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WILL WORK FOR FREE: THE LEGALITY OF UNPAID INTERNSHIPS

ABSTRACT

*This Note addresses the current ambiguity in the law regarding if unpaid interns are employees under the Fair Labor Standards Act. The Note explores relevant case law throughout the circuit courts, but primarily focuses on the Second Circuit's recent decision in *Glatt v. Fox Searchlight Pictures*. It argues that the primary benefits test created by the Second Circuit in *Glatt* does not adequately protect unpaid interns nor does it inform employers of the standards they need to meet in order to adopt legal unpaid internship programs. Instead, courts should adopt a clearer, more rigid test that finds an intern not to be an employee under the FLSA if the following three factors are met: (1) the training is similar to that of which the interns would receive at an educational institution, (2) the program is designed to benefit the intern, and (3) the intern does not displace regular employees. This test is congruent with Congress's intent of only allowing for narrow exceptions to overtime and minimum wage compensation under the FLSA and provides both employers and employees with clearer guidelines for creating future internship programs.*

INTRODUCTION

Kyle Grant made headlines in 2014 for leading a class action lawsuit against Warner Music Group (Warner) for violations of the Fair Labor Standards Act (FLSA).¹ Grant, who dreams of opening his own record label one day, worked for the label for eight months as an unpaid intern.² Unable to afford an apartment of his own during his internship, Grant lived in a homeless shelter to make ends meet, while still hoping to fulfill his dream in the recording industry.³

Unfortunately, Grant's time with Warner was not the experience he had hoped for.⁴ He spent most days doing busy work, which included fetching coffee and lunches for executives, delivering dry-cleaning, and running other errands, from which he learned little about the industry he so deeply wanted to be a part of.⁵ Inspired by his boss's remarks that interns should take advantage of their opportunity and make their efforts stand out by "coming in earlier, leaving later, be[ing] the first one here, be[ing] the last one out," Grant typically spent twelve-hour days at the office.⁶

1. See, e.g., Zach Schonfeld, *Formerly Homeless Unpaid Intern Leading a Lawsuit Against Warner Music*, NEWSWEEK (July 16, 2014, 7:01 AM), <http://www.newsweek.com/2014/08/01/unpaid-internships-warner-music-group-warner-interns-lawsuits-257025.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

Unsurprisingly, this grueling (and importantly, unpaid) work schedule had negative effects on Grant's life outside of work.⁷ Grant was enrolled in classes at the time and his GPA dropped significantly.⁸ Additionally, the homeless shelter had an 8 PM curfew and threatened to kick Grant out on multiple occasions after he did not meet curfew because he had stayed late at the office.⁹ Grant claimed that Warner was insensitive to his other obligations, hassling him when he had to take time off to ensure his food stamp benefits would continue.¹⁰

While a few other interns have told reporters that their time at Warner opened them up to a host of opportunities after their internships, most have complaints similar to Grant's about the program.¹¹ Some have been working in the program at Warner for around three to four years,¹² whereas most internship programs range between six and twelve months.¹³ One intern, who performed hours of tedious data analysis, reported to the media she was entirely ignored by her supervisor.¹⁴ When the intern later inquired about the possibility of becoming a paid Warner employee, the company stated that it would be unlikely since so many other individuals were still so willing to work at the record label for free.¹⁵

Grant spent eight months at the label before Warner fired him for taking an extended lunch break.¹⁶ He claims that he was not even given a scheduled lunch break.¹⁷ He further explained that this particular lunch break was spent in a meeting with the artist and repertoire division of the company to discuss a new band.¹⁸ Grant, upset with how Warner treated him and his fellow interns, filed a collective action lawsuit in the Southern District of New York, alleging that, as interns, they fell within the definition of employees under the FLSA and, thus, Warner was required to pay them minimum wage and overtime compensation.¹⁹ Under the same argument, other unpaid interns have collectively brought suits against the likes of Condè Nast, Gawker, Fox Searchlight Media, MSNBC, and Saturday Night Live among others.²⁰

7. *See id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *See* Nicolas Pologeorgis, *The Impact Unpaid Internships Have on the Labor Market*, INVESTOPEDIA (Oct. 8, 2012), <http://www.investopedia.com/articles/economics/12/impact-of-unpaid-internships.asp>.

14. Schonfeld, *supra* note 1.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *See* FLSA Collective Action Complaint at 6–9, *Grant v. Warner Music Group Corp.*, 2014 WL 4495195 (S.D.N.Y. June 27, 2013) (No. 13 Civ. 4449).

20. *See* Schonfeld, *supra* note 1.

With steadily emerging unpaid intern cases and decisions, the state of the law regarding unpaid internships is rapidly developing. Case law regarding unpaid internships has developed from the Supreme Court's 1947 decision in *Walling v. Portland Terminal Co.*, which provides guidance on how to determine when an unpaid trainee is considered an employee under the FLSA.²¹ Based on this decision, the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL) issued a six-factor test (WHD factors) that private employers must meet when they are not providing interns with compensation.²² The circuit courts have created several different tests from what each regards as the proper interpretation of *Portland Terminal*. The tests also give various levels of deference to the WHD factors. The Court of Appeals for the Fifth and Tenth Circuits, for example, in cases involving unpaid trainees, developed a "totality of the circumstances" test, considering the WHD factors and the economic realities of the situation.²³ The Court of Appeals for the Fourth and Sixth Circuits have developed a "primary benefits" test, analyzing FLSA liability by determining if the program was designed to primarily benefit the employer or the trainee.²⁴ If the primary benefit is for the trainee, the employer is not required to compensate the trainee.²⁵ Recently, in *Glatt v. Fox Searchlight Pictures*, the Court of Appeals for the Second Circuit developed its own version of the primary benefits test, with considerations specifically created to evaluate modern-day unpaid internship programs.²⁶ The decision in *Glatt* has gained national attention, and the Court of Appeals for the Eleventh Circuit has also adopted the Second Circuit's approach.²⁷ Additionally, two cases are currently sitting on appeal in the Seventh and Ninth Circuits in which the district courts followed the *Glatt* reasoning.²⁸

This Note argues that the primary benefits test created by the Second Circuit in *Glatt* does not adequately protect unpaid interns nor does it inform employers of the standards they need to meet to adopt legal unpaid internship programs. The test articulated in *Glatt* incorporates unnecessary factors, which obscure analysis and create a vague standard for employers to follow. Additionally, the test does not encapsulate the policies underlying

21. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–52 (1947).

22. See U.S. DEP'T. OF LABOR, WAGE & HOUR DIV., FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010) [hereinafter WAGE & HOUR DIV., FACT SHEET #71].

23. See, e.g., *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982).

24. See, e.g., *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989).

25. *Id.* at 1209.

26. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 563 (2d Cir. 2015).

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

28. See *Benjamin v. B & H Educ., Inc.*, No. 13-CV-04993-VC, 2015 WL 6164891, at *1 (N.D. Cal. Oct. 15, 2015), *appeal docketed*, No. 15-17147 (9th Cir. Oct. 28, 2015); *Hollins v. Regency Corp.*, No. 1:13-C-07686, 2015 WL 6526964, at *4 (N.D. Ill. Oct. 27, 2015), *appeal docketed*, No. 15-3607 (7th Cir. Nov. 20, 2015).

the FLSA. The courts should adopt a clearer, more rigid test that finds an intern not to be an employee under the FLSA if the following three factors are met: (1) the training is similar to that of which the interns would receive at an educational institution, (2) the program is designed to benefit the intern, and (3) the intern does not displace regular employees. This test is congruent with Congress's intent of only allowing for narrow exceptions to overtime and minimum wage compensation under the FLSA. It also creates a clear legal standard for both employers who wish to utilize internship programs and individuals who wish to participate in them.

Part I of this Note will provide a brief overview of the growing role that unpaid internship programs play in private-sector employment and the current ambiguities that exist in the law regarding compensation. Part II will provide background on the FLSA and explain the Supreme Court's ruling in *Portland Terminal*. This Part will also examine the WHD's six-factor test to determine whether an intern of a private employer is entitled to compensation under the FLSA. Part III will discuss the various tests and case law that the different circuit courts have developed. This Part will also compare the circuit courts that have given greater deference to the WHD factors against those that have started developing a primary benefits test. Particular emphasis will be given to the decision of the Second Circuit in *Glatt* due to its novelty and its particular applicability to modern-day internship programs. Part IV will explain the problems with the *Glatt* test, including its incompatibility with the policies behind the FLSA, its use of extraneous factors that distort analysis, and its particular focus on programs tied to academic institutions. Finally, Part V suggests a rigid three-factor test that the courts should use in determining if unpaid interns are considered employees under the FLSA.

I. UNPAID INTERNSHIPS IN TODAY'S SOCIETY

Internships have become an integral part of the modern-day collegiate and career-recruitment experience. Many employers now expect new recruits to have internship experience before hiring them and sincerely believe that internship experiences are the most important factor when deciding to hire candidates.²⁹ In addition, private companies in various industries have started to use internships as a recruitment tool.³⁰ Because the decisions in upcoming cases alleging that unpaid internship programs

29. Human resource professionals recently ranked internship experience as the most important factor in hiring a candidate. See Joanna Venator & Richard V. Reeves, *Unpaid Internships: Support Beams for the Glass Floor*, BROOKINGS INST. (July 7, 2015, 2:18 PM), <http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/07/07-unpaid-internships-reeves>.

30. Andrew Soergel, *Paid Interns More Likely to Get Hired*, U.S. NEWS (May 5, 2015, 5:30 PM), <http://www.usnews.com/news/articles/2015/05/05/study-suggests-college-graduates-benefit-more-from-paid-internships>.

violate the FLSA will greatly impact the future availability of internship programs, courts should consider the positives and negatives of allowing internship programs to remain unpaid.

Internship programs have recently seen a large expansion and are highly sought after positions.³¹ A recent survey of college seniors from over seven hundred universities shows that 61 percent of students have had internship experience and over half of those internships were unpaid.³² However, college students are not the only ones participating in unpaid internship programs. A range of job-seekers use internships to gain work experience in an industry without being enrolled in any academic program,³³ including a named-plaintiff in the *Glatt* case.³⁴ Additionally, internships are becoming a popular option for older individuals seeking a change in career.³⁵

The outcomes of unpaid internship cases, including *Glatt* on remand, will affect the future availability of these popular programs. For example, publishing powerhouse Condè Nast canceled their unpaid internship program after unpaid interns brought a class action against the company.³⁶ Columbia University has also decided it will no longer give students credit for completing internship programs.³⁷ However, employers and universities should pause before canceling their internship programs and consider the positive aspects of internship programs, which include: allowing participants an opportunity to attain a skill set that will allow them to be successful in their industry of interest,³⁸ which can be vitally helpful when finding paid employment or making future career decisions;³⁹ providing employers with an effective recruitment mechanism for new employees; and reducing training costs.⁴⁰ Because of these benefits, private companies should consider compensating interns rather than canceling the programs so the benefits to both the company and the interns can be reaped without encountering the disadvantages discussed below.

31. *Id.*

32. Venator & Reeves, *supra* note 29.

33. See Nancy Collamer, *Internships Aren't Just for College Kids*, FORBES (Apr. 21, 2014, 11:55 AM), <http://www.forbes.com/sites/nextavenue/2014/04/21/internships-arent-just-for-college-kids/#2715e4857a0b22daa7383903>.

34. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 532 (2d Cir. 2015).

35. See Collamer, *supra* note 33.

36. See Susan Adams, *Why Condè Nast Felt it Had to Stop Using Interns*, FORBES (Nov. 24, 2013, 2:39 PM), <http://www.forbes.com/sites/susanadams/2013/10/24/why-conde-nast-felt-it-had-to-stop-using-interns/>.

37. Zach Schonfeld, *Another Blow to Free Labor, Columbia University Halts Academic Credit for Internship*, NEWSWEEK (Feb. 28, 2014, 12:54 PM), <http://www.newsweek.com/another-blow-free-labor-columbia-university-halts-academic-credit-internship-230554>.

38. See generally Pologeorgis, *supra* note 13.

39. *Id.*

40. *Id.*

While internship programs are a growing recruitment tool and can be beneficial to participants, not providing interns with at least minimum wage compensation for internship programs can have negative effects on the labor market and lead to socioeconomic inequalities. For example, unpaid internship programs can increase unemployment rates by allowing employees to cycle through as unpaid interns, displacing the regular workforce with free labor.⁴¹ It is estimated that unpaid internships save companies approximately \$600 million a year in money they would otherwise pay to regular employees.⁴² While saving private companies money, not compensating interns has long-term negative effects on the economy because without income, interns cannot contribute to economic growth, such as by contributing to social security or accruing capital.⁴³ Additionally, unpaid internships can distort the market view of paid jobs available because individuals will not realize some of these positions are unpaid.⁴⁴ This causes a higher number of individuals to pursue secondary education in a certain field, increasing the demand and cost of the educational institutions, but leaving many of the positions available after graduation to be unpaid.⁴⁵

Critics of unpaid internships also argue that they increase socioeconomic inequalities, since unpaid internships offer opportunities for only those who can afford to work without compensation, which tend to be individuals from higher socioeconomic tiers.⁴⁶ Because not all individuals have family to financially support them through an unpaid internship program, they are at a competitive disadvantage in certain industries that heavily utilize unpaid internship programs.⁴⁷

Courts should take the preceding effects and considerations into account as they determine a standard for the legality of unpaid internship programs. Despite the Second Circuit's decision in *Glatt*, the state of the law remains unsettled. Because *Glatt* was decided on plaintiffs' and defendants' motions for summary judgment, the case was remanded to the district court for further proceedings using the new considerations articulated,⁴⁸ so there has yet to be a determination if the plaintiffs in the case are employees. Additionally, the plaintiffs in two district court cases in California and Illinois, *Hollins v. Regency Corporation* and *Benjamin v. B&H Education, Inc.*, are appealing decisions in which the district court

41. *Id.*

42. Melissa Hart, *Internships As Invisible Labor*, 18 EMP. RTS. & EMP. POL'Y J. 141, 143 (2014).

43. *Id.* at 144.

44. See Pologeorgis, *supra* note 13.

45. See *id.*

46. *Id.*

47. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 218–19 (2002).

48. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 538 (2d Cir. 2015).

adopted the *Glatt* test for determining if interns are employees under the FLSA.⁴⁹ It remains uncertain whether the Seventh and Ninth Circuits will follow *Glatt* or create their own tests based on prior FLSA precedents and interpretations.

The above discussion illuminates the current uncertainty as to an intern's employment status and the importance of creating a clear standard for private employers so internship programs can continue, while limiting their potentially detrimental effects. To create such a standard, the courts must also understand the background of the FLSA and its past interpretations by both the courts and government agencies.

II. FLSA BACKGROUND

Led by President Franklin D. Roosevelt, in a strong push for government control of hours and wages for all workers, especially children, Congress enacted the FLSA in 1938.⁵⁰ Congress, in the declaration of its policy for the FLSA, stated that the "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers"⁵¹ created various burdens to the labor markets and interstate commerce.⁵² In order to ease these burdens and ensure a minimum standard for workers' quality of life, Congress used the FLSA to create federal minimum wage requirements.⁵³ Section 6(a) of the FLSA established the minimum rates employers must pay to employees that are "engaged in commerce or in the production of goods for commerce."⁵⁴

Much debate has formed around whether section 6(a) protects unpaid interns.⁵⁵ The FLSA broadly defines "employee" as "any individual employed by an employer"⁵⁶ and defines "employ" as "to suffer or permit to work."⁵⁷ Section 3 of the FLSA provides exceptions to the definition of employee and, thus, those falling within those exceptions are not subject to

49. See *Benjamin v. B&H Educ., Inc.*, No. 13-CV-04993-VC, 2015 WL 6164891, at *1 (N.D. Cal. Oct. 15, 2015), *appeal docketed*, No. 15-17147 (9th Cir. Oct. 28, 2015); *Hollins v. Regency Corp.*, No. 1:13-C-07686, 2015 WL 6526964, at *4 (N.D. Ill. Oct. 27, 2015), *appeal docketed*, No. 15-3607 (7th Cir. Nov. 20, 2015).

50. Fair Labor Standards Act of 1938 (FLSA), Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)). See also John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 464–66 (1939).

51. FLSA § 2, 29 U.S.C. § 202.

52. *Id.*

53. See 29 U.S.C. § 206.

54. FLSA § 6(a), 29 U.S.C. § 206.

55. See generally Yamada, *supra* note 47.

56. FLSA § 3(e)(1), 29 U.S.C. § 203(e)(1). The Act defines employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization." 29 U.S.C. § 203(d).

57. 29 U.S.C. § 203(g).

the wage and hour requirements stipulated by the Act.⁵⁸ Specifically, the term employee does not include:

[(1)] an individual employed by a public agency, . . . [(2)] any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child or other member of the employer's immediate family, . . . [(3)] any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate government agency, . . . [and (4)] individuals who volunteer their service solely for humanitarian purposes to private non-profit food banks and who receive from the food bank groceries.⁵⁹

Under the FLSA, Congress created the WHD, a group that advises it on information related to the minimum wage, cost of living and employment opportunities, and also gives recommendations for further legislation.⁶⁰ In order to prevent the reduction of certain work opportunities presented to individuals, under section 14(a) of the FLSA, the Secretary of the WHD can "provide for the employment of learners, of apprentices, and of messengers employed primarily in delivering letters and messages" at rates lower than the federal minimum wage.⁶¹ This is achieved by the Secretary of Labor issuing special certificates subject to the limitations provided by the DOL.⁶² This power granted to the WHD indicates Congress's desire to give it some discretion when deciding which individuals are given minimum wage protections under the FLSA.⁶³

A. THE SUPREME COURT'S INTERPRETATION OF EMPLOYEE: *WALLING V. PORTLAND TERMINAL CO.*

While the Supreme Court has yet to decide directly if unpaid interns are considered employees under the FLSA, it provided some guidance through an unpaid trainee case.⁶⁴ In *Portland Terminal*, the plaintiffs brought action against Portland Terminal Co., a railroad company, for not providing them with minimum wage compensation while participating in a practical training program to become yard brakeman.⁶⁵ The training was required for

58. *Id.* § 203.

59. *Id.* § 203(e).

60. *See id.* § 204(d).

61. *Id.* Although beyond the scope of this Note, a different analysis is used to determine if unpaid interns are entitled to compensation at nonprofit organizations and public agencies. Interns engaged by public sector agencies (both state and federal) maybe considered volunteers under regulations enacted by the DOL. *See* 29 C.F.R. §§ 553.100–106 (2010). For nonprofits, FLSA liability may turn on whether the organization is an enterprise engaged in "a common business purpose" under the Act. *See Tony & Susan Alamo Found. v. Sec. of Labor*, 471 U.S. 290, 295–99 (1984) (finding the nonprofit organization to be an enterprise covered by the FLSA).

62. *See* 29 U.S.C. § 214(a).

63. *See generally* Forsythe, *supra* note 50, at 475–76.

64. *See Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

65. *See id.* at 150.

individuals wishing to be employed as a brakeman for the company and it typically lasted seven or eight days without any compensation.⁶⁶ After the training, the trainees were put on a list and subsequently hired as needed.⁶⁷

In determining whether the trainees were to be considered employees of Portland Terminal, the Court started by interpreting the FLSA's definitions to determine whether the trainees working relationships constituted employment.⁶⁸ The Court discussed the exceptions to minimum wage compensation under the FLSA⁶⁹ and explained that the FLSA allows employers to apply for a DOL certificate granting them an exception to the minimum wage requirement for handicapped individuals, learners, and apprentices.⁷⁰ The Court noted this exception might not apply to plaintiff-trainees, because it only applies to "learners who are in 'employment'" and the definition of employment is found elsewhere in the FLSA.⁷¹ Turning to the FLSA's definition of "employ," the Court determined the definition, while very broad, was "obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another." Here, based on the following analysis, the trainees did not fall within the FLSA definition of employees.⁷²

The Court explained that during the training, the trainees observed experienced brakemen and gradually were permitted to work under close supervision.⁷³ The trainees did not, however, replace Portland Terminal's regular employees.⁷⁴ This is because the regular employees were required to stand by and supervise the trainees, and so the trainees' "work [did] not expedite the company business, but [could], and sometimes [did], actually impede and retard it."⁷⁵

Lastly, the Court stated that while the trainees did not fall within one of the FLSA's narrow minimum wage exceptions, the FLSA itself was not intended to be so broad as to require Portland Terminal to pay these trainees minimum wage.⁷⁶ Such a broad interpretation would entitle individuals, such as students, to employee status and, thus, minimum wage.⁷⁷ In enacting the FLSA, Congress did not intend to punish companies for providing potential hires with the same training and instruction they could

66. *Id.* at 149.

67. *Id.* at 150.

68. *See id.* at 152.

69. *See id.* at 151.

70. *Id.* at 151–52. These are the certificates issued by the Secretary of Labor, discussed *supra* in Part II.

71. *Id.* at 152.

72. *See id.*

73. *Id.* at 149.

74. *Id.* at 149–50.

75. *Id.* at 150.

76. *Id.* at 152.

77. *Id.*

receive at a vocational school.⁷⁸ In addition, since Portland Terminal received no “immediate advantage” from the trainee’s work, the Court concluded they were not employees under FLSA.⁷⁹ The WHD would go on to use the reasoning and considerations from *Portland Terminal* to create its own guidelines for determining when unpaid interns are employees under the FLSA.⁸⁰

B. THE WHD’S INTERPRETATION OF EMPLOYEE: FACT SHEET #71

In April 2010, the WHD issued *Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act* (Fact Sheet #71).⁸¹ Its purpose was to provide employers in the “for-profit” private sector with guidance on when interns are covered by the FLSA’s minimum wage and overtime requirements.⁸² Prior to issuing Fact Sheet #71, the WHD had responded to several opinion letters by reiterating the same six-factor test asserted in Fact Sheet #71.⁸³ Fact Sheet #71 provides background on the FLSA, stating that the word “employ” has a broad definition under the FLSA.⁸⁴ Thus, private-sector internship programs will likely be considered employment, unless they satisfy the WHD six factors stated in the Fact Sheet #71.⁸⁵

The WHD interprets *Portland Terminal* as holding “that the term ‘suffer or permit to work’ cannot be interpreted so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction.”⁸⁶ Therefore, companies can create private internship or training programs for individuals without providing compensation so long as such programs serve only the intern’s interest.⁸⁷ In order to fall under the narrow nonemployment-trainee exception, unpaid internships must meet the following six criteria:

78. *Id.* at 152–53.

79. *Id.* at 153.

80. See WAGE & HOUR DIV., FACT SHEET #71, *supra* note 22. While Fact Sheet #71 never directly refers to *Portland Terminal*, the WHD borrows language and reasoning from the Court’s opinion.

81. See *id.*

82. See *id.*

83. See Opinion Letter Fair Labor Standards Act, Dep’t of Labor, 1996 WL 1031777 (May 8, 1996); Opinion Letter Fair Labor Standards Act, Dep’t of Labor, 1995 WL 1032496 (July 11, 1995); Opinion Letter Fair Labor Standards Act, Dep’t of Labor, 1995 WL 1032473 (Mar. 13, 1995); Opinion Letter Fair Labor Standards Act, Dep’t of Labor, 1994 WL 1004761 (Mar. 25, 1994). All letters were inquiries from employers on the application of FLSA to their intern programs. The letters explain that the Supreme Court held that not all trainees are employees and provide the six criteria that determine if interns are employees under the FLSA, as affirmed in Fact Sheet #71. WAGE & HOUR DIV., FACT SHEET #71, *supra* note 22.

84. WAGE & HOUR DIV., FACT SHEET #71, *supra* note 22.

85. *Id.* The WHD focus for the Fact Sheet is only for “for-profit” private-sector companies because the FLSA makes exceptions for certain public sector and nonprofit volunteer programs under section 3(e) as discussed *supra* Part II at n. 61.

86. *Id.*

87. *Id.*

1. The internship, even though it included actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under closer supervision of existing staff;
4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.⁸⁸

The WHD explains that the more an internship program resembles an educational experience, the more likely the program will fit into the exception.⁸⁹ This is especially apparent when there is academic oversight of the program.⁹⁰ In addition, if the skill set that the intern gains from the internship program is transferrable to a variety of different settings beyond that particular employer, it is more likely to be viewed as training, not employment.⁹¹ The employer must not be dependent on the intern and the intern should not be performing the same routine work on a regular basis.⁹²

Fact Sheet #71 also provides that if an employer is substituting or supplementing its workforce with interns, the interns are, at a minimum, entitled to compensation under the FLSA if their hours in a single workweek exceed forty hours.⁹³ In the alternative, it explains that if an intern is participating in job-shadowing exercises in which the intern performs certain tasks under the close supervision of an employee but performs little to no actual work, the internship is likely to be viewed as an educational experience.⁹⁴

The WHD also states that internships from the onset should be for a fixed-time period,⁹⁵ and should not be used by employers “as a trial period

88. *Id.*

89. *Id.*

90. *Id.*

91. *See id.*

92. *Id.* The WHD explains that if an intern is performing routine productive tasks such as clerical work or assisting customers, the fact that they are receiving some benefit from gaining practical work experience and basic skills does not mean they fall within the FLSA nonemployee exception as a result of the employer receiving benefits from the interns' work. *Id.*

93. *Id.*

94. *Id.* The WHD explains that the more the supervision of an intern resembles that of an actual employee, the more likely the internship is to be viewed as employment rather than training. *Id.*

95. *Id.*

for individuals seeking employment.”⁹⁶ Thus, if an intern is hired with the expectation of permanent employment after the internship, the intern is considered an employee under the FLSA.⁹⁷

III. THE CIRCUIT COURTS’ INTERPRETATIONS

While the WHD has used Fact Sheet #71 to assert a clear six-factor test in determining if unpaid interns are employees under the FLSA, not all circuit courts have invoked that test in related cases.⁹⁸ However, many courts have issued rulings dictating when trainees are considered employees for FLSA purposes,⁹⁹ and the Court of Appeals for the Second and Eleventh Circuits have adopted a test with considerations specific to modern-day internship programs.¹⁰⁰

The FLSA decisions in the circuit courts are split, with some giving deference to the WHD factors, and others adopting the primary benefits test. The courts that use the WHD factors, such as the Court of Appeals for the Fifth and Tenth Circuits, do not apply the factors as a rigid checklist, but rather use them when considering the totality of circumstances surrounding the training programs at issue.¹⁰¹ Additionally, courts applying the WHD factors tend to consider the “economic realities”¹⁰² of the situation.¹⁰³

Alternatively, in applying the primary benefits test, courts analyze whether the work done in the program is designed to benefit the employer or the trainee.¹⁰⁴ To determine this, the court considers the nature of the training experience, which includes what type of work the individuals are participating in, and what experience and skills the workers gain from it.¹⁰⁵ The test developed in *Glatt* is an evolution of the primary benefits test that provides factors for evaluating which party received the benefit in the context of modern day internship programs (i.e., if interns receive academic credit).¹⁰⁶ As the explanation of the case law below will show, the court’s use of either the WHD factors or the primary benefits test in analyzing unpaid trainee cases can provide useful guidance for modern day internship programs.

96. *Id.*

97. *Id.*

98. *See, e.g.,* *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989).

99. *See id.*

100. *See* *Schumann v. Collier Anesthesia*, 803 F.3d 1199, 1212 (11th Cir. 2015); *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015).

101. *See, e.g.,* *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993).

102. While many circuit courts say an economic realities test must be considered, none explain what the economic realities test actually involves.

103. *See Reich*, 992 F.2d at 1027.

104. *See McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989).

105. *See generally id.*; *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 520 (6th Cir. 2011).

106. *See Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015).

A. CIRCUIT COURTS USING THE WHD FACTORS

1. The Fifth Circuit

In 1982, the Fifth Circuit decided *Donovan v. American Airlines, Inc.*, and held that trainees of American Airlines were not entitled to compensation under the FLSA because they were not employees.¹⁰⁷ The circuit court approved of the district court's "relative benefits" analysis¹⁰⁸ and also used the WHD factors.¹⁰⁹ The circuit court balanced the benefits that American Airlines received with those that the trainees received.¹¹⁰ Since the trainees did not displace any of American Airlines' regular employees and did no productive work at the training center, the trainees gained a greater benefit in attaining eligibility for employment than they could have attained otherwise.¹¹¹ The court also noted that the case was analogous to *Portland Terminal*; one could simply "change the word 'railroad' to the word 'airline'" and the same conclusion would be reached.¹¹²

Additionally, the court found American Airlines' training program met all six of the WHD factors.¹¹³ While *Donovan* seemed to be a hybrid analysis of both benefits and WHD factors, the following year the Fifth Circuit affirmed that the WHD's factors provided the appropriate test in determining if trainees were employees under the FLSA.¹¹⁴ The court referenced its recent approval of the test in *Donovan* and found the WHD interpretation was entitled to substantial deference by the court.¹¹⁵

2. The Tenth Circuit

The Tenth Circuit, in *Reich v. Parker Fire Protection District*, found that the use of the WHD factors was appropriate to determine if participants in a firefighter academy were employees entitled to compensation under the FLSA.¹¹⁶ In *Reich*, trainees attended the defendant's academy for classes,

107. See *Donovan v. American Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982).

108. *Id.* at 271–272.

109. *Id.* at 273.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 273 (citing the WHD's Wage & Hour Manual, which contains the same six-factor test as provided in Fact Sheet #71).

114. See *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124 (5th Cir. 1983). In *Atkins*, the court found individuals in General Motors' (GM) trainee program were not entitled to employee status and, thus, minimum wage compensation under the FLSA because the program met all of the WHD's criteria. *Id.* at 1128. The court rejected the plaintiffs' argument that GM received the immediate advantage because the two isolated incidents of trainees cleaning fell within the *de minimis* exception. *Id.* at 1129.

115. *Id.* at 1128.

116. See *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993).

tours of the neighborhood, and physical training and simulations.¹¹⁷ Additionally, the trainees helped maintain fire trucks and other firehouse equipment.¹¹⁸ Only once did the trainees respond to an accident, which occurred on the way back to the station from a training exercise.¹¹⁹

While the court thought the WHD factors were the applicable legal standard for FLSA liability, the court rejected the Secretary of Labor's argument for a rigid application requiring all six WHD factors be met.¹²⁰ Rather, the court stated that the test should be applied by considering the totality of the circumstances.¹²¹ It noted that the test was derived almost directly from the Supreme Court's decision in *Portland Terminal*, and that other circuit courts have used the test in their analysis of employment status.¹²² However, a strict application of the test would be inconsistent with *Portland Terminal* because the analysis in *Portland Terminal* does not "support an 'all or nothing' approach."¹²³ Further, the court explained the WHD itself recognized (by looking at its introductory language to the WHD factors) that its factors were meant to be "an assessment of the totality of the circumstances."¹²⁴

In its analysis, the Tenth Circuit looked to its case law precedent regarding independent contractors, noting that in determining employment status, it looked at the totality of the circumstances and to the "economic realities of the relationship."¹²⁵ The Tenth Circuit held the WHD factors were "relevant but not conclusive" in determining whether trainees are employees for FLSA purposes.¹²⁶ The court went on to apply each of the WHD factors to the firefighter trainees,¹²⁷ and found that the curriculum taught in the academy was similar to the educational experience a trainee would receive at any firefighting academy.¹²⁸ As in other cases, important considerations were whether the training program was mainly for the benefit of the trainee and which party received the immediate advantage.¹²⁹ The trainees in *Reich* benefitted from the academy because the attendees acquired skills that would be transferable within the industry as a whole.¹³⁰

117. *Id.* at 1025.

118. *Id.*

119. *Id.*

120. *Id.* at 1026. The Secretary of Labor brought the case against the fire department on behalf of the trainees. *Id.* at 1023.

121. *Id.* at 1027.

122. *Id.* at 1026.

123. *Id.* at 1027.

124. *Id.* at 1026–27.

125. *Id.* at 1026.

126. *Id.*

127. *Id.* at 1027–29.

128. *Id.* at 1027–28.

129. *Id.* at 1028.

130. *Id.* The court rejected the Secretary's arguments that since the program: duplicated trainees' knowledge, allowed them to operate equipment, and created a pool of applicants that the fire department could hire from, the academy was for the benefit of the employer. *Id.*

Additionally, although the firefighter trainees did maintain a fire truck during their training, this was a supervised portion of the program, and when the trainees responded to a single incident during their training period, other qualified firefighters and emergency medical responders were also present.¹³¹

The record in *Reich* clearly demonstrated that the trainees did not replace any regular employees at the fire department,¹³² and the trainees knew they were not going to receive compensation during their time at the academy.¹³³ The only factor of the six the academy did not meet was the fifth, which asks whether there was an expectation of employment upon completion of the program.¹³⁴ Considering that the totality of the circumstances weighed heavily in favor of the trainees not being employees under the FLSA, the court granted the fire department's motion for summary judgment.¹³⁵

B. CIRCUIT COURTS USING THE PRIMARY BENEFITS TEST

1. The Fourth Circuit

In *McLaughlin v. Ensley*, the Fourth Circuit adopted the primary benefits test to determine the applicability of the FLSA to the trainee-plaintiffs.¹³⁶ The Fourth Circuit held that the trainees participating in a five-day orientation program for Kirby Ensley's snack-food distribution company were employees under the FLSA and therefore entitled to compensation.¹³⁷ Both *Portland Terminal* and the Fourth Circuit's own precedent under *Isaacson v. Penn Community Services, Inc.*¹³⁸ established that "when 'the principal purpose of the seemingly employment relationship was to benefit the person in the employee status,' the worker could not be brought under the Act."¹³⁹

131. *Id.*

132. *Id.* at 1029.

133. *Id.*

134. *Id.*

135. *See id.*

136. *See* *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989).

137. *See id.* at 1210.

138. In *Isaacson*, the Fourth Circuit held that a conscientious objector working in the program, in lieu of military service, was not entitled to wage and overtime compensation under the FLSA. The program was created to accommodate conscientious objectors, workers were under supervision during the entire program, and the program was run by a nonprofit corporation for the good of the community. *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1311 (4th Cir. 1971).

139. *McLaughlin*, 877 F.2d at 1209 (quoting *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d at 1308). In his dissenting opinion, Circuit Court Judge Wilkins opined that the district court both correctly applied the WHD factors to the orientation program and correctly concluded that the trainees were not employees. He explained that the six-factor test was consistent with *Portland Terminal's* holding, and it deserved deference under *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The court determined that Ensley received the primary benefit from the orientation program because he had an opportunity to review if potential employees would be successful in the position for free, and his regular employees were aided in their deliveries by the trainees.¹⁴⁰ The most important factor in the court's analysis in determining which party received the primary benefit from the program was the nature of the training experience.¹⁴¹ The court reasoned that the training the individuals received in Ensley's program was very limited: the employees did not receive training comparable to that which they would receive in a vocational school, and many of the skills they learned were so job specific that the skills could not be transferrable to other occupations.¹⁴² Additionally, the court noted that all of the trainees were hired after completing the five-day orientation, suggesting, "they should be considered at-will employees from the beginning."¹⁴³

2. The Sixth Circuit

The Sixth Circuit took a similar approach to *McLaughlin* in a case involving unpaid student work at a boarding school in Tennessee.¹⁴⁴ In *Solis v. Laurelbrook Sanitarium & School, Inc.*, the DOL brought suit against Laurelbrook alleging that the school had violated the FLSA's child labor provisions.¹⁴⁵ The central issue for the court was which standard was appropriate to determine if the students were employees as defined by the FLSA.¹⁴⁶

The court rejected the DOL's argument that the application of the WHD factors was the appropriate standard.¹⁴⁷ It stated that the WHD factors provided a "poor method for determining employee status in a training or educational setting," noting that the factors are very rigid and inconsistent with the Supreme Court's holding in *Portland Terminal*.¹⁴⁸ Instead, the court decided that the ultimate inquiry is which party receives the primary benefit of the program.¹⁴⁹

The court chose to use the primary benefits test in determining if the students were employees,¹⁵⁰ since the test's generality makes it applicable to many different employee-trainee relationships.¹⁵¹ Further, the court

140. *McLaughlin*, 877 F.2d at 1210.

141. *Id.*

142. *Id.*

143. *See id.*

144. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 520 (6th Cir. 2011).

145. *Id.* at 519.

146. *See id.* at 521.

147. *See id.* at 525 (the DOL cited the WHD's Field Operations Handbook, which contains the same six-factor test as provided in Fact Sheet #71).

148. *Id.*

149. *Id.* (the court also rejected the defendant's argument that students at vocational schools can never be considered employees).

150. *Id.* at 529.

151. *Id.*

reasoned the test is able to remedy the problems Congress intended to eliminate with the FLSA.¹⁵² Additionally, the court noted that to determine which party received the primary benefit, it should consider whether the program displaced regular employees and whether the program provided students with an educational experience.¹⁵³

While the school did receive some benefit from the students' work performed at the school, the students received both significant tangible and intangible benefits in gaining hands-on experience and leadership skills that would make them competitive candidates for trade occupations upon graduation.¹⁵⁴ Additionally, the court explained that the students did not displace regular employees, the school would be able to continue functioning without the students' work, and instructors' productive work-time was often disrupted by providing instruction and supervision to students.¹⁵⁵ Thus, the court concluded that the students at the school did not constitute employees under the FLSA.¹⁵⁶

C. THE *GLATT* TEST

1. The Second Circuit

In July 2015, the Second Circuit, in *Glatt v. Fox Searchlight Pictures*, also chose to adopt the primary benefits test and delineated a nonexhaustive list of related considerations to be used in determining if an individual is an employee under the FLSA.¹⁵⁷ The issue on appeal in *Glatt* was to determine under what factual circumstances employers must pay their interns under the FLSA.¹⁵⁸ The plaintiffs argued that the court should adopt an "immediate advantage" test, which finds interns to be employees whenever the employer receives an immediate advantage from work the intern has performed.¹⁵⁹ In the plaintiff's view, the Supreme Court's decision in *Portland Terminal* rested on this determination.¹⁶⁰ Defendants argued for a primary benefits test, which holds that when the interns receive any tangible or intangible benefits from the employer that are greater than their contributions to the employer's operation, an employment relationship is not created under the FLSA.¹⁶¹

The court began its opinion by discussing the Supreme Court's decision in *Portland Terminal* and the WHD factors, which the lower court had

152. *See id.*

153. *Id.*

154. *Id.* at 532.

155. *Id.* at 530.

156. *Id.* at 532.

157. *See Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536–37 (2d Cir. 2015).

158. *Id.* at 535.

159. *Id.*

160. *Id.*

161. *Id.*

relied upon.¹⁶² The Second Circuit declined to use the WHD factors, noting they were too rigid to be consistent with Second Circuit's precedent.¹⁶³ The court explained that the WHD factors were developed from the specific facts in *Portland Terminal* and were therefore difficult to apply in other circumstances.¹⁶⁴

Instead, the court chose the primary benefits test as the applicable standard for the determination of employment status under the FLSA.¹⁶⁵ The primary benefits test has three important features that made it the preferable analytical tool for the Second Circuit: the test focuses on what interns receive for their work, it gives courts the flexibility to examine the economic realities between the parties, and it acknowledges that interns' relationships with their employers must be analyzed in a different context than the typical employer-employee relationship.¹⁶⁶ The court went on to provide its own nonexhaustive seven-factor list to aid district courts in determining employment status under the FLSA (*Glatt* test).¹⁶⁷ The factors are:

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—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given 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 learning.
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.

162. *Id.* at 534–35.

163. *Id.* at 536 (citing *Velez v. Sanchez*, 693 F.3d 308, 326 (2d Cir. 2012)) (internal quotations omitted) (“The determination of whether an employer-employee relationship exists does not depend on ‘isolated factors but rather upon the circumstances of the whole activity.’”). The DOL appeared as amicus curiae in support of the WHD factors in the case. *Id.* at 535.

164. *Id.* at 536.

165. *Id.*

166. *Id.* at 536.

167. *See id.* at 536–37.

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.¹⁶⁸

These considerations require judicial balancing, and no single factor is dispositive.¹⁶⁹ Additionally, as the list is nonexhaustive, courts may consider other relevant factors in appropriate factual circumstances.¹⁷⁰ The court reasoned that its test is faithful to the Supreme Court's decision in *Portland Terminal* because the Supreme Court in no way suggested that any one of the factors in the railroad case would be determinative in another workplace.¹⁷¹ The court also noted that its test reflects a central feature of today's internship programs: "the relationship between the internship and the intern's formal education."¹⁷² The purpose of internships is to integrate what students are learning in the classroom with skill development in the real world.¹⁷³ Lastly, the court stated that this test is better suited for evaluating today's modern internship programs rather than a sixty-eight year old Supreme Court test.¹⁷⁴

2. The Eleventh Circuit

In *Schumann v. Collier Anesthesia*,¹⁷⁵ twenty-five former students of Wolford College brought FLSA violation claims for the work they had done in clinical programs as a part of Wolford's master's program to become certified registered nurse anesthetists.¹⁷⁶ Under Florida law and the Council on Accreditation for Nurse Anesthesia Educational Programs' standards, the students were required to do a minimum of 550 clinical cases to complete the program.¹⁷⁷ The work included completing pre-operation paperwork, setting up anesthesia equipment, administering patient medication, preparing rooms, and monitoring parties through the phases of anesthesia.¹⁷⁸ The plaintiffs appealed from a district court decision declining to use the WHD factors.¹⁷⁹

168. *Id.*

169. *Id.* at 537.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 537–39.

175. *Schumann v. Collier Anesthesia*, 803 F.3d 1199, 1203 (11th Cir. 2015). Previously the Eleventh Circuit had adopted the WHD factors and an "economic realities" test in determining if unpaid interns are employees under the FLSA. *See Kaplan v. Code Blue Billing & Coding, Inc.*, No. 12-12011, 2013 WL 238120, at *2 (11th Cir. Jan. 22, 2013). However, the court made no reference to the previous unpublished opinion.

176. *See Schumann*, 803 F.3d at 1202.

177. *Id.* at 1203.

178. *Id.* at 1204.

179. *See id.* at 1207.

After surveying the existing law and the tests used to determine employee status under the FLSA, the Eleventh Circuit adopted the Second Circuit's *Glatt* test, finding the test to be the appropriate modern-day adaptation of the Supreme Court's factors from *Portland Terminal*.¹⁸⁰ The Eleventh Circuit then went beyond the Second Circuit's decision and gave additional guidance on how the factors should be applied to the facts of a case.¹⁸¹ For example, in programs in which "the clinical training and the academic commitment are one in the same," employers must have a legitimate reason for scheduling training when school is not in session.¹⁸² With regard to the fifth factor (i.e., the internship's duration limited to its useful training), the Eleventh Circuit stated that lower courts should account for the difficulty in designing programs that fit exactly the amount of time necessary to teach interns new skills.¹⁸³ Accordingly, courts should "consider whether the duration of the internship is grossly excessive in comparison to the period of beneficial learning."¹⁸⁴ Finally, the court opined that the result of the analysis may not be an "all-or-nothing determination," and there may be a portion of the internship that primarily benefits the student in addition to a portion of the internship from which the employer takes unfair advantage of the intern.¹⁸⁵

IV. THE PROBLEM WITH *GLATT*

Courts in subsequent employment cases should not adopt the Second Circuit's *Glatt* test because it broadens the purposefully narrow exception to the definition of "employee" under the FLSA. Additionally, the primary benefits test is too ambiguous to aid employers in creating internship programs that comply with the FLSA in part, because the Second Circuit included unnecessary factors further obfuscating the FLSA analysis. Further, the test is too tied to internships stemming from formal education programs to benefit the many different types of internship programs that exist today.

It would be detrimental for other circuits to adopt the *Glatt* test because the test fails to effectuate the purposes of the FLSA. The FLSA defined "employee" in the broadest sense possible,¹⁸⁶ and the Second Circuit enlarges the narrow exception to that definition by changing the analysis from whether individuals are working for their own benefit to analyzing

180. *Id.* at 1212.

181. *See id.* at 1213.

182. *Id.*

183. *Id.*

184. *Id.* at 1213–14.

185. *Id.* at 1214.

186. With regards to the definition of employee under the FLSA, the Supreme Court stated: "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame." *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945).

who is receiving a greater benefit.¹⁸⁷ The Second Circuit has previously acknowledged that the FLSA was intended to be remedial and should thus have the widest possible impact on the economy in order to establish minimum standards in the workplace, strengthen worker's bargaining power, and eliminate unfair competition amongst both employers and job seekers.¹⁸⁸ In *Glatt*, however, the Second Circuit chose to deny FLSA coverage to a great number of people in United States working in unpaid internships, who arguably need FLSA protections the most.¹⁸⁹

Denying employee status to these unpaid interns denies them more than just their right to minimum wage and overtime compensation. For example, the Second Circuit has interpreted most anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, as inapplicable to uncompensated workers.¹⁹⁰ Additionally, the National Labor Relations Act does not cover unpaid staff¹⁹¹ and some courts have ruled that unpaid interns are not covered by the Occupational Health and Safety Act as well.¹⁹² This leaves unpaid interns with minimal statutory protection from workplace hazards and without an ability to collectively bargain for better working conditions.

Additionally, the Second Circuit erred by making job entitlement a consideration in its FLSA analysis. Creating liability for unpaid internship programs that entitle an individual to a job at the end of the program would nullify two of the major benefits of internship programs: (1) that internships can be used as a recruitment tool, and (2) that they are a way to secure future employment.¹⁹³ There is concern that programs where interns are entitled to jobs at the end of the program will allow employers to replace existing compensated-training periods with unpaid internships. This, however, is an unlikely result if courts are ensuring an internship program is similar to the training provided at an educational institution and will not displace regular employees.¹⁹⁴

Finally, the *Glatt* test is too closely tailored to internship programs tied to formal education to be applicable in the wide variety of internship programs that exist today. The second, third, and fourth considerations in the *Glatt* test all reference formal educational programs or academic

187. See *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 531–32 (S.D.N.Y. 2013). District Judge Pauley noted the primary benefits test is not supported by *Portland Terminal's* holding because the Supreme Court relied on findings that the program served *only* the trainees' interests. *Id.*

188. See *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12–13 (2d Cir. 1984).

189. American Federation of State, County and Municipal Employees et al. as Amicus Curiae Supporting Plaintiffs-Appellees at 5, *Glatt v. Fox Searchlight Pictures, Inc.*, 791 F.3d 376 (2d Cir. 2015) (No. 13-4478-CV(L), 13-4481-CV(CON)), 2014 WL 3556311, at *5.

190. *Id.* at 15–16 (citing *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997)).

191. *Id.* at 17 (citation omitted).

192. *Id.* at 19.

193. See generally Pologeorgis, *supra* note 13.

194. See *infra* Part V.

commitments.¹⁹⁵ However, many interns, including one of the named plaintiffs in *Glatt*,¹⁹⁶ are not enrolled in formal education programs during their participation in private-sector internships. Although comparing internship programs to vocational institutions, as the Supreme Court did in *Portland Terminal*, can be helpful for the FLSA analysis, the *Glatt* test's link to academic credit and the internship's resemblance to an academic calendar gives employers a route to improperly broaden the narrow FLSA exception with no benefit to the interns. For example, in an internship where an intern is told her or she will not be compensated or entitled to a job position at the end of the internship, if an employer requires the intern to receive credit from their academic institution and limits the program to a time when school is not in session, the employer has already established that a majority of the *Glatt* considerations fall in favor of an employment relationship. The employer therefore has established a strong case against liability without the need for any analysis of the benefits or training the intern received.

V. SOLUTION: A CLEAR LEGAL STANDARD

Circuit courts should create a clearer standard that parallels the underlying goals of the FLSA. This Note recommends that future courts adopt the first three WHD factors to form a rigid test in determining FLSA liability. Therefore, the ultimate test should be whether the internship is: (1) similar to training that would be given in an educational setting; (2) for the benefit of the intern; and (3) does not displace regular employees. If these criteria are met, the interns should fall outside the scope of "employee" under the FLSA, and thus, employers should not have to provide them with minimum wage and overtime compensation.

While many courts feel the totality of the circumstances should be taken into consideration,¹⁹⁷ a rigid test would provide private employers with a clearer legal standard, enabling them to create internship programs that comply with the three factors. Additionally, individuals participating in unpaid internship programs will have a better understanding of their rights. Although some courts believe a flexible test better suits the vast array of internship programs,¹⁹⁸ this three-factor test is composed of three broad factual inquires under which a variety of different factual circumstances may be considered. A rigid test will not restrain arguments, but will bring the focus back to if the interns are truly working for their own benefit.

Furthermore, while the courts that use the totality of the circumstances test assert that all six WHD factors should be considered in determining

195. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 537 (2d Cir. 2015).

196. See *id.* at 532.

197. See, e.g., *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993).

198. See *Glatt*, 811 F.3d at 536.

FLSA liability, the bulk of their analysis focuses only on the first three factors.¹⁹⁹ Therefore, it seems the first three considerations are, in essence, what the courts are using to determine if employers should pay minimum wage and overtime compensation. For example, the Tenth Circuit in *Reich* based its decision on the first three factors by concluding that: (1) the firefighter curriculum was similar to that which would be taught in any fire academy; (2) the training was for the benefit of the trainees; and (3) the trainees did not displace regular employees; thus, the firefighters were not employees under the FLSA.²⁰⁰ The court determined that the fourth factor, which asks which party is receiving the immediate advantage, should not be an independent factor, but rather is part of the benefit analysis in the second factor.²⁰¹ The court only briefly mentioned the last two WHD factors and denied the trainees' claims, despite the program failing to meet the fifth factor.²⁰²

As to the first recommended factor, since the unpaid trainee exception to the FLSA was created so employers would not have to pay persons working to serve only the worker's own interest,²⁰³ unpaid interns, like students, should gain a skill set they can later utilize in a variety of different workplace settings. As the Court noted in *Portland Terminal*, analysis of whether trainees would receive the same training at a vocational school is useful because no one would suggest that students performing the same coursework and undergoing the same learning experiences are employees of the school under the FLSA.²⁰⁴ A program can still teach policies and practices particular to the employer and be analogous to an educational program, provided that it is also teaching fungible skills that can be used throughout the industry.²⁰⁵

Unpaid internship programs need to be for the benefit of the intern because the Court in *Portland Terminal* only intended to create a very narrow exception to the definition of employees: those who work to serve their own interest.²⁰⁶ While some courts determine which party receives the benefit by weighing the benefits to both sides,²⁰⁷ the real focus of the inquiry should be on the nature of the training.²⁰⁸ For example, interns

199. See, e.g., *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982).

200. See *Reich*, 992 F.2d at 1028 (the court noted that it would consider the immediate advantage factor with the primary benefit factor to determine the relative benefits to both parties as a number of other courts have done).

201. *Id.*

202. See *id.*

203. See WAGE & HOUR DIV., FACT SHEET #71, *supra* note 22.

204. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947).

205. See *Reich*, 992 F.2d at 1029.

206. See *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 531 (S.D.N.Y. 2013).

207. See *Reich*, 992 F.2d at 1028.

208. See generally *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989). The court stated that the nature of the training program would be the most important factor they considered in the FLSA analysis.

should be mastering skills and not repeatedly be performing easily learned tasks (e.g., making photocopies and running office errands). Part of this analysis is determining if the benefits received by interns were incidental to working for the company.²⁰⁹ Paid employees receive additional benefits beyond mere financial compensation (e.g., receiving job references or learning how to use office equipment), therefore internship programs should be designed to give interns more skills and benefits than those received by paid employees to compensate for their lack of comparable monetary compensation.

As to the third factor, allowing companies to hire interns to displace regular employees would undermine the FLSA purpose of ensuring a minimum quality of life for workers.²¹⁰ As the Court noted in *Portland Terminal*, the purpose of trainees is not to “expedite the company business,”²¹¹ and therefore unpaid interns should not be displacing a company’s paid employees. If a private company would have to hire additional employees if not for the work provided by unpaid interns, the interns should receive compensation for the necessary benefit they are providing the company.²¹² In addition, if interns are receiving the same supervision over and feedback on their work as regular employees, it is likely that an employment relationship exists.²¹³ This requires a factual inquiry by the courts to determine if interns are provided more supervision, training, and instruction than that of their paid co-workers to ensure that the interns are not just being used by employers to avoid hiring additional staff.

CONCLUSION

The future of unpaid internship programs in the United States depends on the large number of pending cases involving employee status under the FLSA. Courts must adopt a clear legal standard for liability that effectuates Congress’s intent when it enacted the FLSA. The Supreme Court’s decision in *Portland Terminal* can still provide guidance on what narrow factual situations qualify as exceptions to FLSA’s definition of “employee.” Additionally, while several circuit courts have not yet made determinations on cases involving modern-day internship programs, their analysis in preceding cases involving unpaid trainees helps provide guidance for deciding when interns should be paid for their work or when FLSA violations occur.

While the Second Circuit has recently articulated in *Glatt* a primary benefits test for present-day internship programs, and the test has been

209. See *Glatt*, 293 F.R.D. at 533.

210. See generally *Fair Labor Standards Act of 1938* § 2(a), 29 U.S.C. § 202(a) (2012).

211. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947).

212. See WAGE & HOUR DIV., FACT SHEET #71, *supra* note 22.

213. *Id.*

adopted by other courts, the *Glatt* test is ambiguous and, in certain respects, contrary to the purpose of the FLSA. Instead of adopting *Glatt*'s primary benefits test, courts should establish a clear and rigid legal standard that is more aligned with the FLSA's initial intentions. Courts should only find unpaid interns not to be employees under the FLSA if the first three WHD factors are met. A rigid standard would improve employers' statutory compliance by more easily allowing the creation of programs that do not violate the FLSA. This, in turn, would also help interns better understand the protections they are entitled to under the FLSA, therefore better preventing situations akin to Kyle Grant's from happening in the future. Adopting this standard may clear up some of the pending unpaid-intern litigation and make FLSA liability less ambiguous. Unpaid internship programs should only be allowed when employers develop programs not to displace employees, but to benefit interns by teaching them industry wide skills.

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