THE SECOND CIRCUIT'S NEW APPROACH IN DETERMINING WHEN UNPAID INTERNS ARE EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT

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Do employers need to pay their interns? The answer, at least in the Second Circuit, as well as several other circuits, depends on whether the intern or the employer was the primary beneficiary of the internship. In Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit held that in some circumstances, interns are entitled to wages under the Fair Labor Standards Act. Circuit courts and the Department of Labor have different opinions regarding what test should apply in determining when interns should receive compensation. The Department of Labor bases its examination on a rigid six-factor test, where if one criterion is not satisfied, the intern is an employee. This Note argues that the Second Circuit's approach is ideal because it is not only consistent with prior Supreme Court rulings, but it also gives courts the flexibility to evaluate the totality of the circumstances while focusing on the educational benefit to the intern.*

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I. INTRODUCTION

In recent years, there have been a number of high-profile cases concerning unpaid internships.[1] Several employers have responded to these lawsuits by ending their internship programs.[2] Others, however, have spent millions of dollars to settle suits from former interns alleging Fair Labor Standards Act ("FLSA") violations.[3] Some have even started paying their interns.[4] One recent study found that about 65% of college graduates participated in an internship.[5] Of that group, about 59% percent worked for a for-profit company, with 77% being paid.[6] Interns at local, state, and federal government offices were generally unpaid.[7] Ross Perlin, author of *Intern Nation*, has stated that "due to [the] failure to pay minimum wage and overtime, tens of thousands of unpaid and low-paid internships each year—at the very least—are illegal under federal or state laws that are rarely enforced."[8]

For example, in 2011, Eric Glatt, a recent graduate of Georgetown University Law Center, filed a lawsuit against Fox Searchlight alleging that it violated the FLSA, which governs an employer's requirement to pay wages to workers,[9] by failing to pay him any wages.[10] The alleged wage violations occurred while Mr. Glatt was an intern for the movie *Black Swan*.[11]

1. *See* Mark E. Brossman et al., *2nd Circuit Adopts New 'Primary Beneficiary' Test for Determining If Unpaid Interns Are Employees*, 30 WESTLAW J. EMP. 1, 1 (2015).

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

3. *See Top Eight Intern Cash Settlements*, INTERN LAB. RTS. (June 30, 2015), http://www.internlaborrights.com/2015/06/30/top-eight-intern-cash-settlements.

4. Susan Adams, *Why the Second Circuit Made a Flawed Decision in Upholding Unpaid Internships*, FORBES (July 7, 2015, 11:58 AM), http://www.forbes.com/sites/susanadams/2015/07/07/why-the-second-circuit-made-a-flawed-decision-in-upholding-unpaid-internships.

5. *Percentage of Students with Internship Experience Climbs*, NAT'L ASS'N OF COLLEGES & EMPLOYERS (Oct. 7, 2015), https://web.archive.org/web/20170305232416/https://www.naceweb.org/s10072015/internship-co-op-student-survey.aspx.

6. *Id.*

7. *Id.*

8. ROSS PERLIN, INTERN NATION, at xiv (2011).

9. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

10. Bran Dougherty-Johnson, *Q&A with Eric Glatt, Former Intern Who Sued Fox Searchlight*, MOTIONOGRAPHER (July 18, 2013), http://motionographer.com/2013/07/18/qa-with-eric-glatt-former-intern-who-sued-fox-searchlight-2/; Noam Scheiber, *Employers Have Greater Leeway on Unpaid Internships, Court Rules,* N.Y. TIMES (July 2, 2015), http://www.nytimes.com/2015/07/03/business/unpaid-internships-allowed-if-they-serve-educational-purpose-court-rules.html?_r=0.

11. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 531–32 (2d Cir. 2016).

The Southern District of New York ruled in favor of Mr. Glatt, finding that he was an employee.[12] In July 2015, the U.S. Court of Appeals for the Second Circuit vacated the ruling and remanded it back to the district court, adopting the primary beneficiary test and a non-exhaustive list of factors that would determine when interns are employees under the FLSA.[13] This test examines "whether the intern or the employer is the primary beneficiary of the relationship."[14] The district court had applied the Department of Labor's ("DOL") test,[15] which was largely derived from a 1940s Supreme Court case, *Walling v. Portland Terminal Co*.[16] While other courts had applied the primary beneficiary test to determine whether a worker falls under the FLSA's regulations, at the time of *Glatt*, circuit courts, including the Second Circuit, had not addressed whether interns were covered under the FLSA.[17]

This Note proposes that the Second Circuit's approach to determine whether unpaid interns are employees should be adopted because cases dealing with unpaid interns are significantly different from the facts in *Portland Terminal*, thus warranting its own test. Further, the Second Circuit's approach gives courts the flexibility to examine the totality of the circumstances, compared to the DOL test, where if just one of the six factors went against the employer, the intern was considered an employee.[18] Part II of this Note reviews the case law within the circuits. Part III analyzes the strengths and limitations of the different approaches of the circuit courts and also examines the seven new factors the Second Circuit set out in *Glatt v. Fox Searchlight Pictures, Inc*. It finds that the Second Circuit's ruling is consistent with *Portland Terminal*, but adapts to address circumstances when interns should receive compensation. Part IV recommends that courts adopt the Second Circuit's approach because other tests do not adequately account for the characteristics of modern-day internships. Part V concludes.

12. Scheiber, *supra* note 10.

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

14. *Id.*

15. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 534 (S.D.N.Y. 2013) *vacated and remanded*, 811 F.3d 528 (2d Cir. 2016); Wang v. Hearst Corp., 293 F.R.D. 489, 493 (S.D.N.Y. 2013) *aff'd in part, vacated in part, remanded*, 617 F. App'x 35 (2d Cir. 2015).

16. Brief for Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellees, Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528, 532 (2d Cir. 2016) (Nos. 13-4478, & 13-4481) 2014 WL 3385722, at *11 [hereinafter Brief for Secretary of Labor].

17. *Glatt*, 811 F.3d at 535; Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831, 834 (11th Cir. 2013); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011); Blair v. Wills, 420 F.3d 823, 826, 829 (8th Cir. 2005); McLaughlin v. Ensley, 877 F.2d 1207, 1209–10 (4th Cir. 1989); Donovan v. Am. Airlines, Inc., 686 F.2d 267, 271–72 (5th Cir. 1982).

18. *See Glatt*, 811 F.3d at 534–35.

II. BACKGROUND

There is a circuit split on the issue of which test ought to be used to determine whether interns should be treated as employees.[19] Several courts use the primary beneficiary test, while one court uses the totality of the circumstances test.[20] In addition, the DOL has its own test for determining whether interns should be considered employees.[21] Currently, the FLSA, *Portland Terminal*, and the DOL guidelines regulate whether interns should be considered employees and, therefore, be paid.[22]

A. The Fair Labor Standards Act

In 1938, President Franklin D. Roosevelt passed the Fair Labor Standards Act.[23] Its purpose was to "aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."[24] Under the FLSA, an employer must pay its employee a set minimum wage and overtime if the employee works over forty hours a week.[25] Employee is defined as "any individual employed by an employer,"[26] while employ is defined as: "includes to suffer or permit to work."[27] An employer is "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ."[28] Intern is not defined in the FLSA.[29] Senator Hugo Black, later known as Justice Black, stated that the FLSA, at the time, was intended to have "the broadest definition that has ever been included in any one act."[30]

Exceptions to the FLSA are limited: "Congressional intention [was] to include all employees within the scope of the Act unless specifically excluded."[31] In addition, "employees are covered by the [FLSA] if (1) an employment relationship exists between the employee and the employer,

19. Ashley G. Chrysler, Note, *All Work, No Pay: The Crucial Need for the Supreme Court to Review Unpaid Internship Classifications Under the Fair Labor Standards Act*, 2014 MICH. ST. L. REV. 1561, 1561 (2014).

20. *Id.*

21. WAGE & HOUR DIV., DEP'T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), http://www.dol.gov/whd/regs/compliance/whdfs71.htm [hereinafter FACT SHEET # 71].

22. Madiha M. Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 CONN. L. REV. 1183, 1185 (2015).

23. 29 U.S.C. §§ 201–219 (2012); Paul Budd, Comment, *All Work and No Pay: Establishing the Standard for When Legal, Unpaid Internships Become Illegal, Unpaid Labor*, 63 U. KAN. L. REV. 451, 454–55 (2015).

24. Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945).

25. 29 U.S.C. §§ 206(a), 207(a)(1).

26. *Id.* § 203(e)(1).

27. *Id.* § 203(g).

28. *Id.* § 203(d).

29. *See* 29 U.S.C. §§ 201-219 Malik, *supra* note 22, at 1185–86.

30. United States v. Rosenwasser, 323 U.S. 360, 363 n.3 (1945) (citing 81 CONG. REC. 7656–57 (statement of Sen. Black)); PERLIN, *supra* note 8, at 64.

31. Jaclyn Gessner, Note, *How Railroad Brakemen Derailed Unpaid Interns: The Need for a Revised Framework to Determine FLSA Coverage for Unpaid Interns*, 48 IND. L. REV. 1053, 1058 (2015) (citing *Rosenwasser*, 323 U.S. at 362–63.

(2) the requirements for either individual or enterprise coverage are met, and (3) the work . . . is performed in the United States . . . ."[32] The "plaintiff bears the burden of establishing that he or she is an employee under the FLSA."[33] Further, either employees or the DOL can file suit for violations of the FLSA to recover back wages and liquidated damages from an employer.[34] Suits generally must be filed within two years—three years if the violation is "willful."[35]

B. The Supreme Court

In 1947, the Supreme Court in *Walling v. Portland Terminal Co.*, held that railroad trainees were not considered employees under the FLSA.[36] The suit was brought by the DOL, arguing that the railroad company violated the FLSA by not paying the trainees the minimum wage.[37] At issue was a training program provided by the Portland railroad company for potential yard brakemen.[38] The training usually lasted for seven to eight days, with a maximum of two weeks.[39] The DOL argued that the trainees were employees and should have been paid at least the minimum wage.[40] The Court held that the trainees work did not replace any regular workers, that they were closely supervised, that the regular workers did most of the work, and that their work did not "expedite the company business, but . . . actually impede[d] . . . it . . . ."[41] Further, the Court stated that the FLSA did not intend to require compensation for individuals who decided to work for an employer without an agreement for compensation for their own benefit.[42] It reasoned that the FLSA did not intend to punish employers for providing "the same kind of instruction at a place and manner [as a school or college] which would most greatly benefit the trainees."[43] Finally, the Court stated that because the railroad did not receive an "immediate advantage" from the trainees work, the trainees were not employees under the FLSA.[44] This exclusion is known as the trainee exception,[45] and it still exists today.[46] The DOL

32. AM. BAR ASS'N SECTION OF LABOR & EMP'T LAW, THE FAIR LABOR STANDARDS ACT 3-3 (Ellen C. Kearns et al. eds., 2d ed. 2010).
33. Steelman v. Hirsch, 473 F.3d 124, 128 (4th Cir. 2007).
34. WILL AITCHISON & BREANNE SHEETZ, THE FLSA: A USER'S MANUAL 292 (5th ed. 2010).
35. 29 U.S.C. § 255(a); AITCHISON & SHEETZ, *supra* note 34, at 292–93.
36. Walling v. Portland Terminal Co., 330 U.S. 148, 153 (1947).
37. *Id.* at 149.
38. *Id.*
39. *Id.*; Walling v. Portland Terminal Co., 155 F.2d 215, 217 (1st Cir. 1946), *aff'd*, 330 U.S. 148 (1947).
40. *Walling*, 330 U.S. at 149; *Walling*, 155 F.2d at 216.
41. *Walling*, 330 U.S. at 149–50.
42. *Id.* at 152.
43. *Id.* at 152–53.
44. *Id.* at 153.
45. Budd, *supra* note 23, at 463.
46. AM. BAR ASS'N SECTION OF LABOR AND EMP'T LAW, *supra* note 32, at 3–46.

and appellate courts have used this case to determine whether interns are employees under the FLSA and, therefore, should be compensated.[47]

The Supreme Court has ruled on over 100 cases concerning the FLSA.[48] It has not, however, decided the proper test courts should apply for determining when unpaid interns are employees under the FLSA.[49] As one court noted, "[t]here is no settled test for determining whether a student is an employee for purposes of the FLSA."[50] Three main tests have been used to determine whether an intern is an employee under the FLSA.[51] The first test is the primary beneficiary test, which the Second,[52] Fourth,[53] Fifth,[54] Sixth,[55] and Eleventh[56] Circuits follow. The second test is the totality of the circumstances test, which the Tenth Circuit applies.[57] The third test is the DOL's six criteria test.[58] The following Sections examine the three tests and evaluate their strengths and weaknesses.

C. The Department of Labor Test

Congress entrusted the responsibility of administering the FLSA to the DOL.[59] In general, the DOL is responsible for "enforcing labor and employment legislation."[60] It also issues "non-binding bulletins" and has previously issued opinion letters advising employers on their compliance with the FLSA.[61] Further, it publishes "regulations and interpretation guides" in the Code of Federal Regulations, under Title 29.[62] The DOL also has the right to file suits on behalf of workers for violations of the FLSA.[63] The Department's Wage and Hour Division enforces the minimum wage and overtime requirements of the FLSA.[64]

In 2010, the DOL published Fact Sheet #71 to clarify whether employers are required to pay their interns.[65] The DOL devised its test

47. FACT SHEET #71, *supra* note 21.

48. *See generally* Ann K. Wooster, *Validity, Construction, and Application of Fair Labor Standards Act—Supreme Court Cases*, 196 A.L.R. FED. 507 (2004).

49. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2016); *see generally* Wooster, *supra* note 48.

50. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 521 (6th Cir. 2011).

51. *See* Chrysler, *supra* note 19.

52. *Glatt*, 811 F.3d at 536–39.

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

54. Donovan v. Am. Airlines, Inc., 686 F.2d 267, 271–72 (5th Cir. 1982).

55. *Solis*, 642 F.3d at 526–29.

56. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015).

57. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1029 (10th Cir. 1993).

58. FACT SHEET #71, *supra* note 21.

59. 29 U.S.C. § 204 (2012).

60. Budd, *supra* note 23, at 460.

61. AM. BAR ASS'N SECTION OF LABOR & EMP'T LAW, *supra* note 32, at 2–21 (As of March 24, 2010, the department has stopped issuing such letters); Christopher Keleher, *The Perils of Unpaid Internships*, 101 ILL. B.J. 626, 628 (2013) (citing H. LIVENGOOD, JR., THE FEDERAL WAGE AND HOUR LAW 22–24 (1951).

62. AITCHISON & SHEETZ, *supra* note 34, at 12.

63. *Id.* at 13.

64. WAGE AND HOUR DIVISION MISSION STATEMENT, U.S. DEP'T LAB., http://www.dol.gov/whd/about/mission/whdmiss.htm (last visited Aug.20, 2017).

65. FACT SHEET #71, *supra* note 21.

based on *Portland Terminal*[66] and noted that "employment" under the FLSA is broadly defined.[67] Under the DOL's test, whether an internship is excluded from the requirements of the FLSA depends "upon all of the facts and circumstances of each such program."[68] The elements the test examines are whether:

> 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;
> 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.[69]

All of the above elements must be met under the DOL's test for the intern to be excluded from FLSA's minimum wage and overtime requirements.[70] The DOL has noted that this exclusion is very narrow and has stated that "there aren't going to be many circumstances where you can have an internship and not be paid . . . ."[71] The DOL argues that courts should apply its test rather than a primary beneficiary or a totality of the circumstances test.[72] Some of the arguments raised by the DOL for deferring to it include: it administers the FLSA, that its test is consistent with *Portland Terminal*, that the test uses an objective standard that can be used in different settings, and it encapsulates the relevant characteristics of an employer-employee relationship.[73]

The first element requires that the student's learning be similar to what he/she would learn in a school or college.[74] This element examines whether the student received academic credit for the internship and the extent to which the student's college was involved in the internship.[75] "[T]he more an internship program is structured around a classroom or academic experience as opposed to the employer's actual operations, the more likely the internship will be viewed as an extension of the individu-

66. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1025 (10th Cir. 1993); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 6, 2006), 2006 WL 1094598, at *1.

67. FACT SHEET #71, *supra* note 21.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*; Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010) http://www.nytimes.com/2010/04/03/business/03intern.html?_r=0.

72. Brief for Secretary of Labor, *supra* note 16, at *21–29.

73. *Id.* at *21–22.

74. FACT SHEET #71, *supra* note 21.

75. *Id.*

al's educational experience . . . ."[76] This element is derived from the Court's statement in *Portland Terminal* that "[h]ad these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad," there would not be a question of whether the trainees were employees.[77] The DOL has stated that an employer fulfills this aspect when the interns receive training that incorporates the "practical application of material taught in a classroom."[78] In addition, the more skills—that can be applied in a number of different settings as opposed to skills that only apply at the employer's business—the intern learns, the more the employer will be viewed as fulfilling this requirement.[79] Further, this factor requires that an intern learn these skills not only at the beginning or at the end of the internship, but throughout the time with the employer.[80] In one case, the DOL found the employer fulfilled this criterion because "the internship involve[d] the students in real life situations and provide[d] them with an educational experience that they could not obtain in the classroom, which generally is related to their course of study."[81]

The next factor of the DOL test is whether "[t]he internship experience is for the benefit of the intern," rather than for the benefit of the employer.[82] In *Portland Terminal*, the Court stated that "[t]he Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees."[83] The learning must be substantial—an employer will not fulfill this factor if the intern is learning "new skills, working habits, or getting a general exposure to a particular industry"[84] but is also "performing productive work"[85] for the employer. Further, the skills the intern learns must be more than what a newly hired employee would learn at the very beginning of his or her employment.[86]

The third factor of this test has two parts.[87] The first part examines whether the intern replaces routine workers, and the second part examines whether the intern was working under close supervision.[88] In *Portland Terminal*, the trainee's "activities [did] not displace any of the regular employees, who [did] most of the work themselves, and [the

76. *Id.*; Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184, 193 (2013).

77. Walling v. Portland Terminal Co., 330 U.S. 148, 152–53 (1947).

78. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Apr. 6, 2006), 2006 WL 1094598, at *2.

79. FACT SHEET #71, *supra* note 21.

80. Brief for Secretary of Labor, *supra* note 16, at *14.

81. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (May 17, 2004), 2004 WL 5303033, at *2.

82. FACT SHEET #71, *supra* note 21.

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

84. Brief for Secretary of Labor, *supra* note 16, at *15.

85. FACT SHEET #71, *supra* note 21.

86. Brief for Secretary of Labor, *supra* note 16, at *15.

87. FACT SHEET #71, *supra* note 21.

88. *Id.*

employers were required to] stand immediately by to supervise whatever the trainees [did]."[89] Fact Sheet #71 clarifies that if the employer is using interns to "substitute" or "augment" its current staff, it is required to compensate its interns.[90] An employer meets this standard if the intern shadows a regular employee but does little work, which would indicate that the internship is mainly for the education of the intern.[91] Further, the employer must make sure that the intern is more closely supervised than other employees.[92]

The fourth factor of the DOL test examines whether the employer received an "immediate advantage" from the intern's work.[93] In comparison, the Court in *Portland Terminal* stated that the "the railroads receive no 'immediate advantage' from any work done by the trainees."[94] The Court did not view the fact that the railroad would be able to call from a list of trainees who completed the training as an "immediate advantage."[95] In one case, the DOL found that the employer did receive an "immediate advantage" from an intern's work.[96] That instance concerned a hotel training internship where the interns were responsible for checking people in and performing "maintenance and administrative work."[97] Additionally, in a letter to the American Bar Association, the DOL stated that an unpaid law extern "would be considered an employee subject to the FLSA where he or she works on fee generating matters, performs routine non-substantive work that could be performed by a paralegal, receives minimal supervision and guidance from the firm's licensed attorneys, or displaces regular employees (including support staff)."[98] This seems to indicate that an employer who receives a monetary benefit from an intern, directly or indirectly, by saving money and not having someone else do the work, would not fulfill the requirement of this factor.[99]

The fifth factor of the DOL test examines whether the intern is "entitled to a job at the conclusion of the internship."[100] In *Portland Terminal*, the trainees were not promised employment; rather, the trainees who completed the training had their names placed on a list from which the railroad company could hire.[101] If there is an expectation that the intern will be hired at the conclusion of the internship, the intern will be

89. Walling v. Portland Terminal Co., 330 U.S. 148, 149–50 (1947).
90. FACT SHEET #71, *supra* note 21.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Portland Terminal*, 330 U.S. at 153.
95. *Id.* at 150; Magaldi & Kolisnyk, *supra* note 76, at 192.
96. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter (Mar. 25, 1994) 2004 WL 5303033, at *1.
97. *Id.*
98. Letter from M. Patricia Smith, Solicitor of Labor, U.S. Dep't of Labor, to Laurel G. Bellows, Immediate Past President, Am. Bar Ass'n. (Sept. 12, 2013), http://www.americanbar.org/content/dam/aba/images/news/PDF/MPS_Letter_reFLSA_091213.pdf.
99. *See id.*
100. FACT SHEET #71, *supra* note 21.
101. Walling v. Portland Terminal Co., 330 U.S. 148, 149–50 (1947).

considered to be an employee.[102] In addition, the internship should last for a "fixed duration, established prior to the outset of the internship."[103] Further, the internship should not be used as a "trial period" for future employees.[104]

The sixth factor of the DOL test assesses whether there was an expectation of compensation.[105] In *Portland Terminal*, the railroad company did not pay the trainees, and the trainees did not anticipate that they would receive compensation.[106] Moreover, the Court stated that the FLSA "covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation."[107]

D. The Totality of the Circumstances Test

The Tenth Circuit in *Reich v. Parker Fire Protection District* applied a totality of the circumstances approach in determining whether a trainee was an employee under the FLSA.[108] This case concerned potential firefighters who spent ten weeks at firefighter training academy.[109] The trainees were not paid for the time they spent at the academy.[110] The DOL filed suit alleging that the defendants violated the FLSA and that the trainees were entitled to wages for the time they spent training.[111] Both the plaintiff and the defendant agreed to apply the DOL's six-factor test, but they disagreed on whether all of the factors needed to be met in order for a trainee to be an employee under the FLSA.[112] The DOL argued that all of the factors had to be met or else the trainees would be considered employees under the FLSA.[113] The defendants argued for a totality of the circumstances approach where the "determination should not turn on the presence or absence of one factor in the equation."[114]

Applying *Skidmore* deference to the DOL's interpretation, the court found the DOL's "all or nothing" approach to be "inconsistent" with its prior ruling, as well as "unreasonable."[115] The court further noted that, in determining whether a worker is an employee or independent contractor, "no one . . . factor[ ] in isolation is dispositive; rather, the test is based upon a totality of the circumstances," which it found "informative [in] that determinations of employee status under FLSA in other

102. FACT SHEET #71, *supra* note 21.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Portland Terminal*, 330 U.S. at 150.
107. *Id.* at 151.
108. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1029 (10th Cir. 1993).
109. *Id.* at 1025.
110. *Id.*
111. *Id.* at 1024–25.
112. *Id.* at 1025–26.
113. *Id.* at 1026.
114. *Id.*
115. *Id.* at 1026–27.

contexts are not subject to rigid tests but rather to consideration of a number of criteria in their totality."[116]

The court then went through the six factors of the DOL test. First, the court found that the training the prospective firefighters received was similar to what they would have learned at a vocational school.[117] It stated that "[a] training program that emphasizes the prospective employer's particular policies is nonetheless comparable to vocational school if the program teaches skills that are fungible within the industry."[118] Second, the court found that the trainees benefited from the training program by "acquiring skills transferable within the industry and required by defendant for its career firefighters."[119] Further, the fact that the trainees made "financial sacrifices" was not dispositive because a student at a college would have had to make similar sacrifices.[120] Third, the trainees did not "displace any current employees."[121] Fourth, the trainees did not "immediately benefit" the defendant, and any benefit the defendant received was "de minimis."[122] Fifth, the trainees expected to be hired at the end of their training: "those who successfully completed the course had every reasonable expectation of being hired."[123] This was the only factor of the DOL's test in favor of the plaintiffs.[124] Sixth, the defendant and trainees understood that the trainees would not receive pay during their training.[125]

The Tenth Circuit found that the firefighter trainees were not employees for purposes of the FLSA.[126] Unlike the DOL's application of the test, the court did not require all six factors to be met; a "single factor cannot carry the entire weight of an inquiry into the totality of the circumstances . . . ."[127] Finally, finding that five of the six factors weighed in favor of the defendant, the court ruled that the district court was correct in finding that the trainees were not employees under the FLSA.[128]

E. The Primary Beneficiary Test

The primary beneficiary test examines "whether the intern or the employer is the primary beneficiary of the relationship."[129] In *Glatt v. Fox Searchlight Pictures, Inc.*, the Second Circuit adopted the primary beneficiary test for determining the circumstances under which the FLSA re-

116. *Id.* at 1027.
117. *Id.*
118. *Id.* at 1028.
119. *Id.*
120. *Id.*
121. *Id.* at 1029.
122. *Id.* at 1028–29.
123. *Id.* at 1025, 1029.
124. *See id.* at 1029.
125. *Id.* at 1025, 1029.
126. *Id.* at 1029.
127. *Id.*
128. *Id.*
129. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016).

quires employers to compensate interns.[130] In 2013, the district courts in *Glatt* and in *Wang v. Hearst Corporation*, applied the totality of the circumstances test to determine whether unpaid interns were entitled to compensation under the FLSA.[131] The district court in *Glatt* did not use the primary beneficiary test, and instead found that, under the totality of the circumstances, the interns were not trainees and, therefore, were employees under the FLSA.[132]

The *Glatt* case concerned three interns—Eric Glatt, Alexander Footman, and Eden Antalik—who worked at various Fox offices.[133] The three were not compensated and did not receive academic credit for their work.[134] The plaintiffs worked from three to nine months as unpaid interns.[135] They filed suit alleging that Fox violated the FLSA by not paying them the minimum wage and overtime.[136] The interns did various menial office tasks, including purchasing a pillow for the director of the movie *Black Swan* and bringing him tea.[137]

In *Glatt*, the Second Circuit declined to defer to the DOL's test and adopted the primary beneficiary test to determine whether an intern should be compensated under the FLSA.[138] The court stated that "the proper question is whether the intern or the employer is the primary beneficiary of the relationship."[139] It further stated that this test "focuses on what the intern receives in exchange for his work" and gives "courts the flexibility to examine the economic reality as it exists between the intern and the employer."[140] It then set forth a "non-exhaustive set of considerations" a court should apply when determining whether an intern is an employee under the FLSA:[141]

> 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.

130. *Id.* at 535–36.
131. Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 534 (S.D.N.Y. 2013), *vacated and remanded*, 811 F.3d 528 (2d Cir. 2016); Wang v. Hearst Corp., 293 F.R.D. 489, 493 (S.D.N.Y. 2013) *aff'd in part, vacated in part, remanded*, 617 F. App'x 35 (2d Cir. 2015).
132. *Glatt*, 293 F.R.D. at 532, 534.
133. Glatt, 811 F.3d at 531–33.
134. *Id.* at 532–33.
135. *Id.*
136. *Id.* at 531–32.
137. *Id.* at 532–33.
138. *Id.* at 536.
139. *Id.*
140. *Id.*
141. *Id.* at 536–37.

> 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.[142]

This test requires "weighing and balancing all of the circumstances," where no element is "dispositive."[143] In addition, unlike the DOL test, under the primary beneficiary test, an employer does not need to meet all seven factors for a court to find that its interns are not employees.[144] Also, as the factors are non-exhaustive, a court is free to consider any relevant evidence that would aid it in making a determination.[145] The Second Circuit found this approach to be consistent with *Portland Terminal*, and it focused on the "the relationship between the internship and the intern's formal education."[146] Moreover, the Second Circuit declined to apply the DOL test, finding it "too rigid" and unpersuasive.[147] In addition, the court stated that the DOL interpretation in *Portland Terminal* was owed only *Skidmore* deference and that "an agency has no special competence or role in interpreting a judicial decision."[148]

Two months after the Second Circuit ruling in *Glatt*, the Eleventh Circuit in *Schumann v. Collier Anesthesia* also adopted the primary beneficiary test.[149] This case concerned student nurse anesthetists who were required to participate in 550 clinical cases to graduate.[150] The students alleged that they were employees under the FLSA and should have been paid because the defendants fiscally benefited from their work by employing fewer registered nurses.[151] The court applied *Skidmore* deference to the DOL's interpretation and also found it unpersuasive.[152] The court further found that the Second Circuit's approach effectively determined who the "primary beneficiary" is in an internship.[153] The court further

142. *Id.*
143. *Id.* at 537.
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 536.
148. *Id.* (quoting New York v. Shalala, 119 F.3d 175, 180 (2d Cir. 1997)).
149. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1203 (11th Cir. 2015).
150. *Id*.
151. *Id.* at 1204.
152. *Id.* at 1209.
153. *Id.* at 1203.

noted that "the best way to [determine the primary beneficiary is] to focus on the benefits to the student while still considering whether the manner in which the employer implements the internship program takes unfair advantage of or is abusive towards the student."[154] Prior to this ruling, the Eleventh Circuit applied an economic reality test to determine whether workers were employees under the FLSA.[155]

The Fourth Circuit also has applied the primary beneficiary test. In *McLaughlin v. Ensley*, the Fourth Circuit held that trainees for a snack food distribution company were employees under the primary beneficiary test.[156] The court found that the trainees' learning was "very limited and narrow," the training they received was not similar to that which they would have received at a school, and they "were only taught simple specific job functions."[157] The court found that the defendant benefited more from the arrangement because the training allowed it to hire more experienced workers and to gain an "opportunity to review job performance" and because the trainees assisted the employers "regular employees while they performed their normal duties."[158] The court noted that the skills learned had "no transferable usefulness," and that every trainee who completed the program was hired.[159]

Similarly, the Fifth Circuit has also adopted the primary beneficiary test. In *Donovan v. American Airlines*, the Fifth Circuit applied a "balancing analysis" approach, which evaluated "the relative benefits flowing to [the] trainee and [the] company during the training period."[160] This case concerned prospective flight attendants and reservation sales agents who underwent training for two to five weeks.[161] The DOL brought suit alleging that the trainees were employees under the FLSA and should have been paid.[162] The court found that the trainees did not displace any of the defendant's regular workers and that the airline did not gain an "immediate benefit" from the trainees' work.[163] The court also noted that

154. *Id.* at 1211.

155. The Eleventh Circuit stated that "in determining whether an employer-employee relationship exists under the FLSA, we must consider the 'economic realities' of the relationship, including whether a person's work confers an economic benefit on the entity for whom they are working." *See* Kaplan v. Code Blue Billing & Coding, Inc., 504 F. App'x 831, 834 (11th Cir. 2013) *cert. denied sub nom.*, Kaplan v. Code Blue Billing & Coding, Inc., 134 S. Ct. 618 (2013); *see also* Donovan v. New Floridian Hotel, Inc., 676 F.2d 468, 470 (11th Cir. 1982) ("[I]t is well-established that the issue of whether an employment relationship exists under the FLSA must be judged by the 'economic realities' of the individual case.").

156. 877 F.2d 1207, 1209–10 (4th Cir. 1989) The district court in this case found, after applying the DOL's six-factor test, that these trainees were not employees for purposes of the FLSA. The circuit court, citing precedent, stated that "the general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees' labor." *Id.*

157. *Id.* at 1210.

158. *Id.*

159. *Id.*

160. 686 F.2d 267, 271–72 (5th Cir. 1982) (quoting Donovan v. Am. Airlines, Inc., 514 F. Supp. 526, 533 (N.D. Tex. 1981)).

161. *Id.* at 269–70.

162. *Id.* at 268.

163. *Id.* at 272.

this case was very similar to *Portland Terminal* and affirmed the district court's ruling that the "trainees gain[ed] the greater benefit from their experience."[164]

Likewise, the Sixth Circuit also has applied the primary beneficiary test. It has stated that "the proper approach for determining whether an employment relationship exists in the context of a training or learning situation is to ascertain which party derives the primary benefit from the relationship."[165] The court further rejected the DOL's test, finding it "overly rigid and inconsistent."[166] This case concerned students at a boarding school where the students worked in its "kitchen and housekeeping departments" for vocational training.[167] The court found that the students were the primary beneficiaries of the training program.[168] The students received "hands-on training," learned how to "operate tools" of their trade, and received "a well-rounded education."[169]

The Eight Circuit also has applied the primary beneficiary test.[170] In *Petroski v. H & R Block Enterprises*, the court held that tax professionals were trainees and not entitled to pay during their twenty-four hours of training.[171] The court found the case to be similar to *Portland Terminal* in that the defendant did not gain an "immediate advantage" from the trainees' work, did not "displace any regular employees," and did not "expedite H & R Block's business."[172]

III. ANALYSIS

A. The Level of Deference Courts Should Grant to the Department of Labor's Judgment

Courts should find that the DOL's interpretation of *Portland Terminal* has minimal persuasive influence. Courts and the DOL are in agreement that *Skidmore* deference should apply when courts review the DOL's six-part test.[173] Only "[w]here the FLSA expressly delegates to the Secretary the authority to craft legislative regulations, [are] those regulations [] given the force and effect of law subject to the standard of *Chevron*."[174]

164. *Id.*
165. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011).
166. *Id.* at 525.
167. *Id.* at 520.
168. *Id.* at 532.
169. *Id.* at 531.
170. *See* Blair v. Wills, 420 F.3d 823, 829 (8th Cir. 2005). The Eighth Circuit applied the primary beneficiary test to determine whether a student at a boarding school was entitled to pay under the FLSA because he performed various chores at the school. The court found that the student was not an employee because "those chores were primarily for the students', not the Appellees', benefit."
171. Petroski v. H & R Block Enters., LLC, 750 F.3d 976, 977, 982 (8th Cir. 2014).
172. *Id.* at 980–81.
173. Brief for Secretary of Labor, *supra* note 16, at *21.
174. AM. BAR ASS'N OF LABOR & EMP'T LAW, *supra* note 32, at 2–17.

The DOL's six-factor test appears both in a fact sheet and also in the Wage and Hour Division Field Operations Handbook ("FOH").[175] The DOL has argued that courts should apply *Skidmore* deference to the DOL six-factor test.[176] It has stated that: "As the agency charged with administering the FLSA, the Department's interpretation of the Act's definition of 'employee,' as reflected in its FOH, Fact Sheet, Opinion Letters, and this amicus brief, is entitled to deference under *Skidmore v. Swift & Co*., 323 U.S. 134 (1944)."[177] The Department further argued that its test is consistent with *Portland Terminal*, and it "accurately captures the very limited 'trainee' exception" in that case.[178] In addition, it stated that its test "contains objective criteria" which can be applied to different settings, and "because the test requires all six factors to be met, it gauges the relevant circumstances presented by any one particular training or internship program and, thus, captures all indicia of an employment relationship."[179]

Both courts and the DOL agree that *Skidmore* deference should be applied to the DOL's six-factor test because it is not entitled to *Chevron* deference.[180] The level of weight a court should give to the DOL's interpretation depends first on "the thoroughness evident in its consideration"; second, on "the validity of its reasoning"; third, on "its consistency with earlier and later pronouncements"; and fourth, on "all those factors which give it power to persuade, if lacking power to control."[181]

1. The DOL's Thoroughness and Reasoning in Creating Its Test

The Department's six-factor test is not comprehensive, and its reasoning is flawed. The DOL test does not address the significant differences between a railroad training program from the 1940s and a modern-day internship.[182] Internships today are usually longer than the seven to eight day training program at issue in *Portland Terminal*, and they allow college students to gain practical work experience and networking opportunities.[183]

The fact sheet in which the DOL set forth its test is inherently contradictory.[184] Before listing its six-factor test, the DOL stated that "[t]he

175. WAGE & HOUR DIVISION, DEP'T OF LABOR, FIELD OPERATIONS HANDBOOK, Ch. 10, ¶10b11(b), http://www.dol.gov/whd/FOH/FOH_Ch10.pdf (last updated July 7, 2017); FACT SHEET #71, *supra* note 21.

176. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011); Brief for Secretary of Labor, *supra* note 16, at *21.

177. Brief for Secretary of Labor, *supra* note 16, at *21.

178. *Id.*

179. *Id.* at *21–22.

180. *Id.* at *21.

181. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

182. *See* Matthew Tripp, *In the Defense of Unpaid Internships: Proposing a Workable Test for Eliminating Illegal Internships*, 63 DRAKE L. REV. 341, 353–54 (2015).

183. Walling v. Portland Terminal Co., 330 U.S. 148, 149 (1947); Walling v. Portland Terminal Co., 155 F.2d 215, 217 (1st Cir. 1946) *aff'd,* 330 U.S. 148 (1947); Tripp, *supra* note 182, at 353–54.

184. Budd, *supra* note 23, at 468–69; *see also* Zachary Edelman, Comment, Glatt v. Fox Searchlight Pictures, Inc., 59 N.Y.L. SCH. L. REV. 591, 597 (2014–2015).

determination of whether an internship or training program meets this exclusion depends upon all of the facts and circumstances of each such program," suggesting a totality of the circumstances approach.[185] After listing the factors, however, it stated that if all six factors are not met, then an intern will be considered an employee, and employers will be required to compensate them.[186] Also, the DOL test is inconsistent with the Supreme Court's ruling in *Portland Terminal*: "There is nothing in the Court's opinion that requires an all-or-nothing application of the factors it identified."[187]

2. The Consistency of the DOL's Test with Prior Rulings

The DOL's six-factor test, which takes an all-or-nothing approach, is not consistent with the Department's prior resolutions.[188] In the past, the DOL has advocated for taking all of the circumstances into account when determining whether a worker is an employee under the FLSA, rather than requiring all six factors to be met.[189] In an opinion letter in 1967, the Department stated that there was no single test for determining whether a worker is considered an employee; rather, the totality of the circumstances should be considered.[190] In that letter, the Department specified that: "The Court has made it clear that there is no single rule or test for determining whether an individual is an employee, but that the total situation controls. The Court has indicated a number of factors which help to determine whether an employment relationship exists."[191] On the other hand, in 1975, 1995, and 2002, the Department stated that where the internship was primarily for the benefit of the student, the intern would not be considered an employee, seemingly advocating for the primary beneficiary test.[192] Nevertheless, the Department, in those letters, simultaneously advocated for taking into account all the circumstances while also requiring all six factors of the test be met.[193] The De-

185. Budd, *supra* note 23, at 468–69.

186. *Id.*

187. Cody Elyse Brookhouser, Note, *Whaling on* Walling*: A Uniform Approach to Determining Whether Interns are "Employees" Under the Fair Labor Standards Act*, 100 IOWA L. REV. 751, 770 (2015).

188. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993); Robert J. Tepper & Matthew P. Holt, *Unpaid Internships: Free Labor or Valuable Learning Experience?*, 2015 B.Y.U. EDUC. & L.J. 323, 339 (2015).

189. *Reich*, 992 F.2d at 1026–27.

190. *Id.* at 1027 (quoting U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter No. 638 (July 18, 1967)).

191. *Id.*

192. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA), 2002 WL 32406598, at *3 (Sept. 5, 2002); U.S. Dep't of Labor, Wage & Hours Div., Opinion Letter on the Fair Labor Standards Act (FLSA), 1995 WL 1032473, at *1 (Mar. 13, 1995); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA), 1975 WL 40999, at *1 (Oct. 7, 1975).

193. U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA), 2002 WL 32406598, at *2 (Sept. 5, 2002); U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA), 1995 WL 1032473, at *1 (Mar. 13, 1995); U.S. Dep't

partment has been inconsistent in how its six-factor test should be applied and, therefore, its test should not be followed.

3. The Persuasive Influence of the DOL's Test

Courts have found the DOL test to be unpersuasive.[194] The Second Circuit, in *Glatt v. Fox Searchlight Pictures, Inc.*, was unpersuaded by the DOL's approach.[195] First, it found that the DOL's test was simply a reduced version of the facts of *Portland Terminal*.[196] Second, the court stated that it was a court's role to interpret *Portland Terminal*.[197] Third, the DOL test tried to "fit *Portland Terminal's* particular facts to all workplaces."[198] Finally, the court found that the DOL's test was "too rigid."[199] The Sixth Circuit found it too inflexible because it required all six factors to be met and it was at odds with *Portland Terminal*.[200] The Tenth Circuit found that the DOL's position that all six factors needed to be met was "unreasonable" and declined to follow the DOL.[201] The Eleventh Circuit was also unpersuaded by the DOL test because the DOL formed the test by taking details of *Portland Terminal* and created a test from its facts.[202] Further, the DOL did not devise the test from "rule-making or an adversarial process."[203] Additionally, the circuit courts have not applied the DOL test as the Department has instructed, where all six factors need to be met.[204] As the Eleventh Circuit has stated, "while some circuits have given some deference to the test, no circuit has adopted it wholesale and has deferred to the test's requirement that 'all' factors be met for a trainee not to qualify as an 'employee' under the FLSA."[205]

Therefore, courts should accord little weight to the Department's test. First, since the test was largely formualted from the facts of *Portland Terminal*,[206] this would indicate that the DOL was not very thorough

of Labor, Wage & Hour Div., Opinion Letter on the Fair Labor Standards Act (FLSA), 1975 WL 40999, at *1 (Oct. 7, 1975).

194. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015).

195. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016).

196. *Id.*

197. *See id.*

198. *Id.*

199. *Id.*

200. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011).

201. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993).

202. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1209 (11th Cir. 2015).

203. *Id.*

204. *See Glatt*, 811 F.3d at 53. (Stating that the DOL's "interpretation is entitled, at most, to *Skidmore* deference to the extent we find it persuasive," and found the DOL test to be unpersuasive and did not defer to its interpretation); *Schumann*, 803 F.3d at 1209 (Declining to apply *Skidmore* deference and declining to defer to the DOL's interpretation, finding it unpersuasive); *Solis*, 642 F.3d at 525. (Stating that the DOL's test was "a poor method for determining employee status in a training or educational setting"); McLaughlin v. Ensley, 877 F.2d 1207, 1209 n.2 (4th Cir. 1989) ("We do not rely on the formal six-part test issued by the Wage and Hour Division"). *But see* Petroski v. H & R Block Enters., LLC, 750 F.3d 976, 982 (8th Cir. 2014) (Citing the DOL test as further support for its holding); Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) ("[T]he [DOL's] interpretation is entitled to substantial deference by this court").

205. *Schumann*, 803 F.3d at 1209; FACT SHEET #71, *supra* note 21.

206. *Schumann*, 803 F.3d at 1209.

when coming up with this test. Second, Fact Sheet # 71 seems to be advocating for a totality of the circumstances approach, but then states that all six factors need to be met in order for the intern to be exempt from FLSA requirements,[207] which was inconsistent.[208] Third, the DOL has not been consistent in applying the test, at times claiming all six factors did not have to be met for an intern to be exempt.[209] Finally, the DOL has not been able to persuade courts to follow its test. While some courts have found the factors relevant, no court has required all six factors to be met.[210] Consequently, since the DOL has failed to convince courts to use its test in determining whether an intern is a worker for purpose of the FLSA, a different approach should be taken.

B. The Tenth Circuit's "Totality of the Circumstances" Approach

The Tenth Circuit's approach in determining whether interns are employees under the FLSA is superior to the DOL's test but is still imperfect. Commentators have labeled this approach as the totality of the circumstances test.[211] In fact, the Tenth Circuit's approach is the same as the DOL's test with only a slight change.[212] After noting in *Reich v. Parker Fire Protection District* that the FLSA does not provide a test for determining whether a trainee should be considered an employee, the court noted that the DOL had devised a test.[213] The court, applying *Skidmore* deference to the DOL's test, declined to follow the Department's all-or-nothing approach, but still used the same six factors to determine if the plaintiff was an employee under the FLSA.[214]

The court's analysis can be traced directly back to the DOL test.[215] That being so, the DOL test and the Tenth Circuit's approach share many of the same flaws. The DOL's six factors are mainly based on the facts of *Portland Terminal*,[216] with nothing additional added. While the test would be useful in a case with facts similar to *Portland Terminal*, it is unlikely that a modern-day internship will share the same specificities as

207. FACT SHEET #71, *supra* note 21.

208. U.S. Dep't of Labor, Wage & Hour Div., Op. Letter Fair Labor Standards Act (FLSA), 2002 WL 32406598, at *3 (Sep. 5, 2002); U.S. Dep't of Labor Op. Letter Fair Labor Standards Act (FLSA), 1995 WL 1032473, at *1 (Mar. 13, 1995); U.S. Dep't of Labor Op. Letter Fair Labor Standards Act (FLSA), 1975 WL 40999, at *1 (Oct. 7, 1975).

209. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993).

210. *See Schumann*, 803 F.3d at 1209; *Reich*, 992 F.2d at 1027.

211. Brookhouser, *supra* note 187, at 758; Chrysler, *supra* note 19, at 1576–77; Malik, *supra* note 22, at 1202.

212. *Reich*, 992 F.2d at 1026.

213. *Id.* at 1025.

214. *Compare* id. at 1026–29, *with* FACT SHEET #71, *supra* note 21 (Factor One: the training was at a vocational school, Factor Two: the experience was for the advantage of the trainee, Factor Three: the trainees did not displace the regular employees, Factor Four: there was no material benefit to the employer, Factor Five the court addressed whether the trainees expected to be hired at the conclusion of the training, Factor Six: the trainees did not expect to be paid.)

215. *See Reich*, 992 F.2d at 1027; FACT SHEET #71, *supra* note 21.

216. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016).

the program in question over sixty years ago. The Tenth Circuit should have devised a new solution rather than taking the DOL's lead.

C. The Primary Beneficiary Test

The primary beneficiary test is the best approach for determining whether an intern should be considered an employee under the FLSA. This approach focuses on what the intern gained from his/her experience.[217] Additionally, unlike the DOL test, it is flexible enough to address the different varieties of internships that exist today.[218] Moreover, the primary beneficiary test looks at the totality of the circumstances rather than focusing only on six factors.[219] It is a balanced approach aimed at protecting interns from abuse, and it does not penalize employers for having an internship program.[220] Further, it reviews how the internship advances the intern's education.[221] Finally, this test is consistent with *Portland Terminal* but adapts to the internship realities of modern times.[222]

This approach examines "whether the intern or the employer is the primary beneficiary of the relationship."[223] It reviews the tasks the interns completed, the skills the intern acquired, and the training they received.[224] Through such an examination, a court will be able to see the type of work the employer assigned to the intern, and whether the intern was given meaningful work or gained any knowledge from those assignments. In addition, the training the intern received will shed light on what the employer expected from the intern.

In contrast to the DOL test, which requires all six factors to be met,[225] or the Tenth Circuit's approach, which only examines the factors identified by the Department,[226] the primary beneficiary test is much more flexible.[227] While *Portland Terminal* mentioned the DOL's six factors,[228] courts should not be limited to examining only those factors.[229] The Second Circuit's test identifies seven factors, but allows courts the flexibility to examine any pertinent facts it thinks will assist it in determining who in the relationship was the primary beneficiary.[230] In contrast to the DOL test where the lack of a single factor may change the em-

217. *Id.*
218. *Id.* at 537.
219. Chrysler, *supra* note 19, at 1589–90.
220. Gregory S. Bergman, Note, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 580 (2014).
221. *Glatt*, 811 F.3d at 537.
222. *Id.*
223. *Id.* at 538.
224. Wolfe v. AGV Sports Grp., Inc., No. CIV. CCB-14-1601, 2014 WL 5595295, at *3 (D. Md. Nov. 3, 2014).
225. FACT SHEET #71, *supra* note 21.
226. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–29 (10th Cir. 1993).
227. *Glatt*, 811 F.3d at 537.
228. Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 526 n.2 (6th Cir. 2011).
229. *See Glatt*, 811 F.3d at 536–37.
230. *Id.*

ployment status of an intern,[231] the primary beneficiary test does not have such harsh consequences.[232] Further, this approach looks at all of the facts in determining whether an employer owes an intern compensation.[233] This test analyzes each case by its specific facts rather than trying to fit every case into the *Portland Terminal* factual scenario.[234] The Second Circuit's method is a true "totality of the circumstances" approach, which "weigh[s] and balanc[es] all of the considerations" in a dispute.[235] Therefore, courts should adopt the Second Circuit's primary beneficiary test because its flexibility does not limit courts to only six factors.

The primary beneficiary test effectively balances the need to protect students from exploitation while recognizing that internships are a valuable learning tool.[236] On one hand, internships allow students to put their education to use in the real world, develop skills, and explore different careers.[237] In the case of *Schumann v. Collier Anesthesia, P.A*, an unpaid internship program allowed students training to become certified registered nurse anesthetists to gain supervised training.[238] The court in that case noted the dangers that can arise when new anesthetists start to work with no prior training.[239] On the other hand, some interns spend their time making coffee runs and picking up dry cleaning.[240] In cases where the intern mainly completes menial tasks, the primary beneficiary test will find that there was no significant benefit to the intern and hold the employer liable for back pay. This approach effectively safeguards interns from "predatory internships that provide little or no experiential value."[241] In conclusion, the primary beneficiary test successfully balances the advantages and negative aspects of internships.

The primary beneficiary test, as adopted by the Second and Eleventh Circuits, highlights the educational component of modern-day internships.[242] Five of the seven factors identified by the Second Circuit reference education.[243] Under the primary beneficiary test, internships, that neither provide an educational benefit nor pay the interns, would be required to compensate the interns for their work.[244] This new approach

231. *See* FACT SHEET #71, *supra* note 21.
232. Chrysler, *supra* note 19, at 1589–90.
233. *Glatt*, 811 F.3d at 537.
234. Schumann v. Collier Anesthesia, 803 F.3d 1199, 1210–11 (11th Cir. 2015).
235. Brossman et al., *supra* note 1, at *3.
236. Bergman, *supra* note 220, at 580; Chrysler, *supra* note 19 at 1562.
237. Heather Huhman, *Why You Should Get a Summer Internship*, U.S. NEWS & World Rep. (April 29, 2011, 9:00 AM), http://money.usnews.com/money/blogs/outside-voices-careers/2011/04/29/why-you-should-get-a-summer-internship.
238. *See Schumann*, 803 F.3d at 1202.
239. *Id.* at 1211.
240. Stephanie A. Pisko, Comment, *Great Expectations, Grim Reality: Unpaid Interns and the Dubious Benefits of the DOL Pro Bono Exception*, 45 SETON HALL L. REV. 613, 614 n.2 (2015) (citing Ariel Kaminer, *The Internship Rip-Off*, N.Y. TIMES, Mar. 11, 2012, at MM20).
241. Bergman et al., *supra* note 220, at 580.
242. Brossman, *supra* note 1, at *3.
243. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536–37 (2d Cir. 2016).
244. Chrysler, *supra* note 19, at 1562.

provides several advantages.[245] It focuses on the interns and how the internship relates to their education,[246] addresses modern-day internships, which are aimed at incorporating the topics students learn at school into practical use,[247] and modernizes an approach to dealing with internships that was first put in place when internships were uncommon.[248]

The Second Circuit's primary beneficiary test remains consistent with *Portland Terminal* and updates the evaluation used in determining when to compensate interns to reflect current circumstances.[249] The Eleventh Circuit noted that, "[t]he factors that the Second Circuit has identified effectively tweak the Supreme Court's considerations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships like the type at issue here."[250] The Court in *Portland Terminal* did not require that subsequent cases share the same facts.[251] Further, the seven factors the Second Circuit emphasized can be traced back to *Portland Terminal*.[252] Therefore, courts should apply the primary beneficiary test rather than either the DOL's test or the totality of circumstances test.

D. The Seven New Factors

The Second Circuit's approach has several advantages over the DOL's test and the Tenth Circuit's approach for determining whether employers are required to compensate their interns. For instance, unlike the DOL test, which requires that the employer does not receive an "immediate advantage" from the intern's work, the Second Circuit's test allows the employer to receive some benefit from the intern so long as the intern receives a greater benefit.[253]

The first factor evaluates whether there was an expectation that the intern would not be paid.[254] Suggestions that the intern would be compensated would indicate that the intern was an employee.[255] This relates to when the Court in *Portland Terminal* stated that "[w]ithout doubt the Act covers trainees, beginners, apprentices, or learners if they are employed to work for an employer for compensation."[256] The Court also

245. *Glatt*, 811 F.3d at 537–38.
246. *Id.*
247. *Id.*
248. Neil Howe, *The Unhappy Rise of the Millennial Intern*, FORBES (Apr. 22, 2014, 10:11 AM), https://www.forbes.com/sites/realspin/2014/04/22/the-unhappy-rise-of-the-millennial-intern/#518c88c41328.
249. *Glatt*, 811 F.3d at 537–38; Schumann v. Collier Anesthesia, 803 F.3d 1199, 1212 (11th Cir. 2015).
250. *Schumann*, 803 F.3d at 1212.
251. *Glatt*, 811 F.3d at 537.
252. *Schumann*, 803 F.3d at 1212.
253. Julie M. Capell & Jennifer N. Zhao, *Drafting Effective Unpaid Agreements*, LAW360 (Jan. 13, 2016, 11:05 AM), https://www.law360.com/articles/745648/drafting-effective-unpaid-internship-agreements.
254. *Glatt*, 811 F.3d at 536–37.
255. *Id.*
256. Walling v. Portland Terminal Co., 330 U.S. 148, 151 (1947).

stated that the FLSA did not aim to require employers to compensate individuals who "without any express or implied compensation agreement" decided to work for another person for their own benefit.[257] To avoid having this factor weighed against them, employers should draft an agreement stating that the intern will not be compensated for his/her time, and they should also avoid actions that may seem like agreements to compensate the intern.[258]

The second factor examines the degree to which the internship is similar to that of a clinical program offered by a school.[259] In *Portland Terminal*, the Court noted that the training the brakemen trainees had received was similar to that of a vocational school,[260] and had the trainee received their training at a school, it would have been unreasonable for them to claim they were owed compensation.[261] This factor ensures that the quality of training the intern receives is substantial, and employers should confirm that the work the intern receives is instructive.[262]

The third factor probes whether the internship relates to the intern's education and if the intern is receiving credit from their school.[263] This factor further emphasizes that an internship "should be viewed in the first instance as part of an academic relationship between student and educational institution rather than as a conventional employment arrangement . . . ."[264] Employers can fulfill this factor by only hiring interns who are currently in school and will receive academic credit for completing their internship.[265]

The fourth factor reviews whether the "internship accommodates the intern's academic commitments by corresponding to the academic calendar."[266] Internships that do correspond with the student's academic calendar will be suggestive of a "student-trainee relationship," rather than an "employee-employer relationship."[267] Employers meet this criteria by making sure that the internship does not interfere with the student's academic obligations.[268]

The fifth factor investigates whether the length of the internship is "limited to the period in which the internship provides the intern with beneficial learning."[269] This factor requires an examination of the internship objectives and the reasonable amount of time that will be required

257. *Id.* at 152.
258. Capell & Zhao, *supra* note 253.
259. *Glatt*, 811 F.3d at 537.
260. Hollins v. Regency Corp., 144 F. Supp. 3d 990, 995–96 (N.D. Ill. 2015) (citing *Portland Terminal Co.*, 330 U.S. at 153).
261. 330 U.S. at 152–53.
262. Capell & Zhao, *supra* note 253.
263. *Glatt*, 811 F.3d at 537.
264. *Hollins*, 144 F. Supp. 3d at 1000.
265. *See* Capell & Zhao, *supra* note 253.
266. *Glatt*, 811 F.3d at 537.
267. *Hollins*, 144 F. Supp. 3d at 1001–02.
268. Capell & Zhao, *supra* note 253.
269. *Glatt*, 811 F.3d at 537.

to complete them.[270] Evaluating this factor is "not an exact science;" rather, courts should determine whether the length of the internship is "grossly excessive" of the time required for the internship to exist.[271] When the internship is so prolonged beyond the point where it is providing a benefit to the intern, then an "employee-employer relationship" may be implied.[272] Employers should avoid lengthy internships that seem to be "taking advantage of the intern."[273]

The sixth factor scrutinizes whether the "intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern."[274] This factor relates back to when the Court in *Portland Terminal* noted that the trainees did "not displace any of the regular employees."[275] Employers should not enlist interns in order to avoid the cost of having paid employees.[276] Further, the work the intern is assigned should further his/her educational goals.[277]

The seventh factor appraises whether the intern is guaranteed a position at the end of his internship.[278] This relates to *Portland Terminal* because the trainees were not guaranteed a position upon completion of the training program, but rather had their names placed on a list which the railroad company could use to hire future employees.[279] Employers can ensure they are in compliance with *Glatt's* seven factors by having an agreement in writing with the intern to ensure there are no misunderstandings about the nature of the internship.[280]

The Second Circuit's approach to unpaid interns is an improvement over the tests used by DOL and the Tenth Circuit.[281] The Second Circuit's method covers the key factors the Court identified in *Portland Terminal*, including many of those identified by the DOL test, but tailors the approach to a modern-day internship.[282] The only factor not represented by the Second Circuit's approach is the fourth DOL factor, which requires the employer not to receive any "immediate advantage from the activities of the intern."[283] While *Portland Terminal* does mention that the railroad did not receive an immediate advantage from the trainee's

270. Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1213 (11th Cir. 2015).
271. *Id.* at 1213–14.
272. *Hollins*, 144 F. Supp. 3d at 1002.
273. Capell & Zhao, *supra* note 253.
274. *Glatt*, 811 F.3d at 537.
275. Walling v. Portland Terminal Co., 330 U.S. 148, 149–50 (1947).
276. Capell & Zhao, *supra* note 253.
277. *Id.*
278. *Glatt*, 811 F.3d at 537.
279. *See* Hollins v. Regency Corp., 144 F. Supp. 3d 990, 998 (N.D. Ill. 2015) (citing *Portland Terminal Co.*, 330 U.S. at 153).
280. Capell & Zhao, *supra* note 253.
281. *See* Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1212 (11th Cir. 2015) ("The factors that the Second Circuit has identified effectively tweak the Supreme Court's considerations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships like the type at issue here.").
282. *Id.*
283. *Id.* at 1212–13;FACT SHEET #71, *supra* note 21.

work,[284] there are significant differences between a 1940's railroad training program and a present-day internship.[285] In fact, the railroad company in *Portland Terminal* had a "significant economic incentive" to provide the training program so that, in the future, it would have a group of people ready to start working when needed.[286] Since the Second Circuit remains consistent with *Portland Terminal* and modernizes the method in which courts determine when interns are entitled to compensation under the FLSA, it should be followed.

IV. RECOMMENDATION

This Note proposes that the Supreme Court resolve the circuit split and give courts guidance on which test to apply by adopting the Second Circuit's approach. Further, in the absence of a Supreme Court decision, other circuit courts should adopt the primary beneficiary test set forth in *Glatt v. Fox Searchlight Pictures, Inc.* Given the lack of clarity concerning which test should be used in determining whether unpaid interns are employees under the FLSA—thereby entitling them to receive at least minimum wage and overtime if they work more than forty hours a week—a ruling from the Supreme Court would be helpful. Doing so would provide courts direction on how they should resolve unpaid intern cases.

Currently, the outcome of a dispute under the FLSA may depend on where the suit was filed.[287] Since the current test used by the DOL is derived from *Portland Terminal*, providing guidance on the correct test to use will clarify how its prior ruling should apply. Moreover, employers will be able to plan accordingly and will better understand when they have to pay interns for their work. Likewise, interns will also greatly benefit from a Supreme Court ruling clarifying which test is to be used when determining whether interns should have received compensation.

Given that interns may be unwilling to complain because of possible consequences of doing so,[288] clarification on whether they should receive pay for their work will encourage them to file suit when they are owed compensation. Additionally, by clarifying which test to use, the Supreme Court will set a consistent standard for the entire country. Moreover, because the Court's decision in *Portland Terminal* is seventy years old, an updated approach on how courts should decide whether an intern should be compensated is needed.[289] This Note proposes that the Supreme Court should adopt the Second Circuit's approach because it focuses on the educational aspect of internships.

284. Walling v. Portland Terminal Co., 330 U.S. 153 (1947).

285. *See Schumann*, 803 F.3d at 1213 ("[T]he modern internship as a requirement for academic credit and professional certification and licensure is very different.").

286. *Id.* at 1213.

287. AITCHISON & SHEETZ, *supra* note 34, at 5.

288. *See* Kaavya Asoka, *Interns Aren't Just Cheap Labor to Abuse: They're Workers—and They Deserve Pay*, GUARDIAN (May 7, 2014, 7:45 AM), http://www.theguardian.com/commentisfree/2014/may/07/unpaid-internships-unfair-cheap-labor-abuse.

289. 330 U.S. 148 (1947).

While several other circuits have also adopted the primary beneficiary test, they should consider following the Second Circuit's focus on the educational aspect of an internship. Soon after the Second Circuit decided *Glatt v. Fox Searchlight Pictures, Inc.*, the Eleventh Circuit noted that "the factors that the Second Circuit has identified effectively tweak the Supreme Court's considerations in evaluating the training program in *Portland Terminal* to make them applicable to modern-day internships like the type at issue here."[290] While the Fourth, Fifth, Sixth, and Eight Circuits already apply a primary beneficiary test in determining when a worker falls under the FLSA's requirements, by adopting the "non-exhaustive factors" set by the Second Circuit, courts will bring their approaches up to date.[291]

In short, since the FLSA and *Portland Terminal* are from a different time, updates to the current regulatory framework are needed. The Second Circuit's new approach for determining whether an employer is required to compensate an intern is in the right direction. The Supreme Court can provide a uniform standard for all courts to follow. Likewise, other courts have already started taking the Second Circuit's approach and should continue to do so.

V. CONCLUSION

The test set forth by the Second Circuit in *Glatt* is ideal because it not only examines the benefits the intern and employer receive, but also reviews the educational value the intern receives. The Supreme Court should provide guidance to lower courts on how to resolve issues of whether an intern is considered an employee under the FLSA. This would resolve the circuit split. Further, it would ensure that workers were receiving "a fair day's pay for a fair day's work."[292]

Other circuits can follow the Eleventh Circuit by tailoring the factors of *Portland Terminal* to a modern-day internship.

In conclusion, the Second Circuit's approach is ideal because it is consistent with prior Supreme Court rulings, but it also gives courts the flexibility to evaluate the totality of the circumstances between the intern and employer and focuses on the educational benefit to the intern.

290. *Schumann*, 803 F.3d at 1212.

291. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 538 (2d Cir. 2016); *see supra* Section III.C and note 204 and accompanying text.

292. AM. BAR ASS'N SECTION OF LABOR & EMP'T LAW, *supra* note 32, at 1–11 (quoting President Franklin D. Roosevelt).