court reasoned that these factors were entitled to *Chevron* deference¹¹¹ and were the applicable standard because the test had support in *Portland Terminal*.¹¹² “[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 “[b]ecause 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.”¹¹³

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.”¹¹⁴ 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.”¹¹⁵ 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*.¹¹⁶

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.”¹¹⁷ 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.”¹¹⁸ 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.”¹¹⁹

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

113. *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 380 (2d Cir. 2015).

114. *Id.* at 383.

115. *Id.* (“[T]he primary beneficiary test best reflects the economic realities of the relationship between intern and employer.”).

116. *Id.*

117. *Id.* at 383–84.

118. *Id.*

119. *Id.* at 385.

an internship is primarily for the benefit of the student or for the employer.¹²⁰ In *Schumann v. Collier Anesthesia, P.A.*, “twenty-five former student registered nurse anesthetists . . . who attended a master’s degree program at Wolford College, LLC, with the goals of becoming certified registered nurse anesthetists” sued under the FLSA.¹²¹ To become certified, students had to complete a master’s degree including a four semester clinical component, during which students had to participate in a minimum of 550 clinical cases.¹²² Wolford was owned by anesthesiologists who had an interest in Collier Anesthesia, P.A., a practice that, under Medicare rules, was able to bill for services performed by clinical interns.¹²³ The twenty-five students claimed that Collier and Wolford should have paid them at least minimum wage and overtime for all hours worked during their clinical internships, since both entities profited from their work by substituting unpaid clinical students for certified registered nurse anesthesiologists.¹²⁴

The Eleventh Circuit abandoned the DOL trainee guideline factors in favor of the Second Circuit’s primary beneficiary test, for three reasons.¹²⁵ First, the court rejected the lower court’s deference to the handbook interpreting *Portland Terminal*.¹²⁶ Rather than affording the DOL *Chevron* deference, the court reasoned “an agency has no special competence or role in interpreting a judicial decision.”¹²⁷ Second, the Eleventh Circuit reiterated the *Glatt* court’s observation that the test “attempts to fit *Portland Terminal*’s particular facts to all workplaces, and . . . is too rigid.”¹²⁸ The court added to the Second Circuit’s points by noting that trying to apply the facts of a nearly seventy-year-old case to the facts at issue “is like trying to use a fork to eat soup.”¹²⁹ Third, the court acknowledged that, while the DOL test has been given

120. See *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1212 (11th Cir. 2015).

121. *Id.* at 1202.

122. *Id.* at 1203.

123. See *id.* at 1206.

124. See *id.* at 1204–05.

125. See *id.* 1209.

126. See *id.*

127. *Id.* (quoting *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376, 383 (2d Cir. 2015)).

128. *Id.*

129. *Id.* at 1210.

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.”¹³⁰

Glatt and *Schumann* illustrate that the working test for post-graduate 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%.¹³¹ 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.¹³² Americans today face a markedly different employment environment. As of September 2015, the unemployment rate rested at 5.1%¹³³ after being above 9.5% for much of 2009,¹³⁴ a period that economists classified as part of the Great Recession.¹³⁵ Edu-

130. *Id.* at 1209.

131. U.S. BUREAU OF LABOR STATISTICS, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, <http://www.bls.gov/cps/cpsaat01.htm> (last modified Feb. 10, 2016).

132. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, EDUCATIONAL ATTAINMENT OF THE CIVILIAN POPULATION: APR. 1947, at 1 (May 4, 1948), <https://www.census.gov/hhes/socdemo/education/data/cps/1946/p20-15/p20-15.pdf>.

133. News Release, Bureau of Labor Statistics, The Employment Situation—September 2015 (Oct. 2, 2015, 8:30 AM), http://www.bls.gov/news.release/archives/empisit_10022015.pdf.

134. See U.S. BUREAU OF LABOR STATISTICS, THE RECESSION OF 2007–2009, at 2 (2012), http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

135. See DAVID B. GRUSKY ET AL., THE GREAT RECESSION 3 (2011). While the economist-defined recession ended in June 2009, popular sentiment is that the recession continued much longer. *Id.*; John W. Schoen, *Many Feel Like Recession Still Hasn’t Ended*, USA TODAY (Jan. 1, 2014, 8:05 PM), <http://www.usatoday.com/story/money/personalfinan>

cation 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.¹³⁶ The rise of post-secondary education continues to steadily increase as well.¹³⁷ 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.¹³⁸

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.”¹³⁹ 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.”¹⁴⁰ 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.”¹⁴¹

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.¹⁴² A recent study unveiled that “91% of employers think that students should have between one and two

ce/2014/01/01/cnbc-recovery-slowed-economy/4222929/.

136. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT EDUC., *THE CONDITION OF EDUCATION 2015*, at 32 (2015), <http://nces.ed.gov/pubs2015/2015144.pdf>.

137. *Id.* Educational attainment of a “bachelor’s or higher degree increased from 23% in 1990 to 34% in 2014.” *Id.*

138. *Compare* Walling v. Portland Terminal Co., 330 U.S. 148, 149–50 (1947), and 1996 Opinion Letter, *supra* note 61, with FACT SHEET #71, *supra* note 10.

139. Thompson, *supra* note 3.

140. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1211 (11th Cir. 2015).

141. *Id.* at 1210.

142. NAT'L ASS'N COLLS. & EMP'RS, EXECUTIVE SUMMARY: 2015 INTERNSHIP & CO-OP SURVEY 3 (2015), <https://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2015-internship-co-op-survey-executive-summary.pdf>.

internships before they graduate [college], yet 50% [of those employers] haven't hired any interns in the past six months."¹⁴³ "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.

143. Dan Schawbel, *Millennial Branding Student Employment Gap Study*, MILLENNIAL BRANDING (May 14, 2012), <http://millennialbranding.com/2012/millennial-branding-student-employment-gap-study/>.

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 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 certiorari rarely¹⁴⁸ and would struggle to announce a rule tailored to post-graduate and academic internships in a single opinion. Additionally, 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.¹⁴⁹ Moreover, Congress vested the DOL with authority to promulgate binding rules interpreting the FLSA's broad definitions.¹⁵⁰ 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.¹⁵¹ 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 internship program; specifically, it must focus on whether the employer 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 #71,¹⁵² the rule should articulate guiding factors similar to those outlined in *Glatt* and *Schumann*.¹⁵³ These factors may include, but would not be limited to:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise 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.")

150. 29 U.S.C. § 213(a)(1) (2012).

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.”).

157. See Harrison Thorne, *Intern Protection Laws May Be Hurting Interns*, JURIST (Sept. 15, 2015, 8:00 AM), <http://jurist.org/dataline/2015/09/harrison-thorne-intern-protection.php>.

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,¹⁵⁸ however many of these same employers are reluctant to offer internship opportunities for fear of lawsuits and liability for minimum wage back pay.¹⁵⁹ Despite their unease, employers have an interest in hiring interns.¹⁶⁰ “Employers may like the opportunity, or feel pressure to have an internship program, to have first choice among highly qualified” future applicants.¹⁶¹

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.”¹⁶² 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.”¹⁶³ 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,¹⁶⁴ critics

158. See Derek Thompson, *The Thing Employers Look for When Hiring Recent Graduates*, THE ATLANTIC (Aug. 19, 2014), <http://www.theatlantic.com/business/archive/2014/08/the-thing-employers-look-for-when-hiring-recent-graduates/378693/> (explaining that, outside of academic performance, the top elements employers consider when hiring recent graduates include internships, jobs, volunteering, and extracurricular activities).

159. See Samantha Drake, *Think You Should Hire an Intern? Think Again*, ENTREPRENEUR (May 28, 2014), <http://www.entrepreneur.com/article/234138>; Schawbel, *supra* note 143.

160. Robert J. Tepper & Matthew P. Holt, *Unpaid Internships: Free Labor or Valuable Learning Experience?*, 2015 BYU EDUC. & L.J. 323, 326.

161. *Id.*

162. Brian Wolfman & Bradley Girard, *Opinion Analysis: The Court Slays the D.C. Circuit’s Paralyzed Veterans Doctrine, Leaving Bigger Issues for Another Day*, SCOTUSBLOG (Mar. 10, 2015, 9:22 AM), <http://www.scotusblog.com/2015/03/opinion-analysis-the-court-slays-the-d-c-circuits-paralyzed-veterans-doctrine-leaving-bigger-issues-for-another-day/>.

163. 519 U.S. 452, 461 (1997).

164. Ann Joseph O’Connell, *Agency Rulemaking and Political Transitions*, 105 NW. U. L. REV. 471, 480 (2011) (“Once proposed, a regulation undergoing traditional notice and comment will not go into effect, on average, for 1.3 years.”).

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.¹⁶⁵ 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.

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