

# Glatt v. Fox Searchlight Pictures, Inc.: Moving Towards a More Flexible Approach to the Classification of Unpaid Interns Under the Fair Labor Standards Act

Michael Pardoe

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**GLATT v. FOX SEARCHLIGHT PICTURES, INC.: MOVING  
TOWARDS A MORE FLEXIBLE APPROACH TO THE  
CLASSIFICATION OF UNPAID INTERNS UNDER  
THE FAIR LABOR STANDARDS ACT**

MICHAEL PARDOE\*

Internships have become an integral component of the modern hiring process in the United States.<sup>1</sup> Between 1981 and 1991, the amount of college graduates who participated in an internship during their time in school rose from three percent to thirty-three percent.<sup>2</sup> Recent numbers from a 2015 survey of college graduates indicate that this number has risen to around sixty percent of college students.<sup>3</sup> What could have caused this massive spike in internships? The short answer to this question is that modern internships are increasingly being used as a major hiring tool for both students and employers.<sup>4</sup> College students who participate in an internship or co-op are much more likely to receive job offers right out of college than those who do not.<sup>5</sup> Unfortunately, no internship is created equal. While some indeed pay quite well, around forty percent of internships in the United States are reportedly unpaid.<sup>6</sup> Many view unpaid internships as problematic, however, based on a belief that interns should be considered to be “employees” owed minimum wages under the Fair Labor Standard Act (“FLSA”). A number of current and former unpaid interns

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\* J.D. Candidate, 2017, University of Maryland Francis King Carey School of Law. The author wishes to thank his editors, Skylar Ludwick, Natalie Bilbrough, Michael Cianfichi, and Laura Merkey, and professor Marley Weiss for their thoughtful insight throughout the writing process of this Note. The author would also like to dedicate this Note to his parents, John and Deborah Pardoe, and his sister, Katherine, for all of their love and support.

1. See *infra* notes 2–6 and accompanying text.
2. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 217 (2002) (quoting Dawn Gilbertson, *Glamorous Internships with a Catch: There’s No Pay*, N.Y. TIMES (Oct. 19, 1997), <http://www.nytimes.com/1997/10/19/business/earning-it-glamorous-internships-with-a-catch-there-s-no-pay.html?pagewanted=all>).
3. NAT’L ASS’N OF COLLS. AND EMP’RS, THE CLASS OF 2015 EXECUTIVE SUMMARY 5 (2015), <https://www.nacweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2015-student-survey-executive-summary.pdf> [hereinafter 2015 EXEC. SUMM.] (pointing out that 65.4% of students participated in an internship or co-op prior to graduating from college).
4. See *infra* Part IV.A.
5. 2015 EXEC. SUMM., *supra* note 3, at 5 (noting that 56.6% of students with internships received job offers directly out of college, while only 36.5% of students without internships in college received job offers by graduation).
6. 2015 EXEC. SUMM., *supra* note 3, at 5.

argue that they are due wages as employees under the FLSA.<sup>7</sup> The Department of Labor Wage and Hour Division (“WHD”) has failed to provide a formal agency rule dealing with interns and the FLSA, leading to a circuit split regarding the appropriate test to use to determine whether an intern should be considered an employee for FLSA minimum wage provisions.<sup>8</sup> Needless to say, the increasingly contentious nature of this debate necessitates a universal framework for analyzing unpaid interns under the FLSA. Unpaid interns must not be exploited, and employers should understand what constitutes a permissible unpaid internship scenario.

In *Glatt v. Fox Searchlight Pictures, Inc.*,<sup>9</sup> the United States Court of Appeals for the Second Circuit adopted a modified version of the “primary beneficiary” test as the proper inquiry in ascertaining whether an intern is to be considered an “employee” for the purposes of the FLSA.<sup>10</sup> The Second Circuit concluded that the WHD’s proposed (yet informal) six-factor, all-or-nothing analysis was far too rigid to properly weigh the diverse set of interests involved in each unique internship.<sup>11</sup> In doing so, the Second Circuit properly eschewed the strict “immediate benefit” factor in the WHD’s test.<sup>12</sup> The Second Circuit also correctly added three additional factors to the test, which allow for flexibility in analyzing the unique educational aspects of the modern internship.<sup>13</sup> However, while a flexible analysis is certainly a step in the right direction, the Second Circuit took a step backwards by amending their decision to suggest that courts could choose to analyze internship programs as a whole, rather than on an individualized basis.<sup>14</sup> Furthermore, two of the factors that the Second Circuit incorporated into their “primary beneficiary” test from the WHD’s suggested test create problems under a totality of the circumstances framework.<sup>15</sup> So although the Second Circuit created an excellent framework focusing on the individualized nature of each inquiry, the eventual standard must address these problematic features of the proposed

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7. See *infra* Part I (describing previous unpaid interns’ FLSA claims against their employer).

8. See WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter Fact Sheet #1]; see also *infra* Part II. D.

9. 811 F.3d 528 (2d Cir. 2016).

10. See *infra* Part III.

11. See *infra* Part III.

12. See *infra* Part IV.A.

13. See *infra* Part IV.B.1.

14. See *infra* Part IV.B.2.

15. See *infra* Part IV.C.

analysis to ensure that interns are not improperly exploited by their employers.<sup>16</sup>

#### I. THE CASE

*Glatt v. Fox Searchlight Pictures, Inc.* involves claims asserted by three individuals who served as unpaid interns for Fox Searchlight in New York.<sup>17</sup> Plaintiffs Eric Glatt and Alexander Footman both worked as interns for Fox Searchlight's movie *Black Swan* in New York, while the third plaintiff, Eden Antalik, was an intern at Fox Searchlight's corporate office.<sup>18</sup>

Eric Glatt interned for the *Black Swan* film while pursuing his graduate degree at New York University's School of Education.<sup>19</sup> Glatt worked Monday to Friday from nine a.m. until seven p.m. for around three months.<sup>20</sup> Among other duties, Glatt scanned documents, tracked purchase orders, and maintained employee files.<sup>21</sup> After completing this internship, Glatt took a second internship with the post-production crew.<sup>22</sup> Here, Glatt completed paperwork, ran errands, and drafted brief cover letters.<sup>23</sup> This second internship lasted five months; however, Glatt only worked about two days a week, from eleven a.m. to seven p.m.<sup>24</sup>

Alexander Footman also interned for the movie *Black Swan*, working for about five months in the production department.<sup>25</sup> Footman worked ten-hour days, although he shifted from working five days a week down to three days a week at or about two months into the internship.<sup>26</sup> Footman's responsibilities included setting up office furniture, coordinating lunches, answering phones, photocopying, and making various deliveries.<sup>27</sup> Footman was not enrolled in a graduate program, as he had already graduated with a degree in film studies from Wesleyan University.<sup>28</sup>

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16. See *infra* Part IV.C; *infra* note 54 and accompanying text.

17. 811 F.3d 528, 531 (2d Cir. 2016).

18. *Id.* at 532–33.

19. *Id.* at 532. Glatt's graduate program, however, did not offer him credit for participating in the internship. *Id.*

20. *Id.*

21. *Id.* Additionally, Glatt managed and transported paperwork to various departments. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Footman also took out trash, welcomed and admitted guests into the office, compiled lists of "local vendors," and drafted call sheets for daily use. *Id.*

28. *Id.*

Finally, Eden Antalík worked as an unpaid “publicity intern” in Fox Searchlight’s New York corporate office.<sup>29</sup> For three and a half months, Antalík came to work at eight a.m. and assembled briefs for Fox Searchlight.<sup>30</sup> Additionally, Antalík made travel arrangements, coordinated catering, and shipped documents.<sup>31</sup> She was enrolled in a program at Duquesne University that required an internship to graduate; however, Antalík never actually received the credit.<sup>32</sup>

The three individuals filed a class action complaint seeking minimum wage for the hours worked at these internships according to standards promulgated under the FLSA and the New York Labor Law (“NYLL”).<sup>33</sup> The United States District Court for the Southern District of New York agreed with the plaintiffs and held that the interns had been “improperly classified as unpaid interns.”<sup>34</sup> Additionally, the district court granted Antalík’s motions to certify a class of New York interns within Fox Searchlight.<sup>35</sup> The district court also conditionally granted Antalík’s motion to certify a collective class of nationwide FLSA interns.<sup>36</sup> The defendants, Fox Searchlight Pictures, Inc., timely appealed to the United States Court of Appeals for the Second Circuit.<sup>37</sup>

The Second Circuit considered the issue of “under what circumstances an unpaid intern must be deemed an ‘employee’ under the FLSA and therefore compensated for his work?”<sup>38</sup> In its holding, the Second Circuit rejected the district court’s adoption of the WHD’s proposed analysis, opting instead to develop its own factor test that purportedly analyzes whether the intern or the employer receives the “primary benefit” from the alleged employer-employee relationship.<sup>39</sup> Instead of the WHD’s all-or-nothing standard, the Second Circuit felt that a flexible approach more adequately captures the economic realities of each individual internship.<sup>40</sup>

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29. *Id.* at 532–33.

30. *Id.* at 533. The briefs are referred to as “the breaks.” *Id.* These “breaks” summarize media mentions of various Fox Searchlight Films throughout the media that day. *Id.*

31. *Id.*

32. *Id.* The court did not expand on why the internship did not qualify under Duquesne’s internship requirement. *Id.*

33. *Id.* While the claim began as a class action, all but Antalík abandoned the class claims and proceeded as individuals. *Id.* Antalík proceeded with attempts to certify both a class of New York interns working at Fox, as well as a national FLSA collective. *Id.*

34. *Id.* Thus, the district court granted their motion for summary judgment. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 533–38 (“Instead, we agree . . . that the proper question is whether the intern or the employer is the primary beneficiary of the relationship.”).

40. *See id.* at 536 (holding that the new test allows for a better look into the “economic reality” of the intern’s employment situation).

## II. LEGAL BACKGROUND

Courts have struggled to define the scope of the term “employee” in federal labor law contexts for decades.<sup>41</sup> Part II.A of this Note will introduce Congress’s purpose behind enacting the FLSA.<sup>42</sup> Part II.B will discuss two early Supreme Court decisions, decided prior to the FLSA, in order to contextualize the most prominent factors that the Supreme Court addresses in making “employee” determinations within the context of federal labor statutes generally.<sup>43</sup> Part II.C will introduce *Walling v. Portland Terminal*,<sup>44</sup> the seminal case that heavily influenced the WHD’s suggested six-factor intern-employee test.<sup>45</sup> Finally, Part II.D will illustrate the WHD’s proposed six-factor analysis, as well as the circuit split regarding whether the WHD’s informal Opinion Letter is the appropriate framework for FLSA employee determinations.<sup>46</sup> While some circuits provide a marginal amount of deference to the WHD’s proposed six-factor test, others have rejected the test altogether in favor of what they view as a more “flexible” approach in the “primary beneficiary” test.<sup>47</sup> No court, however, has adopted the WHD test in full.<sup>48</sup>

### A. Congress’s Purpose in Enacting the FLSA

In order to fully appreciate the intern-employee debate facing the Second Circuit in *Glatt*, it is important to first recognize Congress’s purpose in enacting the FLSA. Congress codified the purpose of the FLSA in 29 U.S.C. Section 202(a).<sup>49</sup> Section 202(a) notes that labor conditions that are detrimental to the “maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers” have the potential to create devastating effects on the economy and individual wellbeing.<sup>50</sup> Congress worried that these detrimental conditions fostered unfair competition that could proliferate across industries.<sup>51</sup> This unfair competition would lead to significant labor disputes and interfere with the fair marketing of goods in commerce.<sup>52</sup> President Roosevelt signed the Act

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41. *See generally infra* Part II.

42. *See infra* Part II.A.

43. *See infra* Part II.B.

44. 330 U.S. 148 (1947).

45. *See infra* Part II.C.

46. *See infra* Part II.D.

47. *See infra* Part II.D.

48. *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015) (“[W]hile some circuits have given some deference to the [WHD] test, no circuit has adopted it wholesale . . . .”); *see also infra* Part II.D.

49. 29 U.S.C. § 202(a) (2012).

50. *Id.*

51. *Id.*

52. *Id.*

in 1937 in order to provide “a fair day’s pay for a fair day’s work.”<sup>53</sup> This focus on eliminating the improper exploitation of labor is the central issue fueling the debate regarding the proper framework for making employee determinations under the FLSA.<sup>54</sup>

In enacting the FLSA, Congress created the Wage and Hour Division within the Department of Labor to administer the Act in accordance with these goals.<sup>55</sup> The WHD’s role in administering the FLSA is important to keep in mind, as it is the WHD’s informal interpretation of the appropriate framework for analyzing intern-employer relationships that the Second Circuit expressly rejects in *Glatt*.<sup>56</sup>

*B. Early Non-FLSA “Employee” Determinations Helped to Frame the Relevant Inquiries in Determining Employment Status Under the FLSA*

In order to understand the reasoning behind the WHD’s proposed six-factor test, it is important to first introduce the early Supreme Court cases that formed the basis for the WHD’s informal suggestions.<sup>57</sup> Although the FLSA was signed into law in 1937,<sup>58</sup> there was scant debate surrounding the definition of the term “employee” until around 1947.<sup>59</sup> A few cases, however, which predate the FLSA, frame the scope of the “employee” analysis within the context of federal labor statutes generally.

In *NLRB v. Hearst Publications*,<sup>60</sup> the Supreme Court considered whether newspaper boys were “employees” for the purposes of the National Labor Relations Act.<sup>61</sup> The Supreme Court held that the scope of the term “employee” was “to be determined not exclusively by reference to common-law standards, local law, or legal classifications made for other purposes, but with regard also to the history, context and purposes of the Act and to the economic facts of the particular relationship.”<sup>62</sup> In finding that the newspaper boys *were* employees, the Court took into account a number of considerations, including the regularity of the individuals’ work,

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53. 81 CONG. REC. 4983 (1937) (statement of Pres. Franklin Roosevelt); S. REP. NO. 884-2475, at 2 (1937).

54. See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 527 (6th Cir. 2011) (describing the exploitation of labor as one of the “evils” that the FLSA targets).

55. 29 U.S.C. § 202(a).

56. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2016) (“We decline DOL’s invitation to defer to the test laid out in the Intern Fact Sheet.”).

57. See *infra* Part II.B–C.

58. Susan Harthill, *Shining the Spotlight on Unpaid Law-Student Workers*, 38 VT. L. REV. 555, 557 (2014).

59. *Walling v. Portland Terminal*, 330 U.S. 148 (1947).

60. 322 U.S. 111 (1944).

61. *Id.* at 120.

62. *Id.* at 111.

the workers' reliance on those earnings for primary support, the hours of work supervised, and the sales equipment provided by Hearst to the paperboys for Hearst's benefit.<sup>63</sup>

In *United States v. Silk*,<sup>64</sup> the Supreme Court considered whether a particular group of coal workers should be classified as employees under the Social Security Act. The Court focused on the degree of control over the workers, the skill required to perform the job, and the permanency of the relationship in holding that the workers *were* employees under the Act.<sup>65</sup> Both of the holdings in *Hearst* and *Silk* are important because similar factors came into play once the Supreme Court was faced with its first FLSA employee determination.<sup>66</sup>

### C. Portland Terminal and the Supreme Court's Staunch Approach to the FLSA

While the above cases illustrate some of the early approaches to an "employee" determination under federal labor statutes, the Supreme Court's decision in *Walling v. Portland Terminal Co.*<sup>67</sup> is used as a baseline in making "employee" determinations under the FLSA within the intern/trainee context.<sup>68</sup> The plaintiffs in *Portland Terminal* were trainees working for the defendant's railroad company.<sup>69</sup> This seven or eight day training program was a prerequisite to employment with the company.<sup>70</sup> The trainees would shadow regular employees until they were gradually permitted to take on further responsibilities.<sup>71</sup> However, even if the training program was successfully completed, there was no guarantee of a job at the conclusion of the program.<sup>72</sup> These training programs were unpaid until 1943.<sup>73</sup> Even after this date, the trainees continued to receive well below the minimum wage.<sup>74</sup>

The Supreme Court was tasked with determining whether the trainees should be considered "employees" under the FLSA.<sup>75</sup> If the individuals *were* deemed employees, the railroad company would be compelled to pay

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63. *Id.* at 131.

64. 331 U.S. 704 (1947).

65. *Id.* at 716.

66. *See infra* Part II.C.

67. 330 U.S. 148 (1947).

68. *Id.* Many FLSA "employee" analyses will open with a discussion of this key decision from 1947. *See infra* Part II.D.

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

70. *Id.*

71. *Id.*

72. *Id.* at 150.

73. *Id.*

74. *Id.*

75. *Id.* at 149.

minimum wages for the time spent in the training program.<sup>76</sup> The FLSA, however, provides little clarity in this area. The FLSA defines an “employee” as “any individual employed by an employer.”<sup>77</sup> This vague definition is obfuscated further by the Act’s definition of “employ” as “to suffer or to permit to work.”<sup>78</sup> Faced with such ambiguity, the Court stressed that although the Act was meant to cover those who “contemplated compensation,” the definition of “employ” was clearly 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.”<sup>79</sup>

In their analysis, the Court first noted that the training provided was similar to what one might pay for in a vocational school course.<sup>80</sup> The mere fact that the program created a labor pool, and not guaranteed employees, was not necessarily dispositive, especially considering the free learning experience provided to the trainees.<sup>81</sup> Most importantly, however, the Court noted that the railroad received no “immediate advantage” from these trainees.<sup>82</sup> The fact that the trainees required employee supervision, the Court found, would actually impede the regular employees’ work.<sup>83</sup> Additionally, no regular workers were displaced by the trainee program.<sup>84</sup> The totality of the circumstances of this employment situation led the Court to hold that the trainees were *not* employees.<sup>85</sup> A hasty concurrence from Justice Frankfurter, however, warned that such a narrow conception of the issue “put[s] industry and labor in a legal strait jacket of our own design.”<sup>86</sup> Justice Frankfurter worried that the majority’s rigid approach may have negative implications moving forward.<sup>87</sup>

The Court’s decision in *Portland Terminal* was extremely influential because the WHD’s suggested FLSA employee analysis in the trainee context is based directly upon the factors considered by the Supreme Court

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76. *Id.*

77. 29 U.S.C. § 203(e)(1) (2012).

78. 29 U.S.C. § 203(g).

79. *Portland Terminal*, 330 U.S. at 152.

80. *See id.* at 152–53 (“Had these trainees taken courses in railroading in a public or private vocational school . . . it could not reasonably be suggested that they were employees of the school within the meaning of the [FLSA].”).

81. *See id.* at 153 (noting that the FLSA was not enacted to penalize employers who provided free instructional experience).

82. *Id.*

83. *Id.*

84. *Id.* at 149–50.

85. *Id.* at 150.

86. *Id.* at 154 (Frankfurter, J., concurring).

87. *Id.* at 155 (“This Court has foreclosed every means by which any claim, however dubious . . . can safely or finally be settled, except by litigation to final judgment.”).

in *Portland Terminal*.<sup>88</sup> The informal nature of this proposed test, coupled with the rigid framework suggested by the WHD, has led to a circuit split as to the proper analytical structure to use when determining the employment status of both interns and trainees under the FLSA.<sup>89</sup>

*D. The Modern Circuit Split on the WHD's Suggested FLSA  
"Employee" Analysis*

Since *Walling v. Portland Terminal*, courts have had trouble deciding the appropriate test to apply to intern and trainee employee determinations under the FLSA. The WHD first issued informal guidelines, in the form of a six-factor test, to provide a framework for determining a trainee's employee status under the FLSA.<sup>90</sup> Because these scenarios are so similar to unpaid internships, however, the WHD would often use this same six-factor test in issuing opinion letters on internships.<sup>91</sup> To avoid ambiguity, the WHD eventually issued an informal opinion letter in 2006, which essentially recycled the six-factor trainee analysis to formulate a test dealing directly with internships.<sup>92</sup> Again deriving their interpretation from the relevant factors considered by the Court in *Portland Terminal*, the WHD's informal opinion letter ("Opinion Letter") urges that if all six factors are met, an employment relationship does not exist.<sup>93</sup> According to the WHD's informal Opinion Letter, an intern is *not* an employee if all six of the following factors apply:

1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
2. The internship experience is for the benefit of the intern;
3. The intern does not displace regular employees, but works under close supervision of existing staff;

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88. Gregory S. Bergman, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 569 (2014) (noting that the factors accompanying the WHD's suggested test are derived from *Portland Terminal*).

89. *See infra* Part II.D.

90. *See* *McLaughlin v. Ensley*, 877 F.2d 1207, 1211 (4th Cir. 1989) ("Following *Portland Terminal* the Wage and Hour Division . . . promulgated a six-part test to guide its determination of whether trainees are in fact employees.").

91. *See* Wage & Hour Op. Ltr. No. FLSA2004-5NA (Dep't of Labor May 17, 2004), [http://www.dol.gov/whd/opinion/FLSANA/2004/2004\\_05\\_17\\_05FLSA\\_NA\\_internship.htm](http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm) (applying the six-factor *trainee* framework to analyze a student internship inquiry and noting that the WHD "has consistently applied this test in response to questions about the employment status of student interns"). Thus, while many of the cases in Part II of this Note will involve claims by trainees, the analysis will be analogous in the internship context because the WHD's proposed tests for the two categories are essentially the same. *See infra* Part II.D.1-2.

92. *See* FACT SHEET #71, *supra* note 8.

93. *See id.*; *see also, e.g.*, Bergman, *supra* note 88, at 569 (noting that the factors accompanying the WHD's suggested test are derived from *Portland Terminal*).

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.<sup>94</sup>

The WHD urges an all or nothing, not a totality of the circumstances, approach to this inquiry.<sup>95</sup> However, because the Opinion Letter is not an official agency regulation, courts disagree about whether to adopt the test at all,<sup>96</sup> and this disagreement has led to a circuit split.<sup>97</sup> Regardless of the chosen analysis, the common theme between most of the circuits' decisions shows a clear indication that courts wish to have some flexibility in this area of the law, as opposed to a rigid approach advocated for by the WHD's proposed analysis.<sup>98</sup>

*1. In Rejecting the WHD's Strict Approach, Many Circuits Have Instituted Their Own Versions of a "Primary Beneficiary" Analysis in Place of the WHD's Test*

Many circuits have rejected following the WHD's proposed approach, opting instead to institute their own balancing analysis to determine who primarily benefitted from the supposed employment relationship.<sup>99</sup> For example, the United States Court of Appeals for the Sixth Circuit outlined its approach to FLSA employee determinations in *Solis v. Laurelbrook Sanitarium & School, Inc.*<sup>100</sup> In *Solis*, the WHD decided to pursue potential child labor law violations at a boarding school.<sup>101</sup> The school taught "practical training" to the students, requiring four hours every school day for students to learn various real world skills such as working in a cafeteria.<sup>102</sup> Some of the programs were approved for credit, while others were left up to the discretion of the transferee school.<sup>103</sup> No wages were earned in this endeavor, and the students were not promised jobs after

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94. See FACT SHEET #71, *supra* note 8.

95. See *id.* ("[I]f all of the following six factors are met, an employment relationship does not exist.").

96. See *infra* Part II.D.

97. See *infra* Part II.D.

98. See *infra* Part II.D.

99. See *infra* Part II.D.

100. 642 F.3d 518 (6th Cir. 2011).

101. *Id.* at 519.

102. See *id.* at 520 (noting that students' duties in this regard included working in the cafeteria and the sanitarium).

103. *Id.* at 521.

graduation.<sup>104</sup> The parties disagreed as to whether the WHD six-factor analysis should apply.<sup>105</sup> The Sixth Circuit declined to give deference to the WHD's proposed strict approach to the inquiry.<sup>106</sup> Instead, the Sixth Circuit relied on *Rutherford* to hold that the totality of the circumstances must be used instead.<sup>107</sup>

Similar to the *Glatt* decision, the Sixth Circuit in *Solis* used a “primary beneficiary” type analysis to review the employment relationship.<sup>108</sup> The court's test focused on the “benefits flowing to each party.”<sup>109</sup> In doing so, “[f]actors such as whether the relationship displaces paid employees and whether there is educational value derived from the relationship are relevant considerations that can guide the inquiry.”<sup>110</sup> The court ultimately held that the students received the greater benefit from the relationship based on the fact that the workers spent extra time supervising the students, and because the students received a practical learning experience that made them the “primary beneficiaries” of the relationship.<sup>111</sup>

In a recent September 2015 decision, *Schumann v. Collier Anesthesia, P.A.*,<sup>112</sup> the United States Court of Appeals for the Eleventh Circuit decided to follow the Second and Sixth Circuits in applying the “primary beneficiary” test to inquiries regarding externships in graduate programs.<sup>113</sup> This case is especially significant, considering that the Eleventh Circuit adopted the *Glatt* court's formulation of the “primary beneficiary” test.<sup>114</sup> In *Schumann*, the plaintiffs were enrolled in a masters degree program working to become Certified Registered Nurse Anesthetists (“CRNAS”).<sup>115</sup> Florida law requires CRNAS to complete a clinical portion of education as

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104. *Id.*

105. *See id.* (describing that while the district court applied a version of the “primary beneficiary” test, the Department of Labor Secretary, who originally brought the claim against the defendants, heavily advocated for the court to use the WHD six-factor analysis).

106. *See id.* at 525 (holding that an all-or-nothing approach is inconsistent with the flexible approach that Congress intended the FLSA to allow).

107. *Id.* (citing *Rutherford Food Corp. v. McComb*, 332 U.S. 722, 730 (1947)).

108. *See id.* at 525–26 (pointing out the rigidity of DOL's suggested strict adherence to the six-factor WHD test, and noting that an all-or-nothing approach is inconsistent with the flexible approach that Congress intended in passing the FLSA).

109. *Id.* at 529.

110. *Id.*

111. *Id.* at 530–32. Additionally, the parents testified that they believed the program greatly benefitted their children who were enrolled by providing hands-on experiential learning. *Id.* The Sixth Circuit took this into account in its balancing of the benefits flowing to either party. *Id.*

112. 803 F.3d 1199 (11th Cir. 2015).

113. *See generally Schumann*, 803 F.3d at 1209–14 (rejecting the WHD's Opinion Letter and holding that the Second Circuit's recent decision in *Glatt* represents the appropriate framework for making intern-employee determinations under the FLSA).

114. *See id.*

115. *Id.* at 1202.

a graduation requirement.<sup>116</sup> This clinical component of the CNRA curriculum often required students to work forty-plus hour weeks, readying rooms, stocking carts, and preparing pre-operation forms (often without supervision, even though they had daily evaluations).<sup>117</sup> The students argued that this made them employees under the FLSA.<sup>118</sup> The students claimed that their autonomy on the job, as well as the amount of hours worked per week, displaced the work with which regular employees would otherwise be tasked.<sup>119</sup>

The Eleventh Circuit declined to follow the WHD's six-factor test, holding that these factors amounted to an unnecessarily rigid reduction of the facts of *Portland Terminal*.<sup>120</sup> In moving forward with a "primary beneficiary" approach, the court specifically adopted the factors set forth by *Glatt v. Fox Searchlight Pictures, Inc.*<sup>121</sup> The *Schumann* court expressed skepticism that the entirety of the claim would fall in favor of the employer.<sup>122</sup> The Eleventh Circuit thus remanded the case for further proceedings, and explained that it *could* be the case that a portion of the students' work was properly unpaid, while another portion could qualify the students as employees.<sup>123</sup>

Interestingly, the Eleventh Circuit's rejection of the WHD's proposed analysis arrived merely two years after it provided some deference to the WHD's Opinion Letter. In *Kaplan v. Code Blue Billing & Coding, Inc.*,<sup>124</sup> the plaintiffs were students in MedVance's billing and coding program.<sup>125</sup> In order to graduate, the students were required to complete an externship at Code Blue Billing & Coding, Inc., for which they did not expect or receive pay.<sup>126</sup> The program allegedly lacked formal structure, was repetitive, and provided the students with "little educational benefit," as opposed to the economic benefit that Code Blue Billing & Coding, Inc. allegedly received

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116. *Id.* at 1203.

117. *Id.* at 1203–06.

118. *Id.* at 1204.

119. *Id.* at 1204–05.

120. *See id.* at 1209 (noting that the Wage and Hour Division of the Department of Labor, being an agency, is in no better of a position to interpret the holding of *Portland Terminal* than a court would be).

121. *See id.* at 1209–13 ("Only *Portland Terminal*'s reference to the railroad's receipt of 'no immediate advantage' from any work done by the trainees is not accounted for by the *Glatt* factors.").

122. *See id.* at 1213 (noting that it would be unclear why Collier would be willing to take so many long-term interns if they did not derive an immediate benefit from them, and therefore, the factor is inappropriate).

123. *Id.* at 1214–15.

124. 504 F. App'x 831, 832 (11th Cir. 2013).

125. *Kaplan*, 504 F. App'x at 832.

126. *Id.* at 832–34.

from the students' work.<sup>127</sup> In holding that the students were not employees, the Eleventh Circuit favorably cited the WHD's proposed test, and held that the appropriate analysis required an inquiry into who received the "immediate benefit" in the employment relationship.<sup>128</sup> The court focused on a few educational factors to hold that the defendant did not receive an immediate benefit because the necessary supervision of the students in the programs actually hindered productivity.<sup>129</sup> Finally, the students knew that this work would not entitle them to a job.<sup>130</sup>

In *McLaughlin v. Ensley*,<sup>131</sup> the United States Court of Appeals for the Fourth Circuit also declined to follow the WHD's informal opinion, opting instead to develop a version of the "primary beneficiary" analysis.<sup>132</sup> In *McLaughlin*, the plaintiffs were required to participate in an unpaid weeklong orientation period in order to work as snack food truck salesmen.<sup>133</sup> The orientation, which required about fifty to sixty hours of work, was organized so that trainees would travel ordinary routes with experienced salesmen.<sup>134</sup> While there was purportedly no guaranteed job offer at the conclusion of this period, all who successfully completed the training in the past were in fact offered jobs.<sup>135</sup> The Fourth Circuit first acknowledged that the starting point for determining the appropriate analysis is *Portland Terminal*.<sup>136</sup> However the majority quickly rejected the WHD six-factor test and opted instead to follow existing Fourth Circuit precedent.<sup>137</sup> The Fourth Circuit held that the proper test looks to who principally (or primarily) benefits from the employment arrangement.<sup>138</sup>

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127. *Id.* at 833.

128. *Id.* at 834.

129. *Id.* at 835.

130. *Id.*

131. 877 F.2d 1207 (4th Cir. 1989).

132. *Id.* at 1209.

133. *Id.* at 1208.

134. *Id.*

135. *Id.*

136. *Id.* at 1209.

137. *Id.* The applicable precedent refers to *Wirtz v. Wardlaw*, 339 F.2d 785 (4th Cir. 1964). In *Wirtz*, an employer hired two high school teenagers at his insurance company to work nearly forty-three hour work weeks below minimum wage. *Id.* at 786. The Fourth Circuit found an important factor in the FLSA "employee" determination to be grounded in whether the students were engaged in commerce and also took a look at who benefitted from the labor. *Id.* at 787-88. The Fourth Circuit found that just because he taught the students skills did not mean that they were not employees based on their involvement with interstate company marketing and sales mailings. *Id.* Thus, the defendant was the real beneficiary, and to hold otherwise, the Fourth Circuit noted, "would violate the letter and the spirit of the Act." *Id.* at 788.

138. *McLaughlin*, 877 F.2d at 1209. Additionally, the Fourth Circuit drew support for this interpretation of the appropriate test from its decision in *Isaacson v. Penn Cmty. Serv., Inc.*, 450 F.2d 1306 (4th Cir. 1971). In *Isaacson*, the Fourth Circuit noted that "[T]he rationale of *Portland Terminal* would seem to be that the railroads received no 'immediate advantage' from the

Because the training program in *McLaughlin* specifically displaced regular workers, and because the skills learned were narrowly tailored to the niche “snack-food” industry, the Fourth Circuit decided that the employer principally benefitted from the relationship.<sup>139</sup> Thus, the workers were to be considered employees under the FLSA, and were entitled to wages.<sup>140</sup>

2. *Some Circuits Have Instituted a Totality of the Circumstances Type Framework as Opposed to the WHD’s Suggested All-or-Nothing Approach*

The United States Court of Appeals for the Tenth Circuit, in *Reich v. Parker Fire Protection District*,<sup>141</sup> was faced with an “employee” determination under the FLSA after potential fire department employees filed a claim against their alleged employers.<sup>142</sup> The potential fire fighters, with no pay, underwent a ten-week training program.<sup>143</sup> Although a job was all but guaranteed upon completion, training was a necessary prerequisite to permanent employment.<sup>144</sup> The program involved classroom learning, as well as the maintenance and operation of the department’s equipment.<sup>145</sup> Instead of following the WHD’s rigid adherence to the factors, the Tenth Circuit decided that a totality of the circumstances approach of the proposed factors was more appropriate for these types of inquires.<sup>146</sup> The Court held that the individuals were not employees, because the training was akin to a vocational school’s training program, the maintenance of the equipment was supervised, which hampered regular employee productivity, and the trainees’ presence never removed the need for qualified firefighters at the department.<sup>147</sup>

The United States Court of Appeals for the Fifth Circuit has not expressly rejected the WHD’s proposed factors; however, the circuit has

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trainees’ services . . . the principal purpose . . . was to benefit the person in the employee status.” *Id.* at 1309.

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

140. *Id.*

141. 992 F.2d 1023 (10th Cir. 1993).

142. *Id.* at 1025.

143. *Id.*

144. *See id.* (“Defendant required attendance at its academy not only to ensure that its firefighters knew basic fire science and defendant’s standard operating procedures, but also to build a sense of teamwork and cooperation among the incoming firefighters.”).

145. *See id.* (noting that the maintenance of the equipment involved groups of trainees who staffed a truck that had been attended to by volunteers (the individuals whom the trainees were to replace after the training program was instituted) and keeping the truck stocked and ready).

146. *See id.* at 1026–27 (“Moreover, there is nothing in *Portland Terminal* to support an ‘all or nothing’ approach.”). Additionally, the court used *Skidmore* to hold that the unofficial agency suggestions should not be followed, because an all-or-nothing position is inconsistent with previous WHD interpretations. *Id.*

147. *Id.* at 1027–29.

taken a more flexible approach to the inquiry. In *Donovan v. American Airlines, Inc.*,<sup>148</sup> the court was faced with such a determination in the context of flight attendant trainees selected by the defendant airline company.<sup>149</sup> After being selected, American Airlines required individuals to quit their job to complete a five-week, forty hour-a-week training program.<sup>150</sup> There was no guaranteed offer of employment at the conclusion of the training period.<sup>151</sup> The trainees, however, did *not* supplement or replace regular employee work.<sup>152</sup> After referencing *Portland Terminal*, the Fifth Circuit declined to limit the inquiry to whether an individual works solely for his or her own benefit, noting that if this was the case, then the American Airlines program would be nothing more than an altruistic “pro bono” program of no use to the company at all.<sup>153</sup> The court ultimately decided to weigh both sides’ benefits, holding that the program was a legitimate step towards preparing employees for the job, and the sacrifice made by the individuals was simply a necessary hurdle to employment.<sup>154</sup> The Fifth Circuit concluded their decision by referencing the WHD six-factor test and its derivation from *Portland Terminal*.<sup>155</sup> In citing the WHD’s Opinion Letter, which suggests that “if all six of the criteria are met, no employment relationship exists,” the court found that the trainees did not satisfy any of these criteria and thus reaffirmed their holding on these grounds.<sup>156</sup>

### III. THE COURT’S REASONING

In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit overturned the district court’s grant of summary judgment to the plaintiffs on the issue of whether Glatt and Footman had been improperly classified as interns.<sup>157</sup> The court also overturned Antalik’s motions for class certification with regards to the New York interns, as well as the district court’s conditional certification of the FLSA collective.<sup>158</sup> All three of the

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148. 686 F.2d 267 (5th Cir. 1982).

149. *Id.* at 268.

150. *Id.* at 269.

151. *Id.* at 268.

152. *Id.* at 269.

153. *See id.* at 272.

154. *See id.* (“Trainees make a sacrifice . . . , [b]ut so do all who seek to learn a trade or profession. Centralized training is to American’s advantage, but the airline has no duty to offer training at an inconvenient place.”).

155. *See id.* (classifying the six-factor test as the “Wage and Hour Administrator’s interpretation of *Portland Terminal*”).

156. *See id.* at 273 (“The trainees here are not employees by each of those criteria . . .”).

157. 811 F.3d 528, 536 (2d Cir. 2016).

158. *See infra* notes 181–184 and accompanying text.

claims were remanded for further proceedings under the new “primary beneficiary” test formulated by the Second Circuit.<sup>159</sup>

The Second Circuit first addressed the district court’s determination that Glatt and Footman had been improperly classified as interns during their time working for Fox Searchlight Pictures on the movie *Black Swan*.<sup>160</sup> The Second Circuit noted the ambiguity in this area, as no Supreme Court case had ever definitively addressed the issue of interns with regards to the FLSA.<sup>161</sup> In addition, the Second Circuit recognized that the district court had used the WHD’s proposed six-factor analysis in order to determine the interns’ employment status.<sup>162</sup> The district court found that four of the conditions *were* met by the plaintiffs; however, the final two could not be met.<sup>163</sup> While the WHD’s informal suggestions urged a strict adherence to the six-factor test, the district court took a totality of the circumstances approach in holding that Glatt and Footman were employees.<sup>164</sup> The WHD also appeared in this case as *amicus curiae* in support of the plaintiffs and their proposed factor test.<sup>165</sup> Nevertheless, the Second Circuit declined to follow the WHD’s suggested six-factor analysis derived from *Portland Terminal*, noting that “an agency has no special competence or role in interpreting a judicial decision.”<sup>166</sup> The Second Circuit also declined to adopt the informal WHD test because, as they held, the WHD’s all-or-nothing approach boils down to a “rigid” distillation of the particular circumstances in *Portland Terminal*.<sup>167</sup>

Instead of a rigid approach, the Second Circuit decided that a flexible test was more appropriate in light of the nature of the modern internship.<sup>168</sup> Thus, the court adopted the “primary beneficiary” test, which first considers

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159. *Glatt*, 811 F.3d at 538.

160. *See generally id.* at 533–38 (discussing the issue of whether the interns should be considered employees under the FLSA).

161. *See id.* at 534 (noting that while the Supreme Court decided a 1947 case denying trainees wages under the FLSA, the case does not readily apply to modern internship positions (referencing *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947))).

162. *Id.* at 535. The WHD factors include whether the internship is similar to actual work done by employees, whether the internship is for the “benefit of the intern,” whether the intern displaces regular employees with his work, whether the employer receives an “immediate advantage” from the intern’s contribution, whether the intern is to be offered a job upon completion of the internship, and whether both the employer and the intern understand that the intern is not to be working for a wage. *See* FACT SHEET #71, *supra* note 8.

163. *Glatt*, 811 F.3d at 535.

164. *Id.*

165. *Id.*

166. *See id.* at 536 (quoting *New York v. Shalala*, 119 F.3d 175, 180 (2d Cir. 1997)).

167. *See id.* (noting that this approach is desirable because it focuses on what the intern will receive from the company for his contributions, as well as the flexibility to consider the “economic reality” between interns and employers).

168. *See id.* at 537 (“This approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern’s formal education . . .”).

as a salient feature “what the intern receives in exchange for his work.”<sup>169</sup> The second salient feature of the overall analysis allows for “flexibility to examine the ‘economic reality’ of the relationship as it exists between the intern and the employer.”<sup>170</sup> In order to determine the “economic reality” of an internship in particular, the Second Circuit promulgated its own set of seven factors to consider when applying the “primary beneficiary” test.<sup>171</sup> The non-exhaustive list of relevant factors include:

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.
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.<sup>172</sup>

The Second Circuit felt that this approach adopted flexible guidelines for courts to follow, while continuing to remain true to the Supreme Court’s guidelines set forth in *Portland Terminal*.<sup>173</sup> In determining the “economic reality” of the employment relationship, the Second Circuit reiterated that no one factor is meant to be dispositive, nor is the list meant to be exhaustive.<sup>174</sup> Additionally, the court felt that the test’s focus on the educational aspects of the internship represented the proper inquiry with

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169. *Id.* at 536.

170. *Id.*

171. *Id.* at 536–37.

172. *Id.* at 537.

173. *See id.* (reiterating that the new test better reflects the role of formal education in modern internships).

174. *Id.*

regard to interns.<sup>175</sup> The Second Circuit then remanded for further proceedings based on their new test.<sup>176</sup>

On January 25, 2016, the Second Circuit amended its July decision, presumably to clarify the focus of the “primary beneficiary” test, by including a few additional considerations.<sup>177</sup> While the court reaffirmed their adoption of the “primary beneficiary” test, along with the seven-factor test, the Second Circuit added a third salient feature to the analysis, which:

[A]cknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the educational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job).<sup>178</sup>

The court also noted that because the “economic reality” of the employment relationship is the “touchstone” of the analysis, courts may elect “in certain cases, including cases that can proceed as collective actions, to consider evidence about an internship program as a whole rather than the experience of a specific intern.”<sup>179</sup> The final amendment explicitly states that the “primary beneficiary” test applies only to intern, and not trainee, employment situations under the FLSA.<sup>180</sup>

In the original July 2015 opinion, the Second Circuit also addressed both of Antalík’s class certification claims.<sup>181</sup> Beginning with the motion to certify the New York class of interns in a number of Fox’s divisions, the Second Circuit struck down the district court’s grant of certification to the group on the basis that the “primary beneficiary” test is highly individualized and must be analyzed on a case-by-case basis.<sup>182</sup> Because relevant factors in the new “primary beneficiary” test include the educational benefit derived, the type of training received, and the extent of the time spent at the internship, the Second Circuit felt it would be impossible to adjudicate these claims under the FLSA and the NYLL in a class-action lawsuit.<sup>183</sup> Turning to the conditional certification of the nationwide FLSA collective, the Second Circuit utilized largely the same arguments to determine that those in the collective are also not similarly

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175. *Id.*

176. *Id.* at 538.

177. *Id.* at 536–37.

178. *Id.* at 536.

179. *Id.* at 537.

180. *Id.*

181. *Id.* at 538–40.

182. *See id.* at 538–39.

183. *Id.*

situated, and thus may not be adjudicated in the form of a collective class action.<sup>184</sup>

#### IV. ANALYSIS

In *Glatt v. Fox Searchlight Pictures, Inc.*, the United States Court of Appeals for the Second Circuit invalidated the district court's reliance on the WHD's suggested six-factor test in favor of a more flexible "primary beneficiary" test.<sup>185</sup> While the Second Circuit's adoption of their own factors for the "primary beneficiary" test is not perfect, it is a step in the right direction in an area of law riddled with confusion. The Second Circuit's proposed analysis eschews the dated WHD "immediate benefit" factor from FLSA intern "employee" determinations, a factor that fails to capture the economic reality of a modern intern-employer relationship.<sup>186</sup> At the same time, the Second Circuit also added three important factors to their "primary beneficiary" test, which properly focus on benefits flowing both to and from interns and employers.<sup>187</sup> The recent amendments to the opinion, however, could significantly narrow the flexibility allowed for in these three new factors.<sup>188</sup> Additionally, while the Second Circuit fixed a number of problems with the WHD's suggested analysis, the court improperly included two of the WHD's proposed factors into their "primary beneficiary" test.<sup>189</sup> These factors become problematic both under a flexible approach, as well as when viewed in light of the intimate relationship between internships and future job prospects in today's job market.<sup>190</sup> The eventual standard should adopt this educationally focused "primary beneficiary" approach, absent these problematic WHD factors that made their way into the Second Circuit's analysis.<sup>191</sup>

*A. The Glatt Court Properly Dismissed the WHD's Requirement That an Employer May Not Receive an "Immediate Benefit" from the Work Performed by an Intern*

The Second Circuit was correct in rejecting the WHD's requirement that interns not provide an "immediate benefit" to employers. The Second Circuit's omission of this consideration represents an understanding that both employers and interns should be permitted to benefit from an

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184. See generally *id.* at 539–40 (noting that a nationwide collective does not contain similarly situated class members because it involves a "wider range of experience").

185. See *supra* Part III.

186. See *infra* Part IV.A.

187. See *infra* Part IV.B.

188. See *infra* Part IV.B.

189. See *infra* Part IV.C.

190. See *infra* Part IV.C.

191. See *infra* Part IV.C.

internship, regardless of pay, provided that the experience is mutually beneficial to both parties. The fourth WHD factor queries whether the employer obtains some “immediate benefit” or advantage from the employment relationship.<sup>192</sup> This factor is directly derived from *Portland Terminal*.<sup>193</sup> The WHD’s proposed six-factor test recommends that interns perform “no or minimal work” in order to satisfy the no “immediate benefit” portion of their proposed analysis.<sup>194</sup> While this requirement may have been a relevant factor in trainee or independent contractor FLSA employee determinations, requiring interns to refrain from providing an “immediate advantage” to an employer effectively destroys the modern conception of internships as effective hiring tools.<sup>195</sup>

According to a National Association of Colleges and Employers (“NACE”) survey of recent college graduates, a majority of internships today require interns to perform “core business functions” in one form or another.<sup>196</sup> Furthermore, many feel that internships provide a mutual benefit to both parties.<sup>197</sup> While the student is given the opportunity to receive real world experience, the employer may receive some immediate benefits from the work product and also use the program as a hiring tool.<sup>198</sup> This beneficial give-and-take characteristic of many modern internships

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192. See FACT SHEET #71, *supra* note 8.

193. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947) (“[Because] the railroads receive[d] no ‘immediate advantage’ from any work done by the trainees, we hold that they are not employees within the Act’s meaning.”).

194. See FACT SHEET #71, *supra* note 8 (“[If] the intern performs no or minimal work, the activity is more likely to be viewed as a bona fide education experience.”).

195. See *infra* notes 196–216 and accompanying text.

196. See NAT’L ASS’N OF COLLS. AND EMP’RS, 2010 INTERNSHIP & CO-OP SURVEY 1 (May 2010), [http://www.kstate.edu/ces/conference/documents/ResearchBrief\\_2010Internship\\_Co-opsurvey.pdf](http://www.kstate.edu/ces/conference/documents/ResearchBrief_2010Internship_Co-opsurvey.pdf) (“Interns and co-ops spend the lion’s share of their time engaged in core business functions. On average, less than 3 percent of their time is spent on nonessential functions.”); see also Sarah Braun, *The Obama “Crackdown:” Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281, 295 (2012) (“The WHD’s recommendation, however, that interns perform ‘no or minimal work’ is entirely antithetical to the experiential value inherent in the internship process.”); Deborah C. Brown, *Internships and the FLSA*, 88 FLA. B.J. 53, 56 (2014) (pointing out that the “primary beneficiary” test has been advocated by the “American Council on Education and other college-affiliated industry groups as part of its amicus brief to the Second Circuit in *Glat*”).

197. See Braun, *supra* note 196, at 296 (noting that if internships provide no benefit at all to employers, employers have “absolutely no incentive” to offer internships to students); Jaclyn Gessner, *How Railroad Brakemen Derailed Unpaid Interns: The Need for a Revised Framework to Determine FLSA Coverage for Unpaid Interns*, 48 IND. L. REV. 1053, 1067 (2015) (“Employers find value in new hires with work experience . . . . One study reported that some employers ‘will not consider a candidate for employment who has not completed an internship.’”).

198. See NAT’L ASS’N OF COLLS. AND EMP’RS, 2010 INTERNSHIP & CO-OP SURVEY 1 (May 2010), [http://www.kstate.edu/ces/conference/documents/ResearchBrief\\_2010Internship\\_Co-opsurvey.pdf](http://www.kstate.edu/ces/conference/documents/ResearchBrief_2010Internship_Co-opsurvey.pdf) (“Among respondents, the primary focuses of their programs is to feed their full-time hiring program: Approximately 83 percent of respondents cited this as the primary focus of their internship program.”).

could be destroyed if an intern is prohibited from providing any immediate benefit to the employer. Some argue that a rigid approach properly protects interns;<sup>199</sup> however, a rigid analysis may actually destroy these core educational components that make modern internships so valuable.<sup>200</sup> While the Department of Labor (“DOL”) has remained steadfast in urging the strict application of their six-factor analysis, courts have chipped away for years at the notion that such determinations should be made under an unwaveringly rigid analysis.<sup>201</sup>

With this in mind, and considering the massive rise in the amount of internships participated in every year, it makes little sense to impose a blanket restriction barring *any* “immediate advantage” flowing to the employer.<sup>202</sup> Between 1981 and 1991 the number of students participating in internships throughout college rose from one in thirty-six to one in three; “recent figures set it at two in three or higher.”<sup>203</sup> Sixty-five percent of graduating seniors in 2015 participated in an internship or co-op during their time in school.<sup>204</sup> Even though 40% of college students participated in unpaid internships, only 6.2% of all interns reported dissatisfaction with their experience.<sup>205</sup> Additionally, while 56.5% of students who participated in an internship received at least one job offer, only 36.5% of those with no internship experience received offers.<sup>206</sup> These numbers indicate that obtaining an internship, regardless of pay, provides a more successful path to employment than not doing so.

The DOL’s antiquated six-factor analysis, derived from a 1940s Supreme Court decision dealing with railroad trainees, could not have

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199. See Jessica L. Curiale, *America’s New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1558 (2010) (“If the WHD does not promulgate a rule clearly mandating that the six-factor test be applied in an all-or-nothing manner to determine whether an intern is an employee, courts may continue to find unpaid internships legal under various other tests . . .”).

200. See *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993) (noting that “[there is] nothing in *Portland Terminal* to support an ‘all or nothing’ approach,” and opting instead to view the employment situation under a totality of the circumstances approach); Jaclyn Gessner, *supra* note 197, at 1068 (“While wages offer instantaneous economic relief, the long-term gains from a quality job experience offer more valuable benefits.”).

201. See *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1209 (11th Cir. 2015) (“[W]hile some circuits have given some deference to the [WHD] test, no circuit has adopted it wholesale . . .”).

202. See Gessner, *supra* note 197, at 1056 (“Intern hiring has increased by 2.9, 6.8, 8.5, and 2.7% each year since 2010.”).

203. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 217 (2002) (quoting Dawn Gilbertson, *Glamorous Internships With a Catch: There’s No Pay*, N.Y. TIMES, Oct. 19, 1997, § 3, at 16).

204. 2015 EXEC. SUMM., *supra* note 3, at 5.

205. *Id.*

206. *Id.*

anticipated this role of internships in today's society.<sup>207</sup> Interns should not be discouraged from providing value to the entity for which they are interning; a hands-on learning experience is much more desirable than relegating unpaid experiences to "shadowing" or passively participating in the experience.<sup>208</sup> Furthermore, it is unlikely that companies would bother running long-term internship programs requiring any degree of supervision if they never received any benefits themselves.<sup>209</sup> Accordingly, interns and employers share a mutual interest in eliminating the immediate-benefit bar on intern-employer relationships.

The Second Circuit in *Glatt* recognized this inherent inconsistency in the "immediate benefit" factor, eliminating it from the factors accompanying their "primary beneficiary" test.<sup>210</sup> While the plaintiffs urged the court to analyze the relationship under the "immediate benefit" factor, the Second Circuit felt that a more modern analysis would allow courts additional flexibility in ascertaining the economic realities as they exist between interns and employers.<sup>211</sup>

Many other decisions that incorporate the immediate benefit factor end up failing to capture the true nature of the relationship, further reinforcing the Second Circuit's decision to eliminate it from their "primary beneficiary" test.<sup>212</sup> Consider the Eleventh Circuit's scrutiny in *Kaplan v. Code Blue Billing & Coding, Inc.*, where the court noted, "when a person works for his own advantage or personal purpose—particularly when his work provides no 'immediate advantage' for his alleged 'employer'—he is not an 'employee' under the FLSA."<sup>213</sup> The Eleventh Circuit held that students in an externship at a medical billing company did not provide an "immediate advantage" to their employer.<sup>214</sup> To cabin the discussion in this manner, however, completely ignores the value of the students' work to the employer. There is good reason to believe that if Code Blue consistently

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207. Braun, *supra* note 196, at 293 ("At present, so many internships are likely in violation of the law because they simply cannot satisfy a standard that dates back more than sixty years.").

208. See Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), <https://www.insidehighered.com/views/2010/07/13/aoun> (noting that shadowing represents "a pale imitation of true experiential learning").

209. See *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1213 (11th Cir. 2015) ("[W]e find it difficult to conceive that anesthesiology practices would be willing to take on the risks, costs, and detriments of teaching students . . . without receiving some benefit for their troubles.").

210. See *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528, 536 (2d Cir. 2016) ("[T]he [WHD six-factor] test is too rigid for our precedent to withstand.").

211. See *id.* at 537–38 ("This approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education.").

212. See Gessner, *supra* note 197, at 1065 ("The current legal test makes it nearly impossible for an employer to offer a legal, unpaid internship, because it fails to recognize the many benefits the internship offers. A more flexible test that recognizes the benefits offered by internships is needed to resolve this problem.").

213. 504 F. App'x 831, 834 (11th Cir. 2013).

214. *Kaplan*, 504 F. App'x at 835.

allowed externs to complete their clinical requirement at the company, year after year, then the students must have provided some immediate benefits to justify the training and supervision costs.<sup>215</sup> Thus, a more flexible balancing test would allow courts to properly weigh these benefits flowing to and from either side.<sup>216</sup>

*B. The Second Circuit Correctly Added Educationally Focused Factors to the Analysis, However, the Court Erred in Suggesting that Internship Programs Should be Reviewed as a Whole*

A focus on the educational nature of each internship will better allow courts to ascertain the true economic reality of the unique employment situation of each internship. Some commentators express concerns over the Second Circuit's decision to vacate the interns' victory in order to employ a flexible approach, worrying that a flexible approach provides significant advantages to employers in FLSA "employee" determinations.<sup>217</sup> However, the Second Circuit's proposed factors accompanying their "primary beneficiary" test include three additional modern educational considerations into the "primary beneficiary" test.<sup>218</sup> These added considerations are important add-ons; the factors appear to emphasize the need for an individualized review of the circumstances underlying each intern-employer relationship.<sup>219</sup> The "individualized" nature of the added factors are also what makes the Second Circuit's January 2016 amendments to the decision

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215. See Braun, *supra* note 196, at 295 ("While . . . the internship experience is for the benefit of the intern . . . it is a bit of a stretch to expect a company to provide an internship and receive absolutely no benefit whatsoever in return.").

216. See Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 537 (2d Cir. 2016) ("Applying these considerations requires weighing and balancing all of the circumstances."); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011) (hypothesizing that the "primary beneficiary" test will tease out the benefits to each party in accordance with the flexible approach required by the FLSA); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993) (recognizing that employee determinations under the FLSA in other contexts are not subject to rigid tests, but under a totality of the circumstances approach).

217. See Rebecca M. Lopez, *Second Circuit Establishes 'Primary Beneficiary' Test to Determine Whether Interns Are Employees Covered by the FLSA*, NAT'L L. REV. (July 8, 2015), <http://www.natlawreview.com/article/second-circuit-establishes-primary-beneficiary-test-to-determine-whether-interns-are> ("Although Glatt represents a victory for employers, for-profit employers must still be cautious when engaging unpaid interns and structuring their workplace duties."); see also Noel P. Tripp, *Second Circuit Holds 'Primary Beneficiary' Test Is Standard to Determine Employee Status of Unpaid Interns; Likely Dooms Any Unpaid Intern Class and Collective Actions*, NAT'L L. REV. (July 2, 2015), <http://www.natlawreview.com/article/second-circuit-holds-primary-beneficiary-test-standard-to-determine-employee-status#sthash.HrmonJZ0.dpuf>. ("Employers obtained a clear victory in these cases . . .").

218. See Glatt, 811 F.3d at 539 (laying out the new seven factors accompanying the "primary beneficiary" test and noting that they reflect the need for a "highly context-specific" and educationally focused inquiry); see also *supra* Part III (discussing the new factors formulated by the Second Circuit to accompany the "primary beneficiary" test).

219. See *id.* at 537 ("Applying these factors requires weighing and balancing of all the circumstances.").

so perplexing.<sup>220</sup> The amendments suggest that an internship program should be viewed as a whole, and not on an individualized basis, effectively nullifying the benefits of a “flexible” inquiry.

It is first worth noting that a number of the factors introduced by the *Glatt* court are undoubtedly derived from the WHD’s proposed six-factor analysis.<sup>221</sup> This is important because, as will be explained later, two of the borrowed factors become part of the problem with the Second Circuit’s new test.<sup>222</sup> The borrowed factors include whether the intern clearly expects to be compensated, whether the intern’s work complements or displaces regular employees, the extent to which the training received is akin to that which would be given in an educational environment, and the extent to which interns understand that they are not necessarily entitled to a paid position at the conclusion of the experience.<sup>223</sup> However, the *Glatt* court goes further and adds three more factors specifically designed with an educational focus in mind.<sup>224</sup>

1. *The Educationally Focused Factors Properly Complement a Flexible “Primary Beneficiary” Framework*

The first of the new factors asks whether the experience is tied to the intern’s “formal education program by integrated coursework or the receipt of academic credit.”<sup>225</sup> This factor properly reflects the reality of many internships in today’s society, because offering credit for unpaid internships may sometimes be the only way that certain companies, government organizations, or government agencies can afford to provide internship experiences at all.<sup>226</sup> Many colleges provide accompanying credit or coursework so that the student may earn credit for the work performed at their internships.<sup>227</sup> Courts should take this into consideration, because precluding unpaid internships that otherwise comply with credit or

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220. See *supra* notes 177–180 and accompanying text (discussing the recent amendments to the *Glatt* decision).

221. See *infra* notes 222–223 and accompanying text.

222. See *supra* Part IV.C.

223. Compare *Glatt*, 811 F.3d at 537 (listing out the seven factors for the “primary beneficiary” test to be scrutinized according to the totality of the circumstances), with FACT SHEET #71, *supra* note 8 (proposing an all-or-nothing six-factor analysis to be used in FLSA “employee” determinations within the internship context).

224. *Glatt*, 811 F.3d at 537. Factors three, four, and five of the seven factors proposed by the Second Circuit to accompany the “primary beneficiary” test are geared towards an individual, educationally focused analysis. *Id.*

225. *Id.*

226. See Gessner, *supra* note 197, at 1069–70 (pointing out that if unpaid internships are completely disallowed by the FLSA, many employers may be precluded from providing internships altogether).

227. See Braun, *supra* note 196, at 298 (noting that colleges have added a credit component to many unpaid internships in an attempt to “legitimize” them to the DOL).

coursework requirements would reduce the number of otherwise valuable internship programs simply because the internships are unpaid.<sup>228</sup> Additionally, suggesting that courts examine the link between college credits provided and the internship experience will encourage colleges to continue offering a wider variety of internships—internships that might not be available as a result of the chilling effect of a more rigid analysis under the WHD’s proposed factors.<sup>229</sup> At the same time, a flexible factor test allows courts the leeway to analyze internships held by non-students because courts will be permitted to disregard formal education factors and focus on other factors.<sup>230</sup> For example, if a non-student internship is being scrutinized, a court may nonetheless focus on the second factor, which asks the extent to which the internship provides *similar* training to that which would be given in an educational setting.<sup>231</sup> Thus, a court could still analyze an unpaid internship held by a non-student in an effective manner. This scenario speaks to the one of the many benefits of a flexible analysis.

The second new *Glatt* factor looks at the extent to which the internship “accommodates the intern’s academic commitments by corresponding to the academic calendar.”<sup>232</sup> This too will assist courts in discerning educationally beneficial unpaid internships versus exploitative ones, because the factor suggests that questions *should* arise whenever the link between the academic component and the internship experience becomes tenuous.<sup>233</sup> This consideration will likely encourage courts to analyze the unique educational aspects of each internship in order to determine whether it is a bona fide experience tied to credit received at school, or an exploitative internship.

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228. See Aoun, *supra* note 208 (“However, just the threat of increased regulation could have a chilling effect on the willingness of employers to offer internships—paid or unpaid.”); see also Joseph Aoun et. al., *Letter from University Presidents to Department of Labor*, CHRONICLE (Apr. 28, 2010), [https://chronicle.com/items/biz/pdf/FINAL\\_US%20Department%20of%20Labor%20letter.pdf](https://chronicle.com/items/biz/pdf/FINAL_US%20Department%20of%20Labor%20letter.pdf) (“The Department’s enforcement actions and public statements could significantly erode employers’ willingness to provide valuable and sought-after opportunities for American college students.”).

229. See Braun, *supra* note 196, at 304 (suggesting that colleges could require employers to provide comprehensive descriptions of the internship experiences, and they could monitor the internships throughout in order to ensure that they remain focused and educationally stimulating); see also Aoun, *supra* note 208 (describing the chilling effect of threatening unpaid internships if such internships are subjected to the DOL’s rigid analysis).

230. See Glatt, 811 F.3d at 537 (laying out the seven-factor analysis accompanying the primary beneficiary analysis).

231. *Id.*

232. *Id.*

233. See Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1213 (11th Cir. 2015) (“[W]here the clinical training and the academic commitment are one and the same, this consideration must account for whether a legitimate reason exists for clinical training to occur on days when school is out of session.”).

The final new factor introduced by the Second Circuit into their “primary beneficiary” test analyzes “the extent to which the internship’s duration is limited to the period in which the internship provides the intern with beneficial learning.”<sup>234</sup> This factor implies that internships must be cabined within a reasonable time frame so as to maximize the educational experience, while minimizing the risk of employer exploitation of interns.<sup>235</sup> The recent Eleventh Circuit decision adopting the “primary beneficiary” test, *Schumann v. Collier Anesthesia, P.A.*, helps to clarify this prong of the analysis.<sup>236</sup> In adopting the Second Circuit’s approach, the Eleventh Circuit held that courts must sometimes focus on “whether the duration of the internship is grossly excessive in comparison to the period of beneficial learning.”<sup>237</sup> As some commentators note, this means that the court will look to see whether the internship runs longer than “absolutely necessary” to accomplish the intended experiential goals.<sup>238</sup> This approach is desirable because it takes into account the nuances involved in each unique internship experience. Did the intern spend six weeks learning and using valuable skills, and then the next six weeks learning nothing new? If so, it could mean that the employer improperly exploited the unpaid intern during those last six weeks. However, while these added factors allow for a great deal of flexibility, the Second Circuit’s recent amendments to the decision open a back door that could allow courts and employers to circumvent the flexible components of the analysis entirely.<sup>239</sup>

2. *The Second Circuit Narrowed the Flexibility of Its “Primary Beneficiary” Test by Suggesting That Internships Should Be Viewed as a Whole, Not on an Individualized Basis*

While the new factors promulgated by the Second Circuit appear to advocate for an individualized inquiry into intern-employer relationships, its recent January 25, 2016, amendments to the original opinion suggest otherwise.<sup>240</sup> Among other amendments, the Second Circuit added that courts may choose to “consider evidence about an internship program as a

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234. *Glatt*, 811 F.3d at 537.

235. *Schumann*, 803 F.3d at 1213–14 (noting that while designing internships is not an “exact science,” the duration of the internship should comport with the “goals of the internship”).

236. *Id.*

237. *Id.*

238. See Brian S. Cousins et al., *Eleventh Circuit Adopts and Clarifies “Primary Beneficiary” Test for Unpaid Interns Under the FLSA*, DENTONS (Oct. 5, 2015), <http://www.dentons.com/en/insights/alerts/2015/september/30/eleventh-circuit-adopts-and-clarifies-primary-beneficiary-test-for-unpaid-interns-under-the-flsa> (“The [*Schumann*] court therefore rejected a quantitative approach . . . adopting instead a qualitative approach of looking at the nature of the intern’s daily schedule.”).

239. *Glatt*, 811 F.3d at 537.

240. See *supra* notes 177–180 and accompanying text.

whole rather than the experience of a specific intern” in analyzing the “economic realities” of the employment relationship.<sup>241</sup> These recent amendments obfuscate the primary virtue of the “primary beneficiary” test by placing unreasonable constraints on what was an otherwise flexible inquiry.

By permitting courts to disregard individualized aspects of each internship and allowing for a review of internship programs “as a whole,” the Second Circuit has created an avenue for courts to effectively disregard the “economic reality” of an intern-employer relationship.<sup>242</sup> In *Glatt*, for example, one of the plaintiffs had already graduated from school; he participated in the internship on his own accord.<sup>243</sup> The other plaintiff was a current graduate student.<sup>244</sup> Both performed different functions as interns, and both were in vastly different educational situations.<sup>245</sup> To allow courts to disregard the educational experiences of each individual intern would mean that a court could completely disregard the new, educationally focused factors promulgated above.<sup>246</sup> In fact, this is what the Second Circuit seems to suggest.<sup>247</sup> In their final textual amendment, the Second Circuit explains that the purpose of internships is to tie in coursework with real world “skill development.”<sup>248</sup> However, the court adds, “unlike the brakemen . . . in *Portland Terminal*, all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education.”<sup>249</sup>

This view grossly oversimplifies the new educational components of the Second Circuit’s own proposed factor test. Why introduce factors urging courts to examine the link between the internship and credits or coursework, or the “extent to which the internship . . . [corresponds] to the academic calendar,” when these distinctions can be simply disregarded in favor of a generalized view of the internship as a whole?<sup>250</sup> By allowing courts to circumvent the very framework touted as “flexible,” the Second Circuit has made it easier for employers to satisfy the “primary beneficiary”

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241. *Glatt*, 811 F.3d at 537.

242. *Id.*

243. *Id.* at 532–33.

244. *Id.* at 532.

245. *See id.* at 532–33 (describing the tasks assigned to each plaintiff during their internships at Fox Searchlight Pictures, Inc.).

246. *See supra* Part IV.B.

247. Practical Law Labor & Employment, *Second Circuit Amends Fox Searchlight Decision on Unpaid Internships*, WESTLAW (Feb. 1, 2016), <http://us.practicallaw.com/w-001-3948> (noting that the amendments differ from the July 2015 decision by holding that the “primary beneficiary” analysis “focuses on the internship program as a whole, rather than each individual intern’s experience”).

248. *Glatt*, 811 F.3d at 537.

249. *Id.* at 537–38.

250. *Id.* at 537 (laying out the proposed factors accompanying the “primary beneficiary” test).

framework, even if the program is noncompliant.<sup>251</sup> While the Second Circuit continues to praise its test for its flexibility, the recent amendments raise significant doubts as to the test's true flexibility in its practical application.<sup>252</sup>

*C. The Second Circuit's Adoption of Two Factors from the Wage and Hour Division's Six-Factor Analysis Also Becomes Problematic Under a Flexible, Totality of the Circumstances Approach*

The Second Circuit's conception of the "primary beneficiary" analysis also creates worries regarding the boundaries to set for a flexible view of the FLSA, an Act once said to apply broadly to set "minimum standards in the workplace in order to eliminate unfair competition both among employers and also among workers looking for jobs."<sup>253</sup> The Second Circuit also recognized the problems associated with such a flexible test, noting that, "although the flexibility of the "primary beneficiary" test is primarily a virtue, this virtue is not unalloyed."<sup>254</sup> Thus, the *Glatt* court decided to implement a few of the WHD's proposed factors accompanying the "primary beneficiary" test in order to properly cabin the discussion within the educational context.<sup>255</sup> However, two of the repurposed factors from the WHD's rigid conception of the appropriate test regarding expectations of compensation and entitlement to a job create problems under the Second Circuit's flexible "primary beneficiary" analysis.

The first suspect factor that the Second Circuit borrowed from the WHD test asks whether the intern and employer clearly understand that there is no expectation of compensation.<sup>256</sup> While this consideration seems intuitive when viewed under the WHD's all-or-nothing analysis, it becomes inherently problematic when placed within a totality of the circumstances analysis. Under a totality of the circumstances framework, one could conceive of a scenario where an intern reasonably expected payment, and

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251. Robert S. Whitman et al., *Second Circuit Leaves Interns in the Cold—Again*, MONDAQ (Jan. 28, 2016), <http://www.mondaq.com/unitedstates/x/461896/employee+rights+labour+relations/Second+Circuit+Leaves+Interns+In+The+ColdAgain> (“[These amendments] may render the specific experiences of a named plaintiff less important in the overall ‘primary beneficiary’ analysis and make it easier for an employer to satisfy the test even if a particular manager did not administer a compliant program.”).

252. See *Glatt*, 811 F.3d at 536 (praising the “primary beneficiary” test for its “flexibility to examine the economic reality as it exists between the intern and the employer”).

253. Curiale, *supra* note 199, at 1556.

254. *Glatt*, 811 F.3d at 536.

255. See *id.* at 537 (stressing that the “central feature” of the modern internship is the “relationship between the internship and the intern’s formal education”).

256. *Id.* at 537; FACT SHEET #71, *supra* note 8.

the court could still find that the intern was not an employee.<sup>257</sup> The notion that one could accept a position expecting payment, yet still be denied “employee” status based on the “totality of the circumstances,” is problematic in light of the purposes of the FLSA laid out in *Walling v. Portland Terminal*.<sup>258</sup> In *Portland Terminal*, the Supreme Court stated that the FLSA “was [enacted] to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”<sup>259</sup> While educational considerations lend themselves to flexible interpretations, an expectation of payment should suffice as clear-cut evidence of an employment relationship. There is no place for this factor within a totality of the circumstances framework.

The other problematic factor adopted from the WHD’s proposed test by the Second Circuit essentially requires that “[t]he trainees or students [not be] necessarily entitled to a job at the conclusion of the training period.”<sup>260</sup> This means that under the WHD test, a legitimate unpaid internship likely may not exist if the intern is promised any sort of job prospect at the conclusion of the internship. However, as noted earlier, this is entirely antithetical to the modern realities of internships in our society.<sup>261</sup> As the NACE 2015 Student Survey notes, between thirty-three and fifty percent of students in unpaid internship positions can expect offer rates for a full time job.<sup>262</sup> Furthermore, the cost of hiring former interns is about one-third the cost of recruiting and training new hires.<sup>263</sup> Additionally, a survey of over 65,000 undergraduate students found that over half of those surveyed identified an opportunity for full-time employment as one of the top three things that they would like to get out of an internship.<sup>264</sup> To leave this factor in place suggests that courts could invalidate unpaid internships based solely on their promise of a job.<sup>265</sup> In reality, as long as the educational merit of the internship indicates that the

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257. *Glatt*, 811 F.3d at 537 (noting that “no one factor is dispositive”). However, under the WHD’s suggested test, the all-or-nothing test would compel an employment determination if the individual took the internship with the justified expectation of payment. See FACT SHEET #71, *supra* note 8.

258. See *supra* Part II.B.

259. *Walling v. Portland Terminal*, 330 U.S. 148, 152 (1947).

260. *Glatt*, 811 F.3d at 537; FACT SHEET #71, *supra* note 8.

261. See *supra* Part IV.A.

262. 2015 EXEC. SUMM., *supra* note 3, at 5. The exact rate depends on whether the position was for a for-profit organization, a private organization, or a state and local government internship position. *Id.*

263. David Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 241 (1998).

264. Chris van Mossevelde, *The Value of Internship Programs*, UNIVERSUM (Jan. 14, 2014), <http://universumglobal.com/articles/2014/01/the-value-of-internship-programs/>.

265. See Gessner, *supra* note 197, at 1076 (noting that in order for the employer to comply with this requirement, it seemingly “must not promise its interns future employment”).

intern is the primary beneficiary of the experience, potential job prospects should be irrelevant because they only add value to the experience. And because those surveyed from unpaid internships reported a thirty to fifty percent job offer rate, a consideration that could wipe out potential job opportunities runs contrary to the FLSA's goal to *increase* employment opportunities.<sup>266</sup>

Considering the potentially negative implications of these two erroneous WHD factors in the Second Circuit's "primary beneficiary" test, it would be unwise for the Supreme Court to adopt the Second Circuit's test as it stands today. However, a similar decision clarifying the scope of or omitting these problematic factors could be a perfect opportunity for the Supreme Court to clear up the immense confusion in this area of law.<sup>267</sup> A Supreme Court decision is certainly not the only option; the Department of Labor Wage and Hour Division could promulgate formal agency regulations through their rulemaking authority.<sup>268</sup> Finally, Congress could specifically amend the statute to include a clear standard for analyzing internships under the FLSA.<sup>269</sup> Regardless of the method, a formal standard should be established in order to clear up confusion in this area of the FLSA. While the Second Circuit took steps in the right direction, the addition of improper WHD factors, in addition to the confusion surrounding the recent amendments, means that its conception of the "primary beneficiary" test is not fit for adoption. Beneath these erroneous features, however, lies a great framework for future courts to apply and expand.

## V. CONCLUSION

In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit declined to follow the Department of Labor Wage and Hour Division's proposed framework for making intern-employee determinations under the FLSA, electing instead to develop a more flexible "primary beneficiary" test.<sup>270</sup> The new test properly eschewed rigid WHD factors, such as the

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266. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947) (pointing out that one of the purposes of the FLSA is to "[I]ncrease opportunities for gainful employment"); see also 2015 EXEC. SUMM., *supra* note 3, at 5 ("Offer rates for students in unpaid positions ranged from 33.8 percent to 50.0 percent . . .").

267. See Bergman, *supra* note 88, at 585–89 (advocating for a Supreme Court standard to settle the confusion on the proper FLSA intern employee inquiry).

268. See Curiale, *supra* note 199, at 1548–59 (advocating for the WHD to utilize its formal rulemaking authority under the FLSA to codify a concrete standard for making intern-employee determinations).

269. See *id.* at 1549 (noting that though unlikely, Congress could address the unpaid internship problem). This approach is unlikely because Congress generally writes broad statutes and does not amend the statutes regarding very specific issues. *Id.* Furthermore, Congress specifically delegated power to the WHD to administer the FLSA through rules and regulations. *Id.*; see also *supra* Part II.A.

270. See *supra* Part III.

requirement that interns provide no immediate benefit to the employer, in favor of a totality of the circumstances approach to the analysis.<sup>271</sup> The Second Circuit also correctly added three additional factors into their “primary beneficiary” test in order to shift the inquiry towards an educationally driven approach.<sup>272</sup>

However, while these additions are a step in the right direction, the Second Circuit tainted the utility of these factors with its recent amendments adding limiting language to the test.<sup>273</sup> On the other end, the new test also erroneously retained two factors from the WHD’s proposed factor test.<sup>274</sup> These factors create the potential to allow for results that are inconsistent with both the FLSA, as well as the Supreme Court’s decision in *Walling v. Portland Terminal*.<sup>275</sup> Regardless, the eventual standard in this area of law should be heavily based upon the underlying, educationally-focused framework articulated by the Second Circuit prior to their amendments.<sup>276</sup> This test, in its proper form, should be implemented as soon as possible. Students, colleges, and employers need concrete standards, not informal Opinion Letters. For better or for worse, internships have become a touchstone of the modern hiring process for young job-seekers. Considering the integral role internships play in this process, it is time to provide them with the legal attention that they deserve.

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271. *See supra* Part IV.A.

272. *See supra* Parts III, IV.B.1.

273. *See supra* Part IV.B.2.

274. *See supra* Part IV.C.

275. 330 U.S. 148 (1947); *see also supra* Part IV.C.

276. *See supra* Part IV.C.