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The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA Note

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The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA

MADIHA M. MALIK

Unpaid internships have come under increased scrutiny for their potential illegality under the Fair Labor Standards Act. Due to the limited case law and statutory guidance regarding interns, lower courts have issued conflicting opinions on the proper analysis courts should engage in to determine whether interns are considered “employees” under federal law. Such conflicting judicial interpretation is detrimental to both employers and interns. A bright line rule for determining when an intern qualifies as an employee under the FLSA is critical to settling the uncertainty in this area of the law.

NOTE CONTENTS

I. INTRODUCTION	1185
II. OVERVIEW OF THE INTERNSHIP MARKET	1187
III. UNCLEAR LEGAL STANDARDS	1189
A. STATUTORY LANGUAGE.....	1189
B. JUDICIAL INTERPRETATION OF <i>WALLING</i>	1190
C. ADMINISTRATIVE GUIDANCE	1192
IV. AGENCY DEFERENCE AND JUDICIAL INTERPRETATIONS OF <i>WALLING</i>	1194
A. DOL SIX-FACTOR TEST UNDER <i>SKIDMORE</i> DEFERENCE	1195
B. JUDICIAL TREATMENT OF THE DOL SIX-FACTOR TEST.....	1197
C. TESTS EMERGING FROM FEDERAL COURT DECISIONS	1199
V. CASES ON APPEAL: <i>WANG</i> AND <i>GLATT</i>	1203
A. <i>WANG V. HEARST CORPORATION</i>	1203
B. <i>GLATT V. FOX SEARCHLIGHT PICTURES INC.</i>	1206
VI. CONSIDERATIONS FOR THE SECOND CIRCUIT	1209
A. PREDICTABILITY FOR EMPLOYERS	1209
B. PROTECTION FOR INTERNS	1211
C. TOTALITY OF ECONOMIC CIRCUMSTANCES TEST SHOULD BE APPLIED.....	1211
VII. CONCLUSION.....	1214



The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA

MADIHA M. MALIK*

I. INTRODUCTION

For years, emerging professionals have coveted the opportunity to expand their experiences, résumés, and networks with the help of internships. While the work is often unpaid, it is undertaken with the presumption that the opportunity will serve as a stepping-stone to their prospective careers. However, recent lawsuits have brought the legality of unpaid internships under scrutiny. In response to a slew of class action lawsuits filed by former and current interns, courts have had to consider whether interns fall within the category of “employee” under federal and state labor laws, and as such, must be paid according to minimum wage laws.¹ Three areas of the law currently govern employment jurisprudence for interns: the Fair Labor Standards Act (FLSA), Supreme Court precedent interpreting the FLSA, and the Department of Labor’s Wage and Hour Division (WHD) interpretive guidelines.² These statutes and the cases that interpret them have fallen short of providing a clear test for courts and businesses to uniformly use in determining whether an intern is an employee under federal labor laws.

The FLSA is the federal law that regulates wage and hour requirements for employees and mandates that employees be paid at least the federal minimum wage.³ The text of the FLSA is unhelpful in determining whether an intern is an “employee” because the Act does not mention interns and

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¹ See, e.g., *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 521–22 (S.D.N.Y. 2013) (involving plaintiff interns bringing suit claiming they were “employees” under the FLSA and entitled to compensation); *Wang v. Hearst Corp.*, 293 F.R.D. 489, 492 (S.D.N.Y. 2013) (involving plaintiff interns claiming that they were entitled to minimum wage compensation as “employees” under the FLSA).

² Bernice Bird, *Preventing Employer Misclassification of Student Interns and Trainees*, CORNELL HR REV. (Feb. 28, 2012), http://www.cornellhrreview.org/preventing-employer-misclassification-of-student-interns-and-trainees/#_edn1.

³ Fair Labor Standards Act of 1938, 29 U.S.C. § 206(a) (2012).

provides an inadequate and broad definition of “employee.”⁴ In 1947, the Supreme Court interpreted the FLSA in *Walling v. Portland Terminal Company*,⁵ which presented the question of whether “trainees” for a railroad company were employees entitled to compensation.⁶ While the Court found that the “trainees” were not employees under the FLSA, it failed to establish a clear standard for analyzing whether an individual falls within the definition of an “employee.”⁷ In 2010, the WHD issued guidance in the form of a Six-Factor Test derived from *Walling*, designed for employers to use in order to determine whether interns in a particular program should be treated as employees and thus entitled to the minimum wage.⁸ While the Six-Factor Test provides some guidance, the agency’s interpretation lacks the force of law and is not binding on federal courts.⁹ As such, courts have given varying weight to the WHD’s guidance, with some courts disregarding it all together.¹⁰

Ambiguous statutory language, unclear legal precedent, and non-binding agency interpretation have resulted in courts’ applying inconsistent standards to determine the employment status of interns. The emerging tests are only controlling in the jurisdiction in which the respective federal court sits, resulting in a patchwork of standards in courts across the nation. Such inconsistency of legal standards across jurisdictions inhibits multinational employers and courts from adequately assessing the legality of unpaid internships and elucidates the need for a uniformly controlling standard nationwide.

This Note discusses and critiques the limited guidance available pursuant to the FLSA, the Supreme Court, and the WHD, as well as the various legal tests that have emerged from their interpretations. It suggests a test that courts, employers, and interns alike can apply in order to predict

⁴ See *Wang*, 293 F.R.D. at 492 (“[T]he term ‘intern’ is neither defined nor provided as an exception in the FLSA . . .”); *infra* Part III.A..

⁵ 330 U.S. 148 (1947).

⁶ *Id.* at 150.

⁷ *Id.* at 153; compare *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir. 1983) (deferring to the DOL’s Six-Factor Test in determining the employment status of trainees), with *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011) (dismissing the DOL’s Six-Factor Test as inadequate for determining the employee status of trainees), and *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (finding the DOL’s Six-Factor Test relevant but not conclusive to determining a trainee’s employment status under the FLSA).

⁸ WAGE & HOUR DIV., U.S. 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 DOL FACT SHEET].

⁹ See *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (stating that agency interpretations in formats such as opinion letters are entitled to deference, but only if they are persuasive); *Hoyt v. Gen. Ins. Co.*, 249 F.2d 589, 590 (9th Cir. 1957) (holding that the federal courts of appeal were not bound by explanatory bulletins promulgated by the WHD).

¹⁰ See *infra* Part IV.B (discussing the varied deference courts have afforded the WHD’s interpretation of the FLSA as it relates to interns).

the legality of unpaid internship programs. Part II provides an overview of the market for interns and its evolution as it relates to both employers and interns. Part III discusses the legal standards established by the FLSA, the Supreme Court, and the WHD. Part IV sets out the conflicting tests that have emerged from federal court decisions. Part V introduces two recently litigated cases that are soon to be considered by the Second Circuit and compares the courts' distinct reasoning and decision in each case. Part VI analyzes the ways in which courts can overcome the ambiguity of the law and proposes several factors that should be taken into consideration in formulating a workable solution.

II. OVERVIEW OF THE INTERNSHIP MARKET

High unemployment rates for recent college graduates have led to a hyper-competitive job market, causing internships to become a highly coveted way of getting one's foot in the door.¹¹ Internships provide real-world skills different from knowledge obtained in the classroom, making graduates with internship experience more valuable candidates.¹² Not only do internships provide experience in particular areas of interest, they also help develop "soft skills" such as communication and teamwork, which are highly valuable to employers.¹³ Unpaid internships are particularly desirable in fields where barriers of entry are particularly high and paid internships are rare, including industries such as entertainment, public relations, and publishing.¹⁴ Internships at times provide the prospect of a

¹¹ PEW RESEARCH CTR., YOUNG, UNDEREMPLOYED AND OPTIMISTIC: COMING OF AGE SLOWLY, IN A TOUGH ECONOMY 6 (2012), <http://www.pewsocialtrends.org/files/2012/02/young-underemployed-and-optimistic.pdf> (reporting that 54.3% of employed young adults between ages 18 to 24 were employed in 2011, the lowest total since 1948, when the U.S. Bureau of Labor Statistics first started collecting this data). Contributing to the competitive job market, the Pew Research Center reports that more young adults are enrolled in high school or college today than at any time before in history and that the job losses experienced in the aftermath of the Great Recession have compounded the decreasing employment rate. *Id.* at 3, 6.

¹² See *Solis*, 642 F.3d at 531–32 (placing special emphasis on intangible benefits interns derived from the work, which taught them responsibility, the dignity of manual labor, the importance of working hard, seeing a task through to completion, leadership skills, worth ethic, and other practical skills); Jack Gault et al., *Undergraduate Business Internships and Career Success: Are They Related?*, 22 J. MARKETING EDUC. 45, 51 (2000) (stating that internship programs add real-world experience to their education); see also *infra* Part IV.C.1 (discussing the importance given to intangible skills in assessing the benefits conferred to interns).

¹³ See Catherine Gewertz, 'Soft Skills' in Big Demand, EDUC. WK., June 2007, at 25, available at <http://www.edweek.org/ew/articles/2007/06/12/40soft.h26.html> (stating that it is not enough to be academically strong because business leaders are increasingly valuing soft skills). Such intangible skills have received attention in recent case law and are deemed to have significant value in assessing the benefits derived from an internship. *Solis*, 642 F.3d at 531.

¹⁴ See Christopher Keleher, *The Perils of Unpaid Internships*, 101 ILL. B.J. 626, 627 (2013) (listing industries where unpaid internships provide opportunities to learn and network); see also Eric Gardner, *How All Those Intern Lawsuits Are Changing Hollywood*, HOLLYWOOD REP. (Nov. 16, 2014), <http://www.hollywoodreporter.com/thr-esq/how-all-intern-lawsuits-are-746945> (quoting Rick

full-time job at the end of the program.¹⁵ Employers also benefit from unpaid interns because internship programs often serve as an important pipeline feeding full-time hiring programs.¹⁶ Not only do interns provide employers with a new and young perspective, employers benefit from having time to train and get to know potential new hires before extending a full-time offer, a practice that is known as “converting interns.”¹⁷

Disparities exist between paid and unpaid internships that result in unpaid interns being overlooked for full-time jobs and being assigned menial tasks as compared to their paid counterparts.¹⁸ Menial tasks that provide few professional skills and appear closer to unpaid labor, rather than meaningful learning opportunities, are largely the focus of disgruntled interns who claim they have been exploited.¹⁹ Unpaid internships have also been criticized for diluting the labor market, thereby replacing experienced workers and hurting the U.S. economy.²⁰ Finally, access to unpaid

Levy, partner and general counsel of at talent agency, ICM Partners, which was defending a class action lawsuit brought by former interns, as stating “[t]here is a long, long tradition of intern programs being an integral part of careers in Hollywood”); *Generation i*, *ECONOMIST*, Sept. 6, 2014, <http://www.economist.com/news/international/21615612-temporary-unregulated-and-often-unpaid-internship-has-become-route> (stating that those employers most eager to provide unpaid internships are those who are glamorous enough for students to agree to perform menial work without pay).

¹⁵ See, e.g., *Wang v. Hearst Corp.*, 293 F.R.D. 489, 492 (S.D.N.Y. 2013) (“Hearst made it clear that there was little likelihood, and certainly no guarantee, of a job at the end of their internship.”).

¹⁶ See NAT’L ASSOC. OF COLLS. & EMP’RS, *INTERNSHIPS: CURRENT BENCHMARKS*, <http://www.nacweb.org/internships/benchmarks.aspx> (reporting that 79% of interns accepted full-time job offers with the employers they held an internship with); see also David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 *NOTRE DAME J.L. ETHICS & PUB. POL’Y* 227, 241 (1998) (“Internships benefit employers in a myriad of ways; they provide free labor, fresh perspectives, and a means to screen potential employees.”).

¹⁷ See generally Philip S. Rose et al., *Converting Interns into Regular Employees: The Role of Intern-Supervisor Exchange*, 84 *J. VOCATIONAL BEHAV.* 155 (2014) (studying the predictors of intern conversion).

¹⁸ See NAT’L ASSOC. OF COLLS. & EMP’RS, *CLASS OF 2012: 60 PERCENT OF PAID INTERNS GOT JOB OFFERS* (Aug. 1, 2012), <http://www.nacweb.org/s08012012/paid-intern-job-offer> (reporting that 64% of paid interns received job offers compared to 38.3% of unpaid interns). Paid interns spend 42% of their time on professional duties such as analysis and project management and only 25% on clerical and non-essential functions, compared to unpaid interns who spend 30% of their time on professional tasks and 31% of their time on clerical work. *Id.* The study suggests that this discrepancy between unpaid and paid interns contributes to the disparity in job offers, with paid interns spending more time engaging in “real work,” therefore gaining more relevant and valuable experiences than their unpaid counterparts. *Id.*

¹⁹ See, e.g., *Questioning the Ethics of Unpaid Internships*, NAT’L PUB. RADIO (July 13, 2010), <http://www.npr.org/templates/story/story.php?storyId=128490886> (relaying the story of an NYU student who, during an internship at an animation studio in New York City, was assigned to the facilities department and carried out tasks including cleaning the kitchen and the bathrooms, and cleaning doorknobs to prevent spreading of the H1N1 virus).

²⁰ ROSS PERLIN, *INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY* 71 (2012) (stating that the internship boom has most seriously effected the displacement of regular employees, causing hundreds of thousands of full time, regular employees to be laid off and potentially remain unemployed).

internships is limited largely to those who can afford to take on unpaid work, a luxury that is often unavailable to low-income students, making them less competitive than their more affluent peers.²¹

III. UNCLEAR LEGAL STANDARDS

The FLSA is the primary federal law regulating wages and hours for employees, and is enforced by the Department of Labor's Wage and Hour Division.²² Among other things, the FLSA mandates that employees be paid at least the federally prescribed minimum wage.²³ Since the FLSA does not define or reference unpaid internships, their legality turns on the Act's definition of "employee."²⁴ If an intern, by virtue of his or her job duties, does not meet the definition of "employee" under the FLSA, the Act does not apply and the employer does not have to abide by federal minimum wage requirements. However, if the intern does qualify as an "employee," the employer must comply with the FLSA's minimum wage and overtime provisions.²⁵ As discussed below, determining whether an intern is an "employee" under the FLSA is challenging given the broad language of the statute, unclear judicial interpretation, and non-binding agency guidance.

A. Statutory Language

The FLSA defines the term "employee" broadly as "any individual employed by an employer."²⁶ The definition of "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee."²⁷ The term "employ" is defined as "to suffer or permit to work."²⁸ These expansive definitions were read by the Supreme Court to be comprehensive enough to include an array of working relationships.²⁹

The broad definition of "employee" and "employ" has resulted in the

²¹ KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, ECON. POL'Y INST., NOT-SO-EQUAL PROTECTION-REFORMING THE REGULATION OF STUDENT INTERNSHIPS, 3 (Apr. 9, 2010), <http://www.epi.org/publication/pm160> (reporting that the decision to take an unpaid internship depends on a student's "economic means, thus institutionalizing socioeconomic disparities beyond college").

²² Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–02, 204 (2012) (stating that Congress created the Wage and Hour Division, under the direction of the Administrator, within the DOL to administer and enforce the FLSA); WAGE & HOUR DIV., U.S. DEP'T OF LABOR, OPINION LETTER FAIR LABOR STANDARDS ACT (FLSA) (May 24, 1994), 1994 WL 1004829; WAGE & HOUR DIV., U.S. DEP'T OF LABOR, MISSION STATEMENT, <http://www.dol.gov/whd/about/mission/whdmiss.htm>.

²³ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150 (1947).

²⁴ *See Wang v. Hearst Corp.*, 293 F.R.D. 489, 492 (S.D.N.Y. 2013) ("[T]he term 'intern' is neither defined nor provided as an exception in the FLSA . . .").

²⁵ 29 U.S.C. § 206.

²⁶ *Id.* § 203(e)(1).

²⁷ *Id.* § 203(d).

²⁸ *Id.* § 203(g).

²⁹ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150–51 (1947).

Supreme Court loosely interpreting both terms,³⁰ providing little guidance regarding how they apply in the context of internships. The Court has found the Act's definition of "employ" to enlarge the meaning of "employee," thereby providing coverage for parties who might not otherwise qualify as employees under a strict application of traditional principles of agency law.³¹ Various tests have been developed to determine the employment status of individuals under the FLSA depending on the context in which the question of employment arises, for example with regard to migrant workers³² and independent contractors.³³ However a uniform test for determining the employment status of interns under the FLSA has yet to be developed.

B. *Judicial Interpretation of Walling*

The primary source of judicial interpretation for the term "employee" in the internship context comes from *Walling v. Portland Terminal Company*,³⁴ in which the Supreme Court interpreted the rights of trainees under the FLSA.³⁵ The Court's ruling in *Walling* gave rise to the foundational concept that someone who is trying to learn the skills necessary to perform the required functions of a job need not be treated as an employee.³⁶ This holding has been extended to interns who are, for purposes of the FLSA, treated similar to "trainees."³⁷

³⁰ See *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (stating that the term "employ" has "striking breadth" in the FLSA).

³¹ *Id.*

³² See *Donovan v. Brandel*, 736 F.2d 1114, 1117–20 (6th Cir. 1984) (holding that migrant pickle harvesters were not "employees" under the FLSA and analyzing the potential employment relationship with factors including the permanency of the relationship, the degree of skill required, the workers' capital investment, the migrant workers' opportunity for profit or loss, and the potential employer's degree of control).

³³ In distinguishing between employees and independent contractors, courts focus on "whether, as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008); see also *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308, 1311 (11th Cir. 2013) (stating that when determining whether an individual is an "employee" or an "independent contractor" exempt from the FLSA, courts look to the "economic reality" of the relationship between the alleged employee and employer and whether the relationship exhibits dependence); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1311 (5th Cir. 1976) (stating that the dominant factor in considering whether an individual is an independent contractor or an employee, is the degree of economic dependence that the alleged employee has on the business for which he or she is working).

³⁴ 330 U.S. 148 (1947).

³⁵ See *id.* at 153 (holding that the trainees were not "employees" under the FLSA).

³⁶ Stephen A. Mazurak, *The Unpaid Intern: Liability for the Uninformed Employer*, 29 A.B.A. J. LAB. & EMP. L. 101, 105 (2013).

³⁷ See Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1369 n.30 (2012) ("The DOL practically adopted the trainee standard verbatim—only changing 'training' to 'internship' and

In *Walling*, the employer railroad company required prospective hires, or “trainees,” for the position of brakeman to undergo preliminary training that lasted an average of seven to eight days.³⁸ The Supreme Court held that the trainees were not employees under the FLSA and were not entitled to wages.³⁹ In so holding, the Court reasoned that working for one’s own advantage on another’s premises, without an express or implied compensation agreement, did not automatically make an individual an employee under the FLSA.⁴⁰ Under this reasoning, interns who have no expectation of compensation and work without pay for some other personal benefit, such as building their résumés or networking, cannot automatically claim to be employees within the scope of the FLSA.

The *Walling* Court found several factors relevant to its holding.⁴¹ First, the Court noted that the trainees did not replace regular paid employees; rather the regular employees did most of the work themselves, and stood by to supervise the trainees.⁴² As such, the company did not benefit from the trainees’ work because the trainees, rather than facilitating the company’s business, at times impeded it.⁴³ Second, the Court found it significant that the defendant railroad company did not compensate the trainees, nor did the trainees expect any compensation during the training period.⁴⁴

The Court concluded that the employer railroad received no “immediate advantage” from the trainees’ work, and therefore the trainees were not “employees” under the FLSA.⁴⁵ In cautioning that its holding in

‘trainee’ to ‘intern.’”); DOL FACT SHEET, *supra* note 8 (adopting *Walling* in formulating a guideline for the legality of unpaid internships under the FLSA).

³⁸ *Walling*, 330 U.S. at 149.

³⁹ *Id.* at 153.

⁴⁰ *See id.* at 152 (“The definition ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.”).

⁴¹ These factors were later adopted in the Department of Labor’s Six-Factor Test, *infra* Part III.C. *See* DOL FACT SHEET, *supra* note 8 (listing the criteria to be applied in determining whether an individual is entitled to compensation or not).

⁴² *Walling*, 330 U.S. at 149–50. The yard crew would instruct the trainees, providing supervision by first allowing them to observe routine activities and gradually allowing trainees to do actual work under close scrutiny. *Id.* at 149.

⁴³ *Id.* at 150.

⁴⁴ *Id.* Those who passed the training were certified as competent and subsequently placed in a pool of qualified workers available when the railroad company needed them. *Id.* Pursuant to a collective bargaining agreement, it was agreed that for the war period, the men who would later work for the railroad company would be given a retroactive allowance of \$4 per day for the training period. *Id.*

⁴⁵ *Id.* at 153. The Court’s analysis of the “immediate advantage” received by the employer has led many courts to infer that this was the primary test established by the Supreme Court in employer-trainee jurisprudence, despite the Court’s failure to formulate a bright-line test. *See, e.g., Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App’x 831, 834 (11th Cir. 2013) (citing *Walling* for the proposition that when an individual’s work “provides no ‘immediate advantage’ for his alleged

Walling might provide a way to evade FLSA minimum wage requirements,⁴⁶ the Court's decision alludes to the recent claims of employers unjustly categorizing employees as "interns" to bypass the FLSA. While *Walling* did not present an issue of employers evading the FLSA by employing beginners at less than minimum wage, the Court noted that, "[i]t will be time enough to pass upon such evasions when it is contended that they have occurred."⁴⁷ Such a time is upon us with the current question of whether modern unpaid internships are legal under the FLSA.

C. Administrative Guidance

Following the 2008 recession, the economy saw a dramatic increase in the number of unpaid internships,⁴⁸ prompting guidance for employers from the Department of Labor's Wage and Hour Division (WHD) on how to properly handle the growing number of interns.⁴⁹ In 2010, drawing from the Court's decision in *Walling*,⁵⁰ the WHD issued a test that employers were urged to use to determine whether hiring an intern without compensation was legal under the FLSA.⁵¹ The DOL's Six-Factor Test⁵² requires that in order for an unpaid internship to be considered lawful under the FLSA:

'employer'—he is not an 'employee' under the FLSA"); *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971) ("The rationale of [*Walling*] would seem to be that the railroad received no 'immediate advantage' from the trainees' services.").

⁴⁶ See *Walling*, 330 U.S. at 153 ("We have not ignored the argument that such a holding may open up a way for evasion of the law.").

⁴⁷ *Id.*

⁴⁸ Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), <http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/>. Unpaid internships began to increase in the 1970's and 1980's when the traditional norm of working at one job for life was being moved away from and the development of human resources departments allowed specialization of overseeing new hires and recruits, including interns. *Id.* The "Great Recession" accelerated the increase of unpaid interns, and as of 2012, of the 1.5 million internships in the United States, an estimated one-third to one-half are unpaid. *Id.*; see also *supra* Part II (discussing the economy's impact on the modern-day internship market).

⁴⁹ Gregory S. Bergman, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 564 (2014).

⁵⁰ WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FLSA2004-5NA, OPINION LETTER FAIR LABOR STANDARDS ACT (FLSA) (May 17, 2004), 2004 WL 5303033.

⁵¹ DOL FACT SHEET, *supra* note 8. These guidelines apply only to for-profit employers. Non-profit employers are exempt from the criteria for unpaid internships and may hire unpaid interns as volunteers without meeting the DOL's requirements. *Id.* In 1996, prior to the publication of the DOL Fact Sheet, the WHD articulated similar guidance in an opinion letter responding to an inquiry regarding the FLSA's application to interns. WAGE & HOUR DIV., U.S. DEP'T OF LABOR, OPINION LETTER FAIR LABOR STANDARDS ACT (FLSA), 1996 WL 1031777 (May 8, 1996) [hereinafter 1996 OPINION LETTER].

⁵² This test is sometimes referred to as the "*Walling* Factors." See, e.g., *Summa v. Hofstra Univ.*, 715 F. Supp. 2d 378, 389 (E.D.N.Y. 2010).

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.⁵³

“If all of the factors of the test are met, an employment relationship does not exist under the FLSA, and the Act’s minimum wage and overtime provisions do not apply to the intern.”⁵⁴ The WHD advises that the more an internship program is structured away from the employer’s actual operations, such as providing an academic experience or skills pertaining to several employment settings, the more likely it is to be viewed as non-paid work, acceptable for an unpaid internship.⁵⁵ The WHD further explains that interns engaging in productive work, such as clerical tasks or other business operations, may still be viewed as “employees” entitled to wages and overtime because the employer benefits from the interns’ work, even if the interns are learning new skills.⁵⁶

Though the Six-Factor Test is useful, the WHD’s guidelines are merely discretionary, and courts are not bound by them.⁵⁷ Despite the language in the Fact Sheet suggesting that all six factors be strictly construed in every case,⁵⁸ recent lower court decisions have afforded varying degrees of

⁵³ DOL FACT SHEET, *supra* note 8.

⁵⁴ *Id.*

⁵⁵ *See id.* (stating that the more an internship program is structured around a classroom or academic experience, the more likely the internship will be viewed as an extension of the individual’s educational experience, and the more the internship program provides skills used in several employment settings, the intern will most likely be viewed as receiving training).

⁵⁶ *Id.*

⁵⁷ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (“[I]nterpretations contained in formats such as opinion letters are ‘entitled to respect’ under our decision in *Skidmore*, but only to the extent that those interpretations have the ‘power to persuade.’” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))); *see also infra* Part IV.A (discussing judicial deference to agency regulations and interpretations of law).

⁵⁸ *See* DOL FACT SHEET, *supra* note 8 (“If *all* of the factors listed above are met, an employment relationship does not exist under the FLSA” (emphasis added)).

deference to the DOL's Six-Factor Test, frequently discarding the agency's guidance and creating their own tests to determine when an unpaid intern is an "employee."⁵⁹ The DOL Fact Sheet contributes to the confusion with its introductory language: "whether an internship or training program meets this exclusion depends upon *all of the facts and circumstances* of each such program,"⁶⁰ suggesting a totality-of-the-circumstances approach, which seems to be at odds with applying each part of the DOL Six-Factor Test.⁶¹ Two recent cases filed by unpaid interns in the Southern District of New York, *Wang v. Hearst Corporation*⁶² and *Glatt v. Fox Searchlight Pictures, Inc.*⁶³ discussed below,⁶⁴ and the different tests used in each case, illustrate the need to reconcile the standard for future cases.

IV. AGENCY DEFERENCE AND JUDICIAL INTERPRETATIONS OF *WALLING*

The DOL's Six-Factor Test has been widely criticized as being confusing and contradictory; some courts have disregarded the test entirely when analyzing the existence of employment relationships.⁶⁵ Application of the criteria is viewed as being challenging, difficult to prove, and highly subjective.⁶⁶ The Sixth Circuit stated:

[w]e find the WHD's test to be a poor method for determining employee status in a training or educational setting. For starters, it is overly rigid and inconsistent with a

⁵⁹ See *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271–72 (5th Cir. 1982) (referencing other courts' attempts to develop tests directly from the language of the Court's opinion in *Walling*); see also *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (drawing from a Tenth Circuit case distinguishing an independent contractor and employee, concluding that the totality of circumstances test was proper and that meeting five of the six DOL factors was sufficient to find that there was no employment relationship); *Wirtz v. Wardlaw*, 339 F.2d 785, 787–88 (4th Cir. 1964) (formulating three criteria including displacement of regular workers, whether the trainee was working solely for his or her own benefit, and whether the company benefited from the trainee's work); *infra* Part IV.C (discussing the lack of agency deference by courts and judicial application of several tests including the totality of circumstances test, the primary benefit test, and the immediate advantage test, all drawn from *Walling*).

⁶⁰ DOL FACT SHEET, *supra* note 8 (emphasis added).

⁶¹ *Cf. Wang v. Hearst Corp.*, 293 F.R.D. 489, 493 (S.D.N.Y. 2013) (remarking on the confusion produced by the language in the DOL Fact Sheet).

⁶² 293 F.R.D. 489 (S.D.N.Y. 2013).

⁶³ 293 F.R.D. 516 (S.D.N.Y. 2013).

⁶⁴ See *infra* Part V (discussing *Wang* and *Glatt* at length).

⁶⁵ See Jason A. Cabrera & Sarah A. Kelly, *Unpaid Internships: Training Ground or Legal Landmine?*, LAB. & EMP. OBSERVER (Cozen O'Connor), 2013, at 5, available at http://www.cozen.com/Templates/media/files/LE_Observer1213.pdf (identifying the paradox that giving interns meaningful work creates potential liability because the employer receives an immediate advantage from the intern's work while assigning menial tasks means putting the employer at risk of its actions being interpreted as providing training similar to that given in an educational environment and displacing regular employees).

⁶⁶ Mazurak, *supra* note 36, at 103.

totality-of-the-circumstances approach, where no one fact controls Furthermore, the test is inconsistent with [*Walling*] itself. . . . While the . . . six factors may be helpful in guiding that inquiry, the . . . test on the whole is not.⁶⁷

Despite criticism regarding the application of the DOL Six-Factor Test, courts should give some deference to the DOL Fact Sheet, by virtue of its publication by the WHD, the administrative agency that regulates the FLSA.⁶⁸

A. *DOL Six-Factor Test Under Skidmore Deference*

The Supreme Court has established that informal agency guidelines are entitled to deference “only to the extent that [they] have the power to persuade.”⁶⁹ The persuasive power of a given guideline depends on “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements.”⁷⁰

The DOL Fact Sheet was issued by the WHD as an interpretive guideline in response to requests from employers asking for clarification of minimum wage requirements for unpaid internships.⁷¹ One of the WHD’s functions is to issue non-binding bulletins and opinions interpreting the FLSA.⁷² Courts have viewed DOL Fact Sheets as informal interpretations subject to *Skidmore*⁷³ deference, and therefore are only to be considered if they are determined to be “persuasive.”⁷⁴ The Supreme Court affirmed this

⁶⁷ *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011) (internal citations omitted).

⁶⁸ *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (stating that an administrative agency’s policies are entitled to respect).

⁶⁹ *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

⁷⁰ *Skidmore*, 323 U.S. at 140; *see, e.g.*, *Aluminum Co. of Am. v. Cent. Lincoln Peoples’ Util. Dist.*, 467 U.S. 380, 390 (1984) (analyzing whether an agency’s interpretation applied technical expertise on a complex matter with agency jurisdiction); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 143 (1976) (analyzing whether the agency’s interpretation was consistent with earlier agency pronouncements); *Inv. Co. Inst. v. Camp*, 401 U.S. 617, 626–27 (1971) (analyzing whether an agency’s decision was well-reasoned).

⁷¹ *See WAGE AND HOUR DIV., U.S. DEP’T OF LABOR, RULINGS AND INTERPRETATIONS*, <http://www.dol.gov/whd/opinion/opinion.htm> (explaining that opinion letters are “in response to fact-specific requests submitted by individuals and organizations”); *see, e.g.*, 1996 OPINION LETTER, *supra* note 51, at *1 (responding to an inquiry regarding application of the FLSA to interns).

⁷² *Keleher*, *supra* note 14, at 628.

⁷³ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁷⁴ *Id.* at 140; *see Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1025–26 (10th Cir. 1993) (applying the less deferential *Skidmore* standard to DOL Fact Sheet #71); *Christensen*, 529 U.S. at 587 (finding the WHD’s opinion letter unpersuasive, and therefore did not require deference); *Wang v. Hearst Corp.*, 293 F.R.D. 489, 493–94 (S.D.N.Y. 2013) (applying *Skidmore* deference to DOL Fact Sheet #71).

position in *Christopher v. SmithKline Beecham Corp.*,⁷⁵ a case where the Court afforded *Skidmore* deference to the DOL's interpretation of the FLSA.⁷⁶

While deference to informal agency guidelines is not required, the Court has suggested that statutory interpretation in an opinion letter should be accorded some deference.⁷⁷ In *Skidmore*, the Court held that an agency's interpretation may merit some deference, whatever its form, given the "specialized experience and broader investigations and information" available to the agency,⁷⁸ and given the value of uniformity in its administrative and judicial understandings of what a national law requires.⁷⁹ An argument can therefore be made that *Skidmore* deference should be afforded to the DOL Six-Factor Test, given the benefit of the specialized experience that the DOL's WHD can bring to bear on the issue of defining internships within the FLSA.⁸⁰ This argument, however, is weakened because the DOL Six-Factor Test merely restates the Supreme Court's opinion in *Walling*.⁸¹ Absent independent agency procedure and formal adjudication, the DOL Fact Sheet holds less persuasive force.⁸²

Though some have suggested that ambiguity regarding the employment status of interns should be resolved through agency

⁷⁵ 132 S. Ct. 2156 (2012).

⁷⁶ *Id.* at 2168–69. The Court rejected the contention that *Auer* deference was warranted, stating that such deference was only appropriate in cases where an agency's interpretation is "plainly erroneous or inconsistent with the regulation." *Id.* at 2159 (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (internal quotation marks omitted)).

⁷⁷ See *Christensen*, 529 U.S. at 587 (finding that it was not persuaded by the opinion letter's statutory interpretation). The Court differentiated between opinion letters, which are only compelling if they have the "power to persuade," from interpretations that result from formal adjudications or notice-and-comment rulemaking, which are afforded *Chevron* deference, mandating that the agency interpretation be accepted by courts if "reasonable." *Id.* at 586–87.

⁷⁸ *Skidmore*, 323 U.S. at 139.

⁷⁹ *Id.* at 140.

⁸⁰ See, e.g., *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (finding that reasonable agency interpretations have "at least some added persuasive force" where *Chevron* is inapplicable); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (affording "some deference" to an interpretive rule); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (stating that "some weight" is due to informal interpretations though not "the same deference as norms that derive from the exercise . . . of delegated lawmaking powers").

⁸¹ See Opinion Letters from the Administrator, FLSA2006-12 (April 6, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.pdf ("Based on [*Walling*], the Wage and Hour Division (WHD) has developed six factors to evaluate whether a trainee, intern, extern apprentice, graduate assistant, or similar individual is to be considered an employee.").

⁸² See *United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) (explaining that generally, Congress has intended to give "administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force," and therefore, *Chevron* deference has mostly been applied to interpretations that resulted from formal adjudication or notice-and-comment rulemaking).

rulemaking,⁸³ the limited deference courts have afforded to the DOL Six-Factor Test indicates the lack of persuasive force that the current regulation has and that absent formal procedure, such a solution will likely be ineffective.⁸⁴ Therefore, judicial interpretation for the FLSA at the appellate and Supreme Court level is required to provide clarity in this area of the law and to dissipate the current legal void of unpaid interns.

B. *Judicial Treatment of the DOL Six-Factor Test*

Courts have afforded varying deferential weight to the DOL's Six-Factor Test.⁸⁵ Along with expressly rejecting reliance on the DOL Six-Factor Test,⁸⁶ circuits have disagreed about the proper test to apply in order to determine whether an internship qualifies for the "trainee" exception established by *Walling*.

In *Reich v. Parker Fire Protection District*,⁸⁷ the Tenth Circuit addressed the trainee-employee distinction and held that the DOL factors were "relevant but not conclusive" when determining whether a trainee is an employee under the FLSA.⁸⁸ In an action against a fire department for wages allegedly owed to firefighters training in an academy prior to being employed, the parties agreed that the DOL's Six-Factor Test should be applied, but disagreed as to which factors were necessary to satisfy the

⁸³ See Kimberlee McTorry, *Death of Unpaid Internships, the Rise of Social Equality: Legality of Unpaid Internships Under the Fair Labor Standards Act*, 8 S.J. POL'Y & JUST. L.J. 47, 59–60 (2014) (suggesting that the FLSA be amended to provide an apprentice exception); Jessica L. Curiale, Note, *America's New Glass Ceiling: Unpaid Internships, the Fair Labor Standards Act, and the Urgent Need for Change*, 61 HASTINGS L.J. 1531, 1553 (2010) (proposing rulemaking as the appropriate vehicle for establishing an "intern-learner" exception to the FLSA for unpaid interns); see also Keleher, *supra* note 14, at 631 (proposing that the WHD revise the DOL's Six-Factor Test to improve the test's practicability by providing flexibility for different sizes of companies). Others have suggested that the Department of Education should be the agency regulating unpaid internships, instead of the Department of Labor. See Patricia L. Reid, *Fact Sheet #71: Shortchanging the Unpaid Academic Intern*, 66 FLA. L. REV. 1375, 1395 (2014) (suggesting that Congress should enact a law that delegates the power to regulate unpaid academic internships to the Department of Education). While the concept of shifting oversight to the Department of Education would align with the purpose of internships providing class credit, this approach disregards internships that are not taken to fulfill course credits, but are merely to gain experience and are not affiliated with an educational institution.

⁸⁴ See Bergman, *supra* note 49, at 583 (stating that an updated WHD standard will not solve the circuit split and will contribute to varying judicial interpretation, as well as suggesting instead that a Supreme Court opinion would "provide the authority necessary to unite the circuits" and provide guidance as to proper deference and analysis regarding the DOL Fact Sheet and the employment status of unpaid interns).

⁸⁵ See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011) ("Courts differ on whether the WHD's test is entitled to controlling weight in determining employee status in a training context.")

⁸⁶ See, e.g., *id.* at 525 (rejecting the DOL Six-Factor Test as being at odds with *Walling*'s totality of the circumstances and "primary beneficiary" standard).

⁸⁷ 992 F.2d 1023 (10th Cir. 1993).

⁸⁸ *Id.* at 1027.

test.⁸⁹ While the Secretary of Labor, on behalf of the plaintiffs, argued that all criteria of the DOL Six-Factor Test must be met for the position to be lawfully unpaid, the defendant fire department urged that the proper test was the totality-of-the-circumstances, in which case it was not necessary for all six of the DOL's criteria to be met.⁹⁰ The court reasoned that agency regulations were not controlling on courts and that there was little support that the DOL's Six-Factor Test should be strictly applied in an "all or nothing" approach.⁹¹ The *Reich* court concluded that the proper test was the totality-of-the-circumstances.⁹² The court found that although the trainees met five out of the six DOL criteria, this was insufficient to meet the totality-of-the-circumstances test, thereby holding that the firefighters were not employees entitled to compensation.⁹³

In *Kaplan v. Code Blue Billing & Coding, Inc.*,⁹⁴ the Eleventh Circuit first considered "the 'economic realities' of the relationship," viewing the DOL's Six-Factor Test as a supplement to its analysis.⁹⁵ Students in medical billing and coding programs who had worked at unpaid externships to meet graduation requirements alleged that they had received minimal educational benefit from their externships and that the employer benefited from their work.⁹⁶ The court held that the employer received little, if any, economic benefit from the work, and therefore the student externs were not considered "employees" under the FLSA.⁹⁷ The court further stated that the DOL's Six-Factor Test supported its conclusion but was not controlling on courts.⁹⁸ Similarly, the Sixth Circuit in *Solis v. Laurelbrook Sanitarium and School, Inc.*⁹⁹ applied *Skidmore* deference to the DOL's Six-Factor Test, stating that the factors were individually helpful in guiding the inquiry regarding the employment status of interns, but that the test as a whole was "a poor method for determining employee status."¹⁰⁰

⁸⁹ *Id.* at 1025–26.

⁹⁰ *Id.* at 1026.

⁹¹ *Id.* ("We consider that the rulings, interpretations and opinions of the Administrator under [the FLSA], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

⁹² *Id.* at 1026–27.

⁹³ *Id.* at 1029 (concluding that a "single factor cannot carry the entire weight of an inquiry into the totality of the circumstances" and therefore the trainees were not employees under the FLSA).

⁹⁴ 504 F. App'x. 831 (11th Cir. 2013).

⁹⁵ *Id.* at 834–35 (internal quotation marks omitted).

⁹⁶ *Id.* at 832–33 (citing repetitive work assignments and a lack of formal structure in the program).

⁹⁷ *Id.* at 834.

⁹⁸ *Id.* at 834–35.

⁹⁹ 642 F.3d 518 (6th Cir. 2011).

¹⁰⁰ *Id.* at 525 (stating that the test is unpersuasive, is inconsistent with *Walling*, and is a "poor method for determining employee status").

Finally, in an outlier decision, *Archie v. Grand Central Partnership*,¹⁰¹ the United States District Court for the Southern District of New York held in an opinion by now-Supreme Court Associate Justice Sonia Sotomayor that the DOL Fact Sheet is entitled to *Chevron* deference.¹⁰² In applying a mixed DOL Six-Factor Test and economic realities test, the court in *Archie* held that because the DOL's Six-Factor Test and the findings in *Walling* take the same approach, the DOL's Six-Factor Test is a reasonable application of the FLSA and *Walling*, and is therefore controlling.¹⁰³

C. Tests Emerging from Federal Court Decisions

As previously noted, federal courts have not agreed on a test with which to determine the employment status of interns. Four tests have emerged as a result of federal court jurisprudence: (1) the balancing benefit test; (2) the economic realities test; (3) the totality-of-the-circumstances test; and (4) the all-or-nothing DOL Six-Factor Test. Below is a discussion of each test, in turn.

1. *Balancing Benefits: Immediate Advantage or Primary Benefit Test*

The primary benefit test originates from the second criterion of the DOL's Six-Factor Test, which asks whether "[t]he internship experience is for the benefit of the intern."¹⁰⁴ The DOL further explains that if the intern benefits by deriving "skills that can be used in multiple employment settings, as opposed to skills particular to one employer's operation," it is more likely that the intern will be regarded as a trainee.¹⁰⁵ However, even if the intern receives "some benefits in the form of a new skill or improved work habits," he or she may still be found to be an employee if the work performed is largely clerical.¹⁰⁶

The majority of federal courts have held that an intern is not an employee unless the employer receives an immediate advantage or primary benefit from the intern's work.¹⁰⁷ The Fourth,¹⁰⁸ Fifth,¹⁰⁹ Sixth,¹¹⁰ Tenth,¹¹¹

¹⁰¹ 997 F. Supp. 504 (S.D.N.Y. 1998).

¹⁰² *Id.* at 532.

¹⁰³ *Id.* at 531, 535.

¹⁰⁴ DOL FACT SHEET, *supra* note 8.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *See, e.g.,* *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 (4th Cir. 1989) (stating that the proper test is whether the alleged employer or workers "principally benefited" from the orientation program and that "[t]here [were] several facts that serve[d] to illustrate the relative degrees of benefit"); *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir. 1971) (stating that *Walling* applied an "immediate advantage" rationale, inquiring as to who was the principal beneficiary of the "seemingly employment relationship"); *Wirtz v. Wardlaw*, 330 F.2d 785, 788 (4th Cir. 1964) (finding it determinative that the employer's interests were served by the workers and that the employer "benefited from their labors").

and Eleventh¹¹² Circuits have established that a balance of the benefits analysis is the proper test for determining whether student interns, externs, and trainees are employees under the FLSA.¹¹³

The dispositive question in a balancing of benefits analysis is whether the intern or the employer was the primary beneficiary of the relationship.¹¹⁴ Lower court jurisprudence has introduced an additional consideration to the balancing of benefits analysis, namely that of tangible and intangible benefits, which some courts have taken into account to assess the benefits interns or alleged employees receive from performance of internship duties.¹¹⁵ The *Solis* court, for example, placed particular emphasis on the intangible benefits interns derived from their work, including learning important skills related to responsibility, strong work ethic, and leadership.¹¹⁶ Other federal courts have made similar determinations,¹¹⁷ concluding that intangible benefits are “significant enough to tip the scale of primary benefit in the students’ favor even where the [employer] receives tangible benefits from the students’ activities.”¹¹⁸

¹⁰⁸ See *McLaughlin*, 877 F.2d at 1209 (concluding that the proper test is whether the main beneficiary of the trainees’ labor is the employee or employer).

¹⁰⁹ See *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) (“[T]he district court’s balancing [of relative benefits] analysis appears to us to be more appropriate.”).

¹¹⁰ See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 529 (6th Cir. 2011) (holding that the existence of an employment relationship depends on “which party derives the primary benefit from the relationship”).

¹¹¹ See *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1028 (10th Cir. 1993) (“A number of courts have . . . weigh[ed] the relative benefits to each party, and we are persuaded that conducting the inquiry in this fashion is both permissible and helpful.”).

¹¹² See *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App’x 831, 835 (11th Cir. 2013) (balancing the benefits to determine that two student externs were not employees because the training was similar to that which would be provided to them in school, was related to the workers’ course of study, and was a benefit to the students because they received academic credit for their work, thereby stratifying graduation requirements).

¹¹³ See *Solis*, 642 F.3d at 529 (finding that the primary benefit test is the proper framework for determining employee status).

¹¹⁴ *Velez v. Sanchez*, 693 F.3d 308, 330 (2d Cir. 2012). Further, to determine who is the primary beneficiary of a relationship requires balancing of (a) the tangible and intangible benefits derived by the student, (b) the detriment to the employer, and (c) the benefit to the employer from the students’ activities. *Solis*, 642 F.3d at 526.

¹¹⁵ See *Solis*, 642 F.3d at 531–32 (agreeing that the intangible benefits “are of significant value”).

¹¹⁶ *Id.* at 531.

¹¹⁷ See *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp. 504, 535 (S.D.N.Y. 1998) (considering intangible benefits along with other *Walling* factors. The court determined these intangible benefits to include aiding participants to obtain jobs after the experience and would teach basic job skills including timeliness, good attendance, working a full day, and punching a time clock). See also *Kaplan*, 504 F. App’x at 834 (considering the educational value of hands-on-work, receiving academic credit, and that the externship made plaintiffs eligible for their degrees, along with several of the *Walling* factors); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (considering teamwork, responsibility, accomplishment and pride along with whether the work decreased costs for the employer).

¹¹⁸ *Solis*, 420 F.3d at 532. The *Solis* court explained that the overall educational benefits, even if intangible, should be considered. *Id.* at 532.

Despite the application of the primary benefits test by circuit courts across the country, the test has been criticized as being difficult to apply because it is “subjective and unpredictable.”¹¹⁹

2. *Economic Realities Test*

The “economic realities” test assesses factors “including whether a person’s work confers an economic benefit on the entity for whom they are working.”¹²⁰ This test has been adopted by the Second,¹²¹ Fifth,¹²² Eighth,¹²³ Ninth,¹²⁴ Tenth,¹²⁵ and Eleventh¹²⁶ Circuits. The Supreme Court also applied the economic realities test in *Goldberg v. Whitaker House Coop., Inc.*,¹²⁷ where in assessing whether an employment relationship existed between a cooperative and its members, the Court analyzed the degree of control the alleged employer had over the workers, including management’s ability to hire and fire workers.¹²⁸ However, in *Goldberg*, the Court avoided addressing the absolute use of the economic realities test by stating, “if the ‘economic reality’ rather than ‘technical concepts’ is to be the test of employment, these homeworkers are employees.”¹²⁹ *Walling*

¹¹⁹ *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 531–32 (S.D.N.Y. 2013) (“Under this [primary beneficiary] test, an employer could never know in advance whether it would be required to pay its interns. Such a standard is unmanageable.”).

¹²⁰ *Kaplan*, 504 F. App’x. at 834; *see also* *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982) (“It is well established that the issue of whether an employment relationship exists under the FLSA must be judged by the ‘economic realities’ of the individual case.”).

¹²¹ *See* *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984) (citing as common ground that courts must evaluate the “economic reality” when determining the existence of an employment relationship).

¹²² *See* *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990) (“For purposes of FLSA, determination of employee status focuses on economic reality and economic dependence.”); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1315 (5th Cir. 1976) (stating that in determining employment status, economic realities are determinative).

¹²³ *See* *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (“In determining whether an entity functions as an individual’s employer, courts generally look to the economic reality of the arrangement.”).

¹²⁴ *See* *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1983) (stating that the economic reality test includes inquiries into four factors including whether the alleged employer has the power to hire and fire employees, supervises and controls employee work schedules or conditions of employment, determines the rate and method of payment, and maintains employment records).

¹²⁵ *See* *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 570 (10th Cir. 1994) (stating that the economic realities of the relationship govern the inquiry of employment status); *Dole v. Snell*, 875 F.2d 802, 804 (10th Cir. 1989) (stating that the economic realities of the relationship govern and the focal point is economic dependency on the business (citing *Bartels v. Birmingham*, 322 U.S. 126, 130 (1947))).

¹²⁶ *See* *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App’x 831, 834 (11th Cir. 2013) (applying the economic realities test); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982) (analyzing the economic realities of an individual case).

¹²⁷ 366 U.S. 28 (1961).

¹²⁸ *Id.* at 32–33 (holding that the workers were employees under the “economic reality” test).

¹²⁹ *Id.* at 33 (emphasis added) (citations omitted).

modified the “economic realities” test when it stated that despite the economic realities of the relationship, when an individual works for his or her own purpose, particularly when the work provides no “immediate advantage” for his alleged employer, he or she is not an employee under the FLSA.¹³⁰

3. *Totality-of-the-Circumstances Test*

The totality-of-the-circumstances test originates from *Walling* and the DOL Fact Sheet.¹³¹ Despite a lack of express statutory or Supreme Court guidance regarding the applicability of the test, federal courts have repeatedly held that the totality-of-the-circumstances test determines the existence of an employment relationship.¹³²

In *Rutherford Food Corp. v. McComb*,¹³³ decided four months after *Walling*, the Supreme Court held that determining the existence of an employer-employee relationship does not depend on isolated factors, but rather on the circumstances of the activity “as a whole.”¹³⁴ In its decision, the Court used the economic realities test as one of the factors in analyzing the totality-of-the-circumstances, suggesting a totality of the economic circumstances approach like the one proposed below.¹³⁵ The majority of lower courts seem to have adopted a similar approach.¹³⁶ Under the *Rutherford* standard, courts are required to look at all of the circumstances of an alleged employment relationship to determine whether an intern is an “employee” under the FLSA.

¹³⁰ *Kaplan*, 504 F. App’x. at 834 n.1 (citing *Walling*’s explanation that the FLSA’s definition of “employee” cannot be interpreted to make someone serving his own interest an employee of someone who gives aid and instruction).

¹³¹ The totality of the circumstances is not included as one of the factors in the DOL Six-Factor Test, but is in the language following the six criteria: “If all of the factors listed above are met, an employment relationship does not exist under the FLSA” DOL FACT SHEET, *supra* note 8.

¹³² *See, e.g.*, *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993) (stating that the DOL Six-Factor Test is based on a totality of the circumstances approach).

¹³³ 331 U.S. 722 (1947).

¹³⁴ *Id.* at 730.

¹³⁵ *Id.* (referencing the Tenth Circuit’s conclusion that the underlying economic realities supported its determination and stating, “[w]e think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.”); *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (stating that courts will generally look to the “economic reality” of the arrangement); *see infra* Part VI.C (discussing the totality of the economic circumstances test as the appropriate test for intern-employee jurisprudence).

¹³⁶ *See, e.g.*, *Velez v. Sanchez*, 693 F.3d 308, 330 (2d Cir. 2012) (“[E]conomic reality is determined based upon *all* the circumstances”); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 524 (6th Cir. 2011) (rejecting an approach that “bypasses any real consideration of the economic realities of the relationship and is antithetical to settled jurisprudence calling for consideration of the totality of the circumstances of each case”); *Reich*, 992 F.2d at 1027 (basing the court’s inquiry on the totality-of-the-circumstances test and the economic realities of the relationship); *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324, 1326–27 (10th Cir. 1981) (following the totality-of-circumstances standard of *Rutherford*).

4. *All-or-Nothing DOL Six-Factor Test*

A final All-or-Nothing Test has been suggested, requiring that each element of the DOL's Six-Factor Test must be met in order for an intern to be exempt from "employee" status under the FLSA.¹³⁷ While the language in the DOL Fact Sheet calls for this approach, most courts have discarded the all-or-nothing test in favor of a some-but-not-all-factors approach.¹³⁸

The varying tests used across the circuits to determine whether a trainee is an employee under the FLSA illustrates the lack of a uniform standard that employers and courts can readily implement to determine the legality of unpaid internship programs. Since the *Walling* decision in 1947, the Supreme Court has not issued a definitive rule to determine when an unpaid intern is in fact an employee. In light of the increasing litigation on the issue of unpaid interns, the economic changes that have taken place since *Walling*, and lower courts' inability to clearly apply *Walling* when determining the employment status of interns, the need for a bright line rule has never been greater.

V. CASES ON APPEAL: *WANG* AND *GLATT*

Responding to a recent flood of lawsuits filed by unpaid interns, a Second Circuit panel recently heard two cases concerning whether unpaid interns at Hearst Corporation and Fox Searchlight Pictures Inc. qualify as employees under the FLSA, which would entitle them to back pay and potential damages. Both cases were heard separately by the Southern District of New York and were heard jointly on appeal by the Second Circuit.¹³⁹

A. *Wang v. Hearst Corporation*

The first of the cases on appeal, *Wang v. Hearst Corporation*,¹⁴⁰ involves a class of plaintiffs who brought action against the magazine-publishing conglomerate, Hearst Corporation.¹⁴¹ The plaintiffs allege that they are "employees" under the FLSA and New York Labor Law (NYLL)¹⁴² and that they should have been compensated according to

¹³⁷ Bird, *supra* note 2.

¹³⁸ See DOL FACT SHEET, *supra* note 8 (stating that all six of the DOL factors must be applied when determining the legality of an unpaid internship); see also *supra* Part IV.C (discussing tests adopting some parts of the DOL Six-Factor Test while determining that others are less significant).

¹³⁹ Order Consolidating Appeals Dockets at 2, *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-366 (2d Cir. Nov. 26, 2013).

¹⁴⁰ 293 F.R.D. 489 (S.D.N.Y. 2013).

¹⁴¹ *Id.* at 490.

¹⁴² *Id.* at 492. NYLL uses the same standard for employment as the FLSA. *Cano v. DPNY, Inc.*, 287 F.R.D. 251, 260 n.2 (S.D.N.Y. 2012).

minimum wage requirements.¹⁴³ Named plaintiff Xuedan “Diana” Wang was a former *Harper’s Bazaar* intern who sought damages for five months of unpaid labor in the magazine’s accessories department.¹⁴⁴ Wang and her co-plaintiffs¹⁴⁵ worked as unpaid interns at several of Hearst’s magazines. Despite earning course credit, Wang said in a *Huffington Post* interview that the internship was far from an educational experience.¹⁴⁶

Wang reportedly worked forty to fifty-five hours a week as “head intern,” supervising several other unpaid interns carrying bags to and from PR firms and served as a messenger service for the magazine.¹⁴⁷ Like many unpaid interns, Wang was pursuing her childhood dream of a career in the fashion industry at her favorite magazine.¹⁴⁸ After completing the semester-long internship, Wang’s supervisor declined her request for a letter of recommendation, criticizing Wang for mistakes she had made during her time working for the magazine.¹⁴⁹ After reading the DOL Fact Sheet, Wang reportedly realized that the magazine had been treating her and other unpaid interns inappropriately, prompting her to file suit.¹⁵⁰

At trial, the court found it important that the plaintiffs understood prior to their internship that the position was unpaid and that Hearst had conveyed that there was no guarantee that the internship would lead to a full-time job.¹⁵¹ While both parties agreed that the interns performed some duties that were similar to those of paid employees, Wang and Hearst disputed the amount of supervision provided to the interns and the benefits that Hearst derived from the interns.¹⁵²

The parties also disagreed as to the appropriate test for defining an “employee” under *Walling*.¹⁵³ The plaintiffs sought partial summary

¹⁴³ *Wang*, 293 F.R.D. at 490, 492 n.3 (explaining that circuit courts have held that the NYLL applies the same employment standard as the FLSA, and that while the court’s analysis was based on the FLSA, it is nonetheless applicable to the NYLL).

¹⁴⁴ Alice Hines, *Fashion Week 2012: Unpaid Internships Questioned After Diana Wang’s Harper’s Bazaar Suit*, HUFFINGTON POST (Feb. 14, 2012), http://www.huffingtonpost.com/2012/02/14/fashion-week-2012-unpaid-internships_n_1274181.html.

¹⁴⁵ Wang’s co-plaintiffs worked for Hearst publications including *Cosmopolitan*, *Marie Claire*, *Esquire*, *Redbook*, and *Seventeen*. *Wang*, 293 F.R.D. at 491–92. The interns worked in varying capacities including as a bookings intern, editorial intern, fashion intern, sales intern, and beauty intern. *Id.* at 491.

¹⁴⁶ Hines, *supra* note 144. Wang reportedly carried out menial tasks with little to no supervision. *Id.* She worked long hours and if something went wrong, Wang took the blame. *Id.*

¹⁴⁷ *Id.*; see also *Wang*, 293 F.R.D. at 491 (listing Wang’s duties as including functioning as a contact between editors and public relations representatives, conducting online research, cataloguing samples, maintaining the accessories closet, and creating story boards).

¹⁴⁸ Hines, *supra* note 144.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Wang*, 293 F.R.D. at 492.

¹⁵² *Id.*

¹⁵³ *Id.* at 492–93.

judgment based on the “immediate advantage” standard, arguing that Hearst received a direct benefit from the plaintiffs’ unpaid work.¹⁵⁴ The plaintiffs argued in the alternative that Hearst failed to meet all of the criteria in the DOL’s Six-Factor Test.¹⁵⁵ In opposition, the defendant argued for “a ‘balancing of the benefits test,’ which looks to the totality-of-the-circumstances to evaluate the ‘economic reality’ of the relationship.”¹⁵⁶ Hearst disputed the plaintiffs’ contention that all of the elements of the DOL’s Six-Factor Test must be met, and further argued that judicial deference need not be afforded to the test, criticizing it as “a rigid checklist.”¹⁵⁷

Judge Baer of the Southern District of New York interpreted *Walling*’s totality-of-the-circumstances test to be controlling in determining whether the plaintiffs were “employees” under the FLSA and viewed the DOL Fact Sheet as merely a “framework for an analysis of the employee-employer relationship.”¹⁵⁸ The court rejected the plaintiffs’ reading of *Walling*, that the “presence of an immediate advantage alone creates an employment relationship,” stating that “[t]here is no one-dimensional test; rather, the prevailing view is the totality-of-the-circumstances.”¹⁵⁹ The court cited support for its decision in a Second Circuit opinion affirming the totality-of-the-circumstances test.¹⁶⁰

The district court in *Wang* avoided application of the totality-of-the-circumstances test, stating that the competing standards argued by each side was enough to create a genuine issue of fact regarding the plaintiffs’ status as “employees,” and therefore denied the plaintiffs’ motion for partial summary judgment.¹⁶¹ The court further explained that applying the DOL Six-Factor Test presented a genuine dispute of material issues of fact with respect to the first, second, third, and fourth factors of the test,¹⁶² based on which a reasonable jury might return a verdict favorable to

¹⁵⁴ *Id.* at 493.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 494.

¹⁵⁷ *Id.* at 493.

¹⁵⁸ *Id.* at 493–94.

¹⁵⁹ *Id.* at 493.

¹⁶⁰ *Id.* (“[W]hether an employer-employee relationship exists does not depend on ‘isolated factors but rather upon the circumstances of the whole activity.’” (quoting *Velez v. Sanchez*, 693 F.3d 308, 326 (2d Cir. 2012))). The *Velez* court further noted that a key consideration in the analysis depended on who received the primary benefits from the relationship. *Velez*, 693 F.3d at 330.

¹⁶¹ *Wang*, 293 F.R.D. at 494.

¹⁶² *Id.* at 494. First Factor: “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.” DOL FACT SHEET, *supra* note 8. Second Factor: “The internship experience is for the benefit of the intern.” *Id.* Third Factor: “The intern does not displace regular employees, but works under close supervision of existing staff.” *Id.* Fourth Factor: “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.” *Id.*

Hearst, supporting denial of partial summary judgment.¹⁶³

Discussing the DOL Six-Factor Test, which the plaintiffs claimed the defendants failed to meet, the *Wang* court stated that the test was unclear regarding the appropriate weight to be given to each factor.¹⁶⁴ Furthermore, the court stated that the introductory language of the DOL's test is confusing as it suggests a totality-of-the-circumstances approach, stating that a determination of employment under the FLSA "depends upon all of the facts and circumstances of each such program."¹⁶⁵ In dicta, the court explained that despite the unclear application of the DOL's Six-Factor Test, the test is entitled to some deference because the test was conceived by the WHD, which administers the FLSA, the federal law under which the plaintiffs brought suit.¹⁶⁶

Following the trial court's decision, the plaintiffs in *Wang* filed an appeal to the Second Circuit, which was granted certiorari and will be heard jointly with *Glatt*, explained below.¹⁶⁷

B. *Glatt v. Fox Searchlight Pictures Inc.*

One month after the *Wang* decision, Judge Pauley of the Southern District of New York decided the same issue of whether unpaid interns were "employees" under the FLSA in the case *Glatt v. Fox Searchlight Pictures, Inc.*¹⁶⁸ In *Glatt* the court expressly found that unpaid interns working on film production for various motion pictures "were classified improperly as unpaid interns and [were] 'employees' covered by the FLSA and NYLL."¹⁶⁹ Named plaintiff Eric Glatt worked on production of the film "Black Swan" in New York, pursuing his passion for entertainment.¹⁷⁰ Glatt had an MBA and was employed in the financial sector for years before deciding to change careers.¹⁷¹ After taking a film editing course and becoming certified, Glatt took the opportunity to work on a high budget film with hopes of realizing his dreams, but was instead assigned to the film's accounting department.¹⁷² As an unpaid intern in the accounting

¹⁶³ *Wang*, 293 F.R.D. at 494. The court denied plaintiffs' motion for class certification due to lack of commonality among the policies or practices each magazine held with regard to interns. *Id.* The court adjourned the trial *sine die*. *Id.* at 498.

¹⁶⁴ *Id.* at 493.

¹⁶⁵ *Id.* (quoting DOL FACT SHEET, *supra* note 8).

¹⁶⁶ *Wang*, 293 F.R.D. at 493–94. The court cites *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) for the proposition that "an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information . . . and given the value of uniformity in its administrative and judicial understandings of what a national law requires." *Id.* at 494.

¹⁶⁷ Order Consolidating Appeals Dockets, *supra* note 139, at 2.

¹⁶⁸ 293 F.R.D. 516 (S.D.N.Y. 2013).

¹⁶⁹ *Id.* at 534.

¹⁷⁰ *Id.* at 522; Gardner, *supra* note 14.

¹⁷¹ Gardner, *supra* note 14.

¹⁷² *Id.*

department, Glatt was in charge of timesheets, analyzing reimbursements, and delivering paychecks, all without any compensation.¹⁷³

At trial, Glatt and his co-plaintiffs moved for summary judgment, alleging that they were “employees” under the FLSA and should have been compensated according to federal minimum wage requirements.¹⁷⁴ While the plaintiffs argued that they fell outside of the *Walling* “trainee” exception, the trial court side-stepped this inquiry, stating that the issue had not been addressed by the Second Circuit.¹⁷⁵ The defendant urged for the application of a primary benefit test, but the court disagreed, finding that the test had little support in *Walling* and criticizing the test as being “subjective and unpredictable,” making it an undesirable standard to apply.¹⁷⁶

The *Glatt* court found instead that the Six-Factor Test had support in *Walling* and was entitled to deference because it was promulgated by the WHD, the agency designated to administer the FLSA and its application.¹⁷⁷ In its analysis, the *Glatt* court applied all of the elements of the DOL’s Six-Factor Test, but emphasized that the test required the consideration of all circumstances, with no single factor controlling.¹⁷⁸ Applying the DOL Six-Factor Test, the court found that: (1) the plaintiffs generally did not receive formal training or education during their internships;¹⁷⁹ (2) Fox Searchlight Pictures Inc. was the primary beneficiary of the relationship because it received the benefit of unpaid work that they would have otherwise had to pay regular employees for;¹⁸⁰ (3) the plaintiffs displaced regular employees because without the plaintiffs performing the tasks for free, a paid employee would have been needed to carry out the same duties;¹⁸¹ (4) Fox

¹⁷³ *Id.*

¹⁷⁴ *Glatt*, 293 F.R.D. at 530–31.

¹⁷⁵ *Id.* at 531.

¹⁷⁶ *Id.* at 531–32. “Under [the primary beneficiary] test, an employer could never know in advance whether it would be required to pay its interns. Such a standard is unmanageable.” *Id.* at 532.

¹⁷⁷ *Id.* at 532. While both *Wang* and *Glatt* note the deferential value of the WHD’s opinion, as the enforcement arm of the FLSA, *Glatt* seems to give more deference to the WHD than *Wang*, which stated that the DOL Six-Factor Test, though entitled to deference, was simply a “framework for an analysis.” *Wang*, 293 F.R.D. at 493–94.

¹⁷⁸ *Glatt*, 293 F.R.D. at 532.

¹⁷⁹ *See id.* at 532–33 (stating that while the record for *Glatt* was unclear on the first factor, his co-plaintiff Alexander Footman conclusively did not receive formal training or education during his internship and that learning through the experience was not enough).

¹⁸⁰ *Id.* at 533 (finding that benefits including résumé improvement, job references, and knowledge of the workings of a production office are incidental to working in the office, in either a paid or unpaid capacity, and are not related to academic or vocational training, as the WHD envisioned in this factor of the DOL test).

¹⁸¹ *Id.* (finding that the plaintiffs carried out routine tasks that the defendant would have otherwise had to pay a regular employee to perform). These “routine tasks” included gathering documents for personnel files, picking up paychecks, and collecting managers’ signatures. *Id.* *Glatt*’s supervisor stated on the record that had *Glatt* not performed the duties he was assigned was an unpaid intern, another

Searchlight conceded that it received an immediate advantage from the plaintiffs' work because otherwise, their tasks would have been performed by paid employees and the defendant's business was never impeded by the plaintiffs;¹⁸² and (5) the plaintiffs knew they were not entitled to jobs at the end of their internships and understood that the internships were unpaid.¹⁸³

After analyzing all six parts of the DOL Six-Factor Test, the *Glatt* court concluded that, under the totality of the circumstances, the interns were misclassified and were in fact employees under the FLSA.¹⁸⁴ Among the factors the court considered were that the interns performed the work of paid employees, provided an immediate advantage to the employer, performed basic tasks that did not provide educational or technical training, and any benefits that the interns received were not educational.¹⁸⁵ The court distinguished *Glatt* from *Walling*, in which the "trainees impeded the regular business of the employer, worked only in their own interest, and provided no advantage to the employer."¹⁸⁶

Both the *Wang* and *Glatt* courts utilized the "totality of circumstances" test and the DOL's Six-Factor Test, but weighed each standard differently. Whereas the *Wang* court found the totality-of-the-circumstances test to be controlling and viewed the DOL's Six-Factor Test as merely an added framework for analysis, *Glatt* applied the DOL Six-Factor Test as its primary analytical tool and supplemented with the totality of circumstances analysis, rejecting the primary beneficiary test.

Wang and *Glatt*, illustrate the federal courts' varying interpretations of the FLSA based on the *Walling* decision and the DOL Six-Factor Test, and the glaring need for a uniform standard. On November 26, 2013, a Second Circuit panel agreed to hear appeals for *Wang* and *Glatt* jointly.¹⁸⁷ Given the varying tests applied in each case, one of the two questions on appeal is a clarification of the appropriate legal standard for determining whether an unpaid intern is an "employee" entitled to minimum wage under the FLSA.¹⁸⁸

paid production assistant or regular staff member would have had to work overtime to complete the tasks. *Id.*

¹⁸² *Id.* at 534.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Order Consolidating Appeals Dockets, *supra* note 139, at 2.

¹⁸⁸ Plaintiffs-Respondents' Opposition to Petition for Permission to Appeal at 4-5, *Glatt v. Fox Searchlight Pictures, Inc.*, No. 13-4481 (2d Cir. Oct. 7, 2013).

VI. CONSIDERATIONS FOR THE SECOND CIRCUIT

With the Second Circuit Court of Appeals having jointly taken up the appeals in *Wang* and *Glatt*,¹⁸⁹ some guidance on the issue of the intern-employee distinction is likely on the horizon. Considering the statutory, legislative, and judicial history discussed above, there are two operating principles that courts and legislatures should consider when resolving questions about unpaid internships under the FLSA. Among the factors that courts should take into account when proposing a new standard are the competing and mutually dependent interests of employers and interns. A careful balancing of employers' need for predictability in avoiding legal liability and interns' need for protection from being taken advantage of is necessary to reach a workable solution for the legal and industrial communities as well as students and prospective interns.

A. *Predictability for Employers*

Court decisions based on varying tests severely impede employers' ability to predict liability. Using different tests to determine whether interns are "employees" under the FLSA poses a challenge to businesses that rely on predictability, uniformity, and efficiency. These circuit court tests are controlling only within those courts' jurisdictions and do not bind employers across the nation. This contributes to employers' inability to apply the appropriate legal standard and construct lawful internship programs. While many have sought advice from law firms on steps to take to avoid liability,¹⁹⁰ judicial establishment of a uniform test is necessary to ensure consistent application of the FLSA with regard to the employment status of unpaid interns.

Some lower courts have considered the employer's ability to predict liability for providing unlawful unpaid internships in determining which test to use in analyzing whether an intern is an "employee" under the FLSA. For example, in *Glatt*, the trial court found that the "primary benefit" test was unmanageable because employers could not determine in advance whether to pay their interns because of the unpredictable and subjective nature of the primary benefit inquiry.¹⁹¹

Employers found to be in willful violation of the FLSA open themselves up to prosecution by the Attorney General and fines of up to

¹⁸⁹ Ben James, *Labor and Employment Cases to Watch in 2015*, LAW360 (Jan. 2, 2015), <http://www.law360.com/articles/601418/labor-and-employment-cases-to-watch-in-2015>.

¹⁹⁰ E.g., Jeff P. Dunlaevy, "Research Me a Cup of Coffee and a Cinnamon Scone!": *Unpaid Internships Pose Major Legal Risks, but Are Law Firms Exempt?*, 25 S.C. LAW. 44, 48 (2014) (suggesting guidelines to assist law firms and other private employers in establishing legally compliant internship programs).

¹⁹¹ *Glatt*, 293 F.R.D. at 532.

\$10,000 or imprisonment for up to six months, or both.¹⁹² Interns who are found to be “employees” are entitled to damages including back wages liquidated damages, attorney’s fees, as well as appropriate equitable relief, the boundaries of which are undefined.¹⁹³ Such liability has the potential of being financially taxing, particularly for employers faced with class action lawsuits, in which payouts multiply depending on the number of plaintiff interns.¹⁹⁴ The cost of legal liability for unpaid internships has become apparent in the recent settlements that have been reached in class action complaints filed by interns, which in one case amounted to a total of \$6.4 million.¹⁹⁵

Without reliable legal standards to determine the legality of unpaid internships, businesses and employers who would otherwise provide opportunities for unpaid internships have a strong incentive to discontinue their programs.¹⁹⁶ Conversely, if some employers value their internship programs enough to continue providing them, but are overly cautious and risk-averse, they may convert all of their unpaid internship positions to paid internships, when it might not be necessary to do so. While some have recommended employers adopt such an approach,¹⁹⁷ the over-provision of paid internships will contribute to an extra cost for businesses, undoubtedly stunting companies’ rate of growth and discouraging the provision of internships all together or providing fewer internships opportunities. The potential discontinuation or lessening of internships can be avoided by providing clarity in the law, specifically by way of a test that can be easily applied by businesses.

¹⁹² 29 U.S.C. § 216(a) (2012).

¹⁹³ *Id.* §§ 216(a)–(b). Alternatively, interns can file a complaint with the Secretary of Labor who has authority to bring legal action against employers and recover similar damages to backpay, other equitable damages, and attorney’s fees. *Id.* § 216(c).

¹⁹⁴ See *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982) (“[E]mployers are governed . . . by the demands of the market place and by their own specialized needs.”); see also Jonathan Stempel, *U.S. Court Approves Condé Nast \$5.85 Mln Intern Pay Settlement*, REUTERS (Dec. 29, 2014), <http://www.reuters.com/article/2014/12/29/condenast-interns-idUSL1N0UD1LE20141229> (stating that the settlement applies to roughly 7,500 interns who had worked for defendant’s magazines and each of the former interns who worked at Condé Nast from June 2007 to the present are expected to receive payments ranging from \$700 to \$1,900 each).

¹⁹⁵ E.g., Daniel Miller, *NBCUniversal to Settle Suit by Former Interns for \$6.4 Million*, L.A. TIMES (Oct. 24, 2014), <http://touch.latimes.com/#section/-1/article/p2p-81764733/> (stating that NBCUniversal agreed to settle a class action lawsuit with thousands of interns claiming they should have been paid for their work).

¹⁹⁶ See NAT’L ASS’N OF COLLS. & EMP’RS, UNPAID INTERNSHIPS: A SURVEY OF THE NACE MEMBERSHIP 4, 5 (2010) (stating that the DOL’s Six-Factor Test has likely caused “a chilling effect on all internships because employers [are] frightened by the increased scrutiny”).

¹⁹⁷ See Keleher, *supra* note 14, at 628 (suggesting the best way for employers to avoid legal liability is to treat all interns as employees and pay them the minimum wage).

B. *Protection for Interns*

The divide between the courts and the DOL has created a “legal void” in which interns are neither volunteers exempt from the FLSA, nor employees protected by the FLSA.¹⁹⁸ Some suggest that recent cases such as *Wang* and *Glatt* have revealed a larger trend in the business community of mislabeling individuals to evade obligations under the FLSA.¹⁹⁹ In this case, since the term “intern” is not included in the FLSA, employers labeling positions as “internships” would fall outside the regulatory void of the WHD. In *Walling*, the Court warned of such evasions and stated that one of the FLSA’s purposes is to increase opportunities for gainful employment.²⁰⁰ Internships, both paid and unpaid, are an important vehicle in today’s job market and often provide the necessary learning experience that employers frequently require.²⁰¹ Internships also provide a learning and skill-building opportunity unavailable in the classroom setting.²⁰²

The benefits of internships in today’s competitive job market puts employers in a position of power and renders interns vulnerable to exploitation and unwilling to voice concerns regarding abuses of power.²⁰³ Furthermore, businesses are in a position of power with respect to internships because the majority of for-profit employers will stay in business without them.²⁰⁴

C. *Totality of Economic Circumstances Test Should be Applied*

In deciding whether an unpaid internship is legal under the FLSA, the three bodies of law regarding the employment status of internships (the FLSA, *Walling*, and the DOL Fact Sheet) illustrate a common concern for determining who benefits economically from the business relationship in the internship setting.²⁰⁵ Many of the tests used by courts have been

¹⁹⁸ David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 245 (2002).

¹⁹⁹ See James, *supra* note 189 (referencing a growing trend among businesses to evade FLSA obligations).

²⁰⁰ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151 (1947).

²⁰¹ *Gregory*, *supra* note 16, at 241.

²⁰² See *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 531 (6th Cir. 2011) (describing testimony of alumni that the leadership skills and work ethic developed through the school’s practical training program was “highly valuable in their future endeavors”).

²⁰³ Peter W. Fulham, *Unpaid Interns and Labor Laws: Gaining Experience, Enduring Abuse*, POL. DAILY (May 12, 2010), <http://www.politicsdaily.com/2010/05/12/unpaid-interns-labor-laws-students-experience-abuse/> (recounting instances of interns expressing reluctance to report abuses in order to maintain good relationships with employers).

²⁰⁴ Mazurak, *supra* note 36, at 118.

²⁰⁵ See, e.g., *Marshall v. Baptist Hosp., Inc.* 473 F. Supp. 465, 476 (M.D. Tenn. 1979) (determining that X-ray technicians-in-training enrolled in a two-year accredited college program were employees because the defendant benefited economically from the work performed by the trainees by charging patients at full rates).

criticized as being subjective and overly rigid, thereby preventing the courts from applying an analysis tailored to varying internship structures.²⁰⁶ While some have advocated for a totality-of-the-circumstances test that complies with *Walling*,²⁰⁷ such a test would provide an employer with little guidance on how to structure an internship program capable of satisfying this subjective approach. The totality-of-the-circumstances test, while referenced by both the WHD in the DOL Six-Factor Test and *Walling*, requires a framework with which to analyze the entirety of the circumstances. The economic realities test provides such a framework and has support in judicial precedent.

The totality-of-the-economic-circumstances test analyzes the entirety of the circumstances when determining the economic realities of a relationship. The proper test for unpaid internships should be whether: (1) the worker is not independent and receives constant direction and supervision, and (2) the worker is receiving academic credit or other tangible benefits for the internship. Under the proposed test, if these factors are not met while taking into consideration the totality of the circumstances, the intern must be paid.

These factors have significant support in Supreme Court jurisprudence. Though federal circuit courts are split regarding the use of the economic realities test,²⁰⁸ the Supreme Court has twice indicated a preference for the economic realities test.²⁰⁹ First, in *Rutherford*, the Supreme Court effectively added the totality of circumstances analysis to the economic realities test, thereby establishing the totality-of-the-economic-circumstances-test.²¹⁰ Second, in *Goldberg*, the Supreme Court applied the economic realities test but failed to state that the test was the primary

²⁰⁶ *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013) (stating that the primary benefit test is “subjective and unpredictable” and “unmanageable” for employers); *Solis*, 642 F.3d at 525 (stating that the all-or-nothing approach is “overly rigid”).

²⁰⁷ 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, 769–71 (2015).

²⁰⁸ Compare *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 273 (5th Cir. 1982) (omitting the economic realities test from its analysis of the status of trainees as employees), with *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993) (noting that the court must evaluate the economic reality of the relationship between the employer and the individual).

²⁰⁹ *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U.S. 28, 33 (1961); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947).

²¹⁰ *Rutherford*, 331 U.S. at 730–31 (affirming the Tenth Circuit’s application of the economic realities test but stating that the determination depends on the circumstances of the whole activity). Such a test is patently different from a balancing-economic-advantages-test proposed by some. See Natalie Bacon, *Unpaid Internships: The History, Policy, and Future Implications of “Fact Sheet #71,”* 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 92 (2011) (proposing adopting a test balancing the economic advantages of parties, which would compare the experience received by the intern and the benefit the employer received from the internship through a comparison of the per-hour cost to the employer of the intern and the per-hour benefit to the employer of an intern).

vehicle for determining the employment status of an intern.²¹¹ Lower courts have since repeatedly found that whether an individual is an employee or not is determined by the “economic realities” of the potential employment situation, which requires consideration of the totality-of-the circumstances.²¹²

The economic realities test would more accurately assess the legality of unpaid internship programs. *Goldberg*’s economic realities test requires consideration of functional aspects of a potential employment relationship, including the worker’s independence, the method of compensation, and the principal’s authority over the worker as opposed to technical concepts.²¹³ The worker’s independence implies the requirement of supervision and the compensation method should include assessing whether the internship is for course credit or simply provides “soft skills” benefits, which can be learned at any job.²¹⁴ This test suggests that the greater control the employer has the greater the likelihood that the intern is an employee under the FLSA.

The factors in the proposed test are supported by the WHD in favoring internship programs that provide a “classroom or academic experience,” as the WHD views such opportunities as an extension of the intern’s education.²¹⁵ However, simply stating that the experience should be similar to training that would be provided in an educational environment does not ensure that the desired standard will be met. More guidance is required as to what a sufficient educational environment entails. The first factor of the proposed test, that the worker is not independent and receives constant direction and supervision provides a two-fold benefit. First, it provides guidance for the employer regarding what resources are required in order to provide a classroom-like experience, satisfying the first part of the DOL Six-Factor Test. Second, it ensures that an unpaid intern does not displace an otherwise paid worker, satisfying the third part of the DOL Six-Factor Test. The first prong also engages in an analysis of the economic realities of the relationship, ensuring that the intern’s work is not being used to save

²¹¹ *Goldberg*, 366 U.S. at 33 (conditionally holding that the individuals were employees “if the ‘economic reality’ rather than ‘technical concepts’ is to be the test of employment” (citations omitted)).

²¹² See, e.g., *Velez v. Sanchez*, 693 F.3d 308, 329–30 (2d Cir. 2012) (applying the economic reality test to determine the employment relationship of a domestic worker under the FLSA); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522 (6th Cir. 2011) (explaining that whether an employment relationship exists depends on the economic reality as determined on a case-by-case basis considering the surrounding circumstances); *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp. 504, 531–32, 535 (S.D.N.Y. 1998) (considering “all of the circumstances” to determine which party benefited more and assessing whether the economic reality favored the existence of an employment relationship).

²¹³ *Goldberg*, 366 U.S. at 33.

²¹⁴ See *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 533 (S.D.N.Y. 2013) (stating that benefits such as résumé improvements, job references, and understanding the workings of an office are incidental to working in an office, regardless of the nature of the relationship).

²¹⁵ DOL FACT SHEET, *supra* note 8; 1996 OPINION LETTER, *supra* note 51, at *1.

on the cost of hiring a paid worker, thereby allowing the employer to benefit unjustly. In *Walling*, the Court looked favorably upon the railroad company's supervision over the trainees when determining that the trainees did not displace regularly paid workers and were not employees.²¹⁶

The second prong of the proposed test, that the unpaid intern be provided academic credit or other tangible benefits, addresses the DOL Six-Factor Test's first part—of receiving training that would be given in an educational environment—and the second part, which concerns the internship experience being for the benefit of the intern.²¹⁷

The proposed test, while not fool-proof, does have precedential support in *Walling* and the DOL's Six-Factor Test and provides for a fact-based inquiry allowing all parties to easily determine whether the internship falls outside of the confines of the FLSA's definition of "employee." Interns who are given clerical work without supervision, even when receiving academic credit or tangible benefits, will be able to determine when they are being used for productive work that is not academic in nature, allowing them to assert their rights and demand fair treatment. Similarly, employers using this guidance will be able to structure unpaid internship programs to ensure constant supervision similar to that in the academic environment and that the intern is receiving a tangible benefit that will provide skills useful in their career trajectories if the student is not receiving academic credit. Finally, the proposed test allows courts to engage in a fact intensive inquiry while still providing some flexibility through a totality-of-the-circumstances analysis.

VII. CONCLUSION

Unpaid internships are a nationally prevalent and span various industries, necessitating a uniform legal standard for assessing their legality under the FLSA. The totality-of-the-economic-circumstances test is such a standard. It provides employer predictability, protects interns against exploitation, and accounts for the Supreme Court's interpretation of the FLSA and the DOL's guidance. The economic realities test, assessed in light of the total circumstances of the situation, is a fact-based test relying on the functional aspects of an internship, allowing for a clearer and more comprehensive standard for businesses, interns, and courts to apply. In considering the appeal of the *Glatt* and *Wang* cases, the Second Circuit should strongly consider the totality-of-the-economic-circumstances test as an applicable standard that is favorable to all parties involved in current and future litigation concerning unpaid internships under the FLSA.

²¹⁶ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 149–50 (1947).

²¹⁷ DOL FACT SHEET, *supra* note 8.