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Michael A. Hacker
Boston College Law School, michael.hacker@bc.edu

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PERMITTED TO SUFFER FOR EXPERIENCE: SECOND CIRCUIT USES “PRIMARY BENEFICIARY” TEST TO DETERMINE WHETHER UNPAID INTERNS ARE EMPLOYEES UNDER THE FLSA IN *GLATT v. FOX SEARCHLIGHT PICTURES, INC.*

Abstract: On January 25, 2016, the U.S. Court of Appeals for the Second Circuit in *Glatt v. Fox Searchlight Pictures, Inc.*, vacated the U.S. District Court for the Southern District of New York’s order, which found that unpaid interns were “employees” under both the Fair Labor Standards Act (“FLSA”) and New York Labor Law. The Second Circuit also vacated the district court’s certification of a New York class and conditional certification of a nationwide FLSA collective. In so doing, the Second Circuit held that the proper inquiry for determining whether an intern is an “employee” under the FLSA is whether the intern rather than the employer is the “primary beneficiary” of the engagement. This Comment argues that the Second Circuit’s reasoning was based on a misunderstanding of the reality of unpaid internships and thus failed to address the common attributes of the modern internship. This Comment then proposes a set of revised factors for courts to consider, which better represent internship realities.

INTRODUCTION

The word “intern” can convey many meanings to a potential employer.¹ Notwithstanding the vagueness of the word, an internship entry on a résumé is an important, if not requisite, stepping stone to gainful employment.² Until the middle of the twentieth century, however, internships only existed in the medi-

¹ See *Intern*, MERRIAM-WEBSTER’S NEW COLLEGIATE DICTIONARY 632 (9th ed. 1991) (defining “intern” as “an advanced student or graduate usu. in a professional field (as medicine or teaching) gaining supervised practical experience (as in a hospital or classroom)”); ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 23 (2012) (describing the “ambiguity” of the word “intern”).

² Andrew Mark Bennett, Comment, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 296 (2011) (writing that the “consensus” is that internships are necessary to gaining white-collar employment); 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, 1536 (2010) (writing that students and employers view internships as a necessary means to be competitive in the employment marketplace).

cal field, where students spent a year or two working in a hospital before entering the medical profession.³ Today, internships in a wide range of professional fields are commonplace for students in undergraduate and graduate school, and even after graduation.⁴ Colleges encourage students to pursue internships, some require internship completion as a prerequisite to graduate, and some schools incorporate internships directly into their curriculum through “cooperative” education programs.⁵ The current estimate is that as many as half of all internships in the United States are unpaid, and the number of unpaid international internships is growing.⁶

³ PERLIN, *supra* note 1, at 30 (writing that apprenticeships in the medical profession existed for centuries, but not until the advent of major medical schools did the formal internship program become popular).

⁴ *Id.* at xiv (highlighting the fact that seventy-five percent of the 9.5 million college students in the United States graduate with at least one completed internship); Becca Lundberg, *5 Reasons a Postgraduate Internship May Work for You*, U.S. NEWS & WORLD REP. (Apr. 19, 2015, 9:32 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2015/08/19/5-reasons-a-postgraduate-internship-may-work-for-you> [<https://perma.cc/WX49-HNNC>] (describing the benefits of a postgraduate internship); see also Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2617 (1998) (noting that law students take unpaid positions with judges during law school in order to increase their chances of getting hired after graduation); cf. Christopher Keleher, *The Perils of Unpaid Internships*, 101 ILL. B.J. 626, 628 (2013) (noting that it would be likely that “given the weight of law school student debt” a law student would be willing to take an unpaid position at a law firm in order to gain firm experience).

⁵ See William G. Bissell & H. Russell Hettinger, *Cooperative Legal Education at Northeastern University*, 3 J. CONTEMP. L. 210, 211 (1977) (discussing the “learning by doing” approach at Northeastern University School of Law); Jessica A. Magaldi & Olha Kolisnyk, *The Unpaid Internship: A Stepping Stone to a Successful Career or the Stumbling Block of an Illegal Enterprise? Finding the Right Balance Between Worker Autonomy and Worker Protection*, 14 NEV. L.J. 184, 202 (2013) (discussing colleges’ “complicity” in the rise in unpaid interns); Ross Perlin, Editorial, *Interns, Victimized Yet Again*, N.Y. TIMES (July 3, 2015), http://www.nytimes.com/2015/07/03/opinion/interns-victimized-yet-again.html?_r=0 (discussing the fact that some colleges require students to complete internships); *Career and Cooperative Education*, NE. UNIV., <http://www.northeastern.edu/coop/> [<https://perma.cc/2NWU-4WCY>] (last visited Mar. 24, 2016) (describing the cooperative education curriculum at Northeastern University); *Cooperative Education*, DREXEL UNIV., <http://drexel.edu/difference/co-op/> [<https://perma.cc/8NG7-74LL>] (last visited Mar. 24, 2016) (describing the cooperative education curriculum at Drexel University); *Co-op Experience*, GA. INST. OF TECH., <http://www.life.gatech.edu/co-op-experience> [<https://perma.cc/KN6V-H8L2>] (last visited Mar. 24, 2016) (describing the cooperative education curriculum at Georgia Tech); *Internships*, B.C., <http://www.bc.edu/offices/careers/jobs/internships.html> [<https://perma.cc/L49G-ZYE2>] (last visited Mar. 24, 2016) (recommending that Boston College students hold at least two internships during their four years as an undergraduate); *Intro to Co-op*, ROCHESTER INST. OF TECH., <https://www.rit.edu/emcs/occe/student/intro-to-co-op> [<https://perma.cc/R5C4-LN89>] (last visited Mar. 24, 2016) (describing the cooperative education curriculum at Rochester Institute of Technology).

⁶ See Keleher, *supra* note 4, at 627 (describing the increasing number of interns); Curiale, *supra* note 2, at 1535 (noting that internships in the U.S. are “on the rise”); Steven Greenhouse, *Internships Abroad: Unpaid, With a \$10,000 Price Tag*, N.Y. TIMES (Feb. 5, 2015), <http://www.nytimes.com/2015/02/08/education/edlife/the-10000-unpaid-global-internship.html> (noting that the number of international unpaid internships has increased in recent years); Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 3, 2010), <http://www.nytimes.com/2010/04/03/business/03intern.html> [hereinafter Greenhouse, *The Unpaid Intern*] (referencing a 1992 study, which found that only seven-

In 2016, in *Glatt v. Fox Searchlight Pictures, Inc. (Glatt III)*, the U.S. Court of Appeals for the Second Circuit faced the question of whether unpaid interns should be classified as “employees” under the Fair Labor Standards Act (“FLSA”) and New York Labor Law (“NYLL”).⁷ Such a classification would make unpaid interns entitled to at least minimum wage compensation.⁸ In vacating the district court’s finding that the plaintiffs had been improperly classified as unpaid interns rather than as paid employees, the Second Circuit adopted a test that focuses on which party, the employer or the intern, is the “primary beneficiary” of the relationship, and held that additional factual development was needed to determine which party primarily benefitted from the engagement.⁹

This Comment argues that the Second Circuit’s “primary beneficiary” test is overly particularized and subjective and is based on a misunderstanding of the realities of modern internships.¹⁰ Part I reviews the social and legal aspects of unpaid internships, the status of the law governing internships, and the district court’s holding in *Glatt v. Fox Searchlight Pictures, Inc. (Glatt I)*.¹¹ Part II explores the Second Circuit’s holding in *Glatt III* that the primary beneficiary test should be used to determine an intern’s employment status under the FLSA.¹² Part III argues that the primary beneficiary test is based on a misunderstanding of unpaid internships and proposes a revised set of factors for courts to consider in their determination of employee status under the FLSA and similar state labor laws.¹³

teen percent of graduating college students had completed an internship). At the same time that students are being encouraged to pursue unpaid internships, the price of college admission continues to rapidly rise. See NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEP’T OF EDUC., DIGEST OF EDUCATION STATISTICS 2013, at 8 (2015), <http://nces.ed.gov/pubs2015/2015011.pdf> [<https://perma.cc/N52V-EPNA>] (describing the rise in the price of a college degree). Between the 2002 and 2012 academic years, prices for undergraduate tuition, room, and board at public institutions rose thirty-nine percent, and prices at private nonprofit institutions rose twenty-seven percent, after adjustment for inflation, to an average yearly cost of \$25,784. *Id.*

⁷ *Glatt v. Fox Searchlight Pictures, Inc. (Glatt III)*, 811 F.3d 528, 531 (2d Cir. 2016); see 29 U.S.C. § 206 (2012) (establishing minimum wage requirement); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.1 (2013) (same). The Second Circuit issued its original decision on July 2, 2015. *Glatt v. Fox Searchlight Pictures, Inc. (Glatt II)*, 791 F.3d 376 (2d Cir. 2015), *amended and superseded by Glatt III*, 811 F.3d at 531. The court, however, amended and superseded its original opinion on January 25, 2016. *Glatt III*, 811 F.3d at 531.

⁸ See 29 U.S.C. § 206 (establishing a minimum wage for all employees); N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.1 (same).

⁹ *Glatt III*, 811 F.3d at 541.

¹⁰ See *infra* notes 69–100 and accompanying text.

¹¹ See *infra* notes 14–46 and accompanying text.

¹² See *infra* notes 47–63 and accompanying text.

¹³ See *infra* notes 69–100 and accompanying text.

I. SLAVING AWAY FOR “EXPERIENCE”

As a result of a highly competitive employment market, interns descend on cities across the country every year to gain work experience.¹⁴ Students often trade the possibility of a low-skill, paid summer job for internship experience, which has been referred to as a “de facto form of currency.”¹⁵ In return for offering internship programs, employers receive free labor and an opportunity to evaluate potential employees in a workplace environment.¹⁶ Even at major corporations, internships are often completed for college credit, rather than for traditional compensation.¹⁷ Although unpaid interns may sometimes gain work experience and training, their protections under the law are un-

¹⁴ See Julia Morpurgo, Note, *Should Class Be Dismissed? The Advantages of a One-Step Class Certification Process in Unpaid Intern FLSA Lawsuits*, 36 CARDOZO L. REV. 765, 774 (2014) (writing that many companies assure interns that instead of being paid, the interns will make contacts, enhance their résumé, and generally “get a foot in the door”); see also PAUL TAYLOR ET AL., PEW RES. 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> [<https://perma.cc/DH9V-7BGV>] (reporting that only 54.3 percent of young adults between ages eighteen to twenty-four were employed in 2011); Ashley G. Chrysler, Comment, *All Work, No Pay: The Crucial Need for the Supreme Court to Review Unpaid Internship Classifications Under the FLSA*, 2014 MICH. ST. L. REV. 1561, 1568 (noting that the recent economic recession has led to an increased number of interns); Madiha M. Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 CONN. L. REV. 1183, 1187 (2015) (noting that high unemployment rates have driven students to pursue internships to break into the workforce).

¹⁵ Ezra H. Stoller & Lily C. Sugrue, *Unpaid Internships: A Priceless Experience?*, HARV. CRIMSON (Apr. 3, 2014), <http://www.thecrimson.com/article/2014/4/3/unpaid-internships-experience/> [<https://perma.cc/LNG4-V8X2>].

¹⁶ David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 241 (1998) (noting that internships “benefit employers in a myriad of ways”).

¹⁷ See Keleher, *supra* note 4, at 627 (noting that interns “are ultimately volunteers who agree to work for free”); Sara Lipka, *Would You Like Credit With That Internship?*, CHRON. HIGHER EDUC. (D.C.) (May 9, 2010), <http://chronicle.com/article/Would-You-Like-Credit-With/65434/> [<https://perma.cc/6NE7-XAXF>] (writing that colleges view academic credit as an appropriate substitute for monetary compensation). Northwestern Mutual Life Insurance Company of Milwaukee hires 2500 interns every year, the retailer Target hires approximately 1000 interns each year, and since launching the Disney College Program in 1980, Disney has hired over 50,000 interns. PERLIN, *supra* note 1, at 6, 35–36; see Greenhouse, *The Unpaid Intern*, *supra* note 6 (reporting that employers posted 643 unpaid internships on Stanford University’s job board in 2010, which is triple the 174 internships posted in 2008). As a result of the rapid expansion of the internship market, there is arguably a widening economic gap between those who can afford to work in expensive cities for little to no pay, and those who cannot. See Magaldi & Kolisnyk, *supra* note 5, at 206 (describing the socio-economic effects of the growth of unpaid internships); Bennett, *supra* note 2, at 296–97 (same); Greenhouse, *The Unpaid Intern*, *supra* note 6 (arguing that the growth in unpaid internships favors “well-to-do and well-connected students, speeding their climb up the career ladder”). This economic gap becomes apparent upon graduation when employers favor applicants who have internship experience. See PERLIN, *supra* note 1, at xiv (discussing the fact that candidates with internship experience are more likely to be hired than candidates without experience).

clear.¹⁸ Section A provides an overview of the status of the law regarding unpaid internships.¹⁹ Section B reviews the facts and procedural posture of *Glatt v. Fox Searchlight Pictures, Inc.* in the district court.²⁰

A. Status of the Law Governing Unpaid Internships

The FLSA regulates the majority of employment in the United States and mandates a minimum wage, maximum working hours, and provides other protections to workers.²¹ A worker must meet the FLSA's definition of "employee" to be guaranteed these protections.²² The FLSA broadly defines "employee" as anyone "employed by an employer."²³ "Employ" is defined as "to suffer or permit to work," and an "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee."²⁴ Because the

¹⁸ See Chrysler, *supra* note 14, at 1569 (finding that attempts to make employment regulations pair with unpaid internships have proved challenging, in part because of a lack of holding from the U.S. Supreme Court); Curiale, *supra* note 2, at 1531 (arguing that the law regarding unpaid internships is "convoluted and unclear"); see also Keleher, *supra* note 4, at 628 (writing that the FLSA does not use the word "intern" once).

¹⁹ See *infra* notes 21–33 and accompanying text.

²⁰ See *infra* notes 34–46 and accompanying text.

²¹ 29 U.S.C. §§ 206, 207, 218(c) (2012). Congress enacted the FLSA to correct "the existence . . . of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . ." 26 U.S.C. § 202 (2012). An employee cannot give up his or her right to minimum wage because a waiver of such right would "nullify" the public policy purpose of the FLSA. See *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981) (holding that to waive the right to minimum wage would "thwart the legislative policies [the FLSA] was designed to effectuate").

²² See 29 U.S.C. § 203(e)(1) (2012) (providing the definition of "employee"); Malik, *supra* note 14, at 1189 (writing that if an intern does not meet the definition of "employee" under the FLSA, the employer does not have to abide by the law); see also *O'Connor v. Davis*, 126 F.3d 112, 119 (2d Cir. 1997) (affirming district court's holding that unpaid intern subjected to repeated sexual abuse in the workplace was not entitled to protections because she was not an "employee" under the FLSA); *Evans v. Wash. Ctr. for Internships & Acad. Seminars*, 587 F. Supp. 2d 148, 149 (D.D.C. 2008) (finding plaintiff's sexual harassment claims failed because she was not an "employee" within the meaning of the District of Columbia Human Rights Act, which substantially mirrors the FLSA's definition of "employee"). There has also been significant dispute as to whether independent contractors should be classified as "employees" under the FLSA. See Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities": The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B.C. L. REV. 239, 239–40 (1997) (discussing the difference between employees and independent contractors); see also Jennie Davis, Note, *Drive at Your Own Risk: Uber Violates Unfair Competition Laws by Misleading Uberx Drivers About Their Insurance Coverage*, 56 B.C. L. REV. 1097, 1105 (2015) (describing the criticism faced by Uber regarding the company's categorization of drivers as independent contractors); Noam Scheiber, *Uber Drivers and Others in the Gig Economy Take a Stand*, N.Y. TIMES (Feb. 2, 2016), <http://www.nytimes.com/2016/02/03/business/uber-drivers-and-others-in-the-gig-economy-take-a-stand.html> (discussing the on-going dispute between Uber drivers and the company over whether drivers should be classified as employees rather than independent contractors).

²³ 29 U.S.C. § 203(e)(1).

²⁴ 29 U.S.C. § 203(g) (defining "employ"); *id.* § 203(d) (defining "employer"); see *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (stating that the term "employ" has "striking

FLSA does not carve out an exception for unpaid internships, the legality of withholding compensation from interns turns solely on whether interns meet the FLSA's definition of "employee."²⁵

In the past few years, unpaid interns have begun challenging the legality of their unpaid internships under the FLSA and similar state labor laws by filing lawsuits against their former employers seeking unpaid wages.²⁶ The U.S. Supreme Court, however, has not heard a case closely on point since 1947 when it decided *Walling v. Portland Terminal Co.*²⁷ In *Portland Terminal*, the Court held that unpaid participants in a railroad company's one-week training program were not employees under the FLSA and were not entitled to compensation.²⁸ The Court found it persuasive that the railroad company received "no immediate advantage" from any work done by the trainees.²⁹

In 2010, the U.S. Department of Labor ("DOL") issued *Fact Sheet No. 71: Internship Programs Under The Fair Labor Standards Act* ("Fact Sheet

breadth" under the FLSA); U.S. DEP'T OF LABOR, WAGE & HOUR DIV., ADMINISTRATOR'S INTERPRETATION NO. 2015-1 (July 15, 2015), http://www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf [<https://perma.cc/S37P-FW3M>] (explaining that the "suffer or permit" language was intended to be broadly interpreted and was added to curb child labor law violations). The U.S. Supreme Court has consistently viewed the FLSA liberally to further the public policy purpose of the legislation. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985) (noting that the Court has liberally interpreted the FLSA).

²⁵ Malik, *supra* note 14, at 1189 (noting that if an intern is an "employee" then he or she is entitled to minimum wage but arguing that it is hard to determine an intern's employee status due to a lack of judicial clarity and the "broad language" of the FLSA).

²⁶ See, e.g., *Tart v. Lions Gate Entm't Corp.*, No. 14-cv-8004 (AJN), 2015 WL 5945846, at *2-3 (S.D.N.Y. Oct. 13, 2015) (approving settlement and finding plaintiffs alleged facts showing common internship policies); *Klein v. Octagon, Inc.*, No. 14. Civ. 6770(AT), 2015 WL 5821629, at *3 (S.D.N.Y. Sept. 30, 2015) (denying plaintiff-intern's motion for conditional collective action certification); *Ballinger v. Advance Magazine Publishers, Inc.*, No. 13 Civ. 4036(HBP), 2014 WL 7495092, at *1 (S.D.N.Y. Dec. 29, 2014) (seeking unpaid wages and class certification for interns in suit against Condé Nast); *Mark v. Gawker Media LLC*, No. 13-cv-4347 (AJN), 2014 WL 4058417, at *1 (S.D.N.Y. Aug. 15, 2014) (seeking unpaid wages and class certification for interns in suit against large media corporation); *Glatt v. Fox Searchlight Pictures Inc. (Glatt I)*, 293 F.R.D. 516, 521-22 (S.D.N.Y. 2013) (seeking unpaid wages and class certification for interns in suit against movie distribution company), *vacated*, *Glatt III*, 811 F.3d 528; *Wang v. Hearst Corp.*, 293 F.R.D. 489, 490 (S.D.N.Y. May 18, 2013) (seeking unpaid wages and class certification for interns in suit against magazine), *aff'd in part, vacated in part*, 617 F. App'x 35 (2d Cir. 2015).

²⁷ *Chrysler*, *supra* note 14, at 1564 (noting that no U.S. Supreme Court case since the 1947 case of *Walling v. Portland Terminal Co.* provides guidance on the issue of interns' legal employment status); see *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947) (holding trainees in railroad company program were not entitled to compensation).

²⁸ *Portland Terminal*, 330 U.S. at 153 (interpreting the FLSA's definitions of "employ" and "employee," the language of which are the same as today). The Court noted that in addition to providing "no immediate advantage" to the railroad company, the trainees actually "impede[d]" its operation. *Id.* at 150, 153. The trainees in the seven-day program were first sent to the railroad yard crew for supervision and instruction through observation, and were then soon permitted to do actual work under the scrutiny of the yard crew. *Id.* at 149.

²⁹ *Id.* at 153.

No. 71”), which provided informal guidance to employers in the for-profit sector on when an unpaid intern might be considered an employee under the FLSA.³⁰ Fact Sheet No. 71 includes a six-factor test that was based on the same criteria used by the Court in *Portland Terminal*.³¹ Fact Sheet No. 71 instructs that an employment relationship does not exist if all of the six factors are met.³² Legislation addressing unpaid internships has yet to occur.³³

B. *Glatt I in the District Court*

In 2011, four interns filed suit against Fox Searchlight Pictures, Inc. (“Searchlight”), a movie distribution company, and its parent company, alleging that the companies violated the FLSA and NYLL by classifying the plaintiffs as unpaid interns instead of as paid employees.³⁴ Two of the interns, Eric Glatt and Alexander Footman, worked in the production office of the Search-

³⁰ See U.S. DEP’T OF LABOR, WAGE & HOUR DIV., FACT SHEET NO. 71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1–2 (2010), <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [<https://perma.cc/V552-D2R9>] [hereinafter FACT SHEET NO. 71]. The DOL guidelines apply only to employers who engage in a business for profit. *Id.* at 1. Non-profits may hire unpaid interns as volunteers and are not subject to the six-factor test. *Id.*

³¹ See Malik, *supra* note 14, at 1196 (observing that Fact Sheet No. 71 “merely restates” the reasoning from *Portland Terminal*). The six factors are:

- (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.

Id. The New York Department of Labor has also issued a fact sheet on unpaid internships, which uses the same six factors as Fact Sheet No. 71 but adds five more factors. See N.Y. STATE DEP’T OF LABOR, WAGE REQUIREMENTS FOR INTERNS IN FOR-PROFIT BUSINESSES 1–2 (2011), <https://www.labor.ny.gov/formsdocs/factsheets/pdfs/p725.pdf> [<https://perma.cc/TS5Q-3XG4>].

³² FACT SHEET NO. 71, *supra* note 30, at 1.

³³ Morpurgo, *supra* note 14, at 781; see Chrysler, *supra* note 14, at 1564–65, 1569 (noting that no legislation has specifically addressed the issue of unpaid internships); Curiale, *supra* note 2, at 1546 (arguing that employer compliance with employment law is nearly impossible because no legislation specifically addresses unpaid internships).

³⁴ *Glatt I*, 291 F.R.D. at 521–22. The definition of “employee” under NYLL does not differ significantly from that of the FLSA. Compare N.Y. COMP. CODES R. & REGS. tit. 12, § 142-2.14 (2013) (“Employee means any individual employed, suffered or permitted to work by an employer . . .”), with 29 U.S.C. § 203(e)(1) (2012) (“[E]mployee’ means any individual employed by an employer.”). Although the plaintiffs alleged violations of the California Unfair Competition Law (“CAUCL”), the district court found that claim time-barred. *Glatt I*, 293 F.R.D. at 524. Plaintiffs did not appeal the court’s holding on that issue. See generally *Glatt III*, 811 F.3d 528 (omitting discussion of the CAUCL).

light film, *Black Swan*.³⁵ Another intern, Eden Antalik, worked in the Searchlight corporate offices in New York City.³⁶ When Glatt started working on *Black Swan*, he was enrolled in a graduate program, but the school did not offer him credit for the *Black Swan* internship.³⁷ Footman had recently graduated from college and was not enrolled in a degree program at the time of his internship.³⁸ Due to the school requirements, in order to graduate, Antalik had to complete an internship program.³⁹ All of the interns were unpaid.⁴⁰

Glatt and Footman moved for partial summary judgment on the grounds that they were employees covered by the FLSA and NYLL and that Searchlight was their employer.⁴¹ Antalik moved for certification of a New York class under NYLL and conditional certification of a nationwide collective under the FLSA.⁴² On June 11, 2013, the district court granted partial summary judgment for Glatt and Footman and found that they were employees under the FLSA and NYLL.⁴³ In particular, the district court found that Glatt and Footman's internship duties did not require any special training.⁴⁴ The court stressed that any educational benefits Glatt and Footman may have received were the result of "having worked as any other employee works," not of internships specifically designed to provide educational value.⁴⁵ The district court also certified

³⁵ *Glatt I*, 293 F.R.D. at 522.

³⁶ *Id.* Kanene Gratts, a fourth intern and plaintiff, worked on production of the film *500 Days of Summer*. *Id.* Gratts was not a plaintiff in the original action but the plaintiffs filed an amended complaint, adding Gratts to the suit. *Id.* at 523. The district court however, held that Gratts' claims were time-barred because her internship ended before August 2008 and because she was not entitled to equitable tolling, which the plaintiffs did not appeal. *Id.* at 525. Thus, Gratts is not a subject in the Second Circuit's opinion in *Glatt III*. See generally *Glatt III*, 811 F.3d 528 (omitting discussion of Kanene Gratts).

³⁷ *Glatt III*, 811 F.3d 528 at 531. Glatt worked at Searchlight as an intern from December 2, 2009, through February 2010 in *Black Swan*'s accounting department. *Id.* He worked five days per week from approximately 9:00 a.m. to 7:00 p.m. *Id.* From March 2010 to August 2010 he interned a second time in *Black Swan*'s post-production department, during which time he worked from approximately 11:00 a.m. until 6:00 or 7:00 p.m. two days per week. *Id.*

³⁸ *Id.* at 532.

³⁹ *Id.* at 533. Antalik began work around 8:00 a.m. each day and worked from August 2009 until mid-May 2010. *Id.*

⁴⁰ See *Glatt I*, 293 F.R.D. at 522.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 539. In finding that Glatt and Footman were employees of Searchlight under the FLSA and NYLL, the district court applied the six factors enumerated in Fact Sheet No. 71, but did not require that all six factors be present to establish that the interns were not employees, which departed from the DOL's guidance. *Glatt III*, 811 F.3d at 535. Instead, the district court balanced the factors, finding they weighed in favor of an employee determination. *Id.*

⁴⁴ *Glatt I*, 293 F.R.D. at 534.

⁴⁵ *Id.*

Antalik's New York NYLL class and conditionally certified her nationwide FLSA collective.⁴⁶

II. THE SECOND CIRCUIT'S DECISION: PRIMARY BENEFICIARY TEST CONTROLS THE INQUIRY

On appeal, the U.S. Court of Appeals for the Second Circuit vacated the U.S. District Court for the Southern District of New York's orders and remanded the case for the application of its newly introduced "primary beneficiary" test.⁴⁷ The Second Circuit disagreed with the district court's reliance on the six factors in Fact Sheet No. 71.⁴⁸ Instead of simply applying Fact Sheet No. 71 to the facts of the case, the Second Circuit created a new, non-exhaustive set of seven factors to determine whether the intern or the employer is the "primary beneficiary" of the relationship.⁴⁹ Under the court's test, if an unpaid intern is

⁴⁶ *Id.* at 539. When a court certifies a class action, it allows one or more plaintiffs to sue as representative parties on behalf of all members of the class. *See* FED. R. CIV. P. 23(a). The FLSA provides that a suit "may be maintained against any employer . . . in any Federal or State court . . . by any one or more employees for and on behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (2012), *invalidated by* *Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895 (6th Cir. 2014) (holding that, without a violation of the Fourteenth Amendment, Congress could not remedially authorize suits against the states under the FLSA, which does not pertain to the private employer issue in *Glatt*). In order to certify the New York collective, Antalik bore the burden of showing that the class met the requirements of Rule 23, which are numerosity, commonality, typicality, and adequacy of representation. FED. R. CIV. P. 23(a)(1)–(4). In addition to finding that the above requirements were met, the court also had to find that "questions of law or fact common to class members predominate over any questions affecting only individual members." *See* FED. R. CIV. P. 23(b)(3).

⁴⁷ *Glatt v. Fox Searchlight Pictures, Inc. (Glatt III)*, 811 F.3d 528, 531 (2d Cir. 2016). The Second Circuit first issued an opinion in this case in July 2015 and then amended and superseded that opinion in January 2016. *Id.*; *Glatt v. Fox Searchlight Pictures, Inc. (Glatt II)*, 791 F.3d 376, 386 (2d Cir. 2015), *superseded and amended by Glatt III*, 811 F.3d 528. The appeal in *Glatt II* was argued in tandem with *Wang v. Hearst Corp.*, in which the Second Circuit also reversed and remanded on the same issues as in *Glatt III*. *Wang v. Hearst Corp.*, 617 F. App'x 35, 38 (2d Cir. 2015).

⁴⁸ *Glatt III*, 811 F.3d at 536 (declining to rely on Fact Sheet No. 71 because it is a "distillation" of *Portland Terminal*, and an agency does not have authority to interpret a court decision). The court noted that at most, Fact Sheet No. 71 was entitled to persuasive deference under the 1944 U.S. Supreme Court holding in *Skidmore v. Swift & Co. Id.*; *see Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that the amount of deference given to an administration's guidance depends on "all those factors which give it power to persuade").

⁴⁹ *See Glatt III*, 811 F.3d at 536–37; *see also Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1211–15 (11th Cir. 2015) (adopting and applying the Second Circuit's "primary beneficiary" test to remand suit brought by unpaid student nurse anesthesiologists). The seven factors are:

- (1) The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
- (2) The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
- (3) The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
- (4) The

the primary beneficiary of the arrangement, they are correctly classified as a nonemployee under the FLSA, and vice versa.⁵⁰

The Second Circuit rejected the district court's holding that the plaintiffs were employees under the Fair Labor Standards Act ("FLSA") and New York Labor Law ("NYLL") because the district court limited its inquiry to the six factors in Fact Sheet No. 71.⁵¹ The court held that because Fact Sheet No. 71 was essentially a distillation of the factors used by the U.S. Supreme Court in 1947 in *Walling v. Portland Terminal Co.*, the Fact Sheet did not "reflect" the "central feature of the modern internship," which the court held was the strength of the nexus between the internship and the intern's formal education.⁵²

According to the Second Circuit, the "primary beneficiary" test first focuses on what the intern receives in exchange for his or her work.⁵³ The Second Circuit also saw the test as one that provides courts with the flexibility to examine the economic reality of the arrangement between the intern and the company.⁵⁴ The court reversed the district court because it held that the six-

extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar. (5) The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning. (6) The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern. (7) The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Glatt III, 811 F.3d at 536–37.

⁵⁰ *See id.* at 537 (describing the possible outcome of the primary beneficiary test and noting that "[n]o one factor is dispositive and every factor need not point in the same direction"); Chrysler, *supra* note 14, at 1581 (explaining the "primary beneficiary" test).

⁵¹ *Glatt III*, 811 F.3d at 535.

⁵² *Id.*

⁵³ *Id.* at 536.

⁵⁴ *See id.* The "primary beneficiary" test incorporates aspects of tests used by courts in various circuits in similar contexts. Chrysler, *supra* note 23, at 1575–76 (describing multiple tests); *see, e.g., Velez v. Sanchez*, 693 F.3d 308, 331 (2d Cir. 2012) (finding genuine dispute of material fact as to the "economic reality" of the plaintiff's situation where plaintiff alien alleged that she was a domestic service worker covered by the FLSA); *Solis v. Laurelbrook Sanitarium & Sch. Inc.*, 642 F.3d 518, 525–26 (6th Cir. 2011) (rejecting a "rigid" test in favor of a "primary benefit" approach); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993) (using a "totality of the circumstances" test to find firefighter trainees not employees under FLSA); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) (holding the determination hinged on which party "principally benefited" from the engagement); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) (applying an "economic reality" test to determine that nontaxed nurses employed by health-care service were employees, not independent contractors, under FLSA); *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." (quoting *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1189 (5th Cir. 1979))); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271–72 (5th Cir. 1982) (holding that trainees of defendant employer's educational training program were "employees" under the FLSA by addressing the benefit received by both parties); *Wirtz v. Wardlaw*, 339 F.2d 785, 788 (4th Cir. 1964) (holding workers were "employ-

factor test from the Fact Sheet attempted to conform *Portland Terminal's* particular facts to all workplaces.⁵⁵ The court held that the test does not conform to all workplaces because an intern enters into their engagement with the expectation of receiving educational benefits, which is not true of all employment scenarios.⁵⁶

After determining that the district court applied an inaccurate test, the Second Circuit went on to discuss the district court's certification of Antalik's New York NYLL class and conditional certification of her nationwide FLSA collective.⁵⁷ To proceed as a class action, Antalik bore the burden of proving the predominance requirement of Federal Rules of Civil Procedure 23 ("Rule 23").⁵⁸ In order to meet this requirement, "questions of law or fact common to class members [must] predominate over any questions affecting only individual members"⁵⁹ The Second Circuit noted that the predominance inquiry is met if the questions of law or fact could be answered through "generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof."⁶⁰ The Second Circuit held that Antalik failed to meet this requirement because the issue of an intern's legal employment status is a "highly context-specific inquiry" when considering whether the predominance inquiry is met.⁶¹ For comparison, in September, 2015, in *Klein v. Octagon, Inc.*, the U.S. District Court for the Southern District of New York found that the plaintiff intern did not present sufficient evidence to meet the "generalized proof" standard in *Glatt III*.⁶² Less than a month later, however, in October 2015 in *Tart v. Lions Gate Entertainment Corp.*, the U.S. District Court for the Southern District of New York granted preliminary approval of a class and collective action settlement and found that the plaintiff interns provided sub-

ees" under FLSA and finding determinative that employer's interests were served by the plaintiffs' work and that the employer "benefited from their labors"); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947) (finding independent contractors "employees" under the FLSA when examining the "circumstances of the whole activity").

⁵⁵ *Glatt III*, 811 F.3d at 537–38.

⁵⁶ *Id.*

⁵⁷ *Id.* at 538–40.

⁵⁸ *Glatt III*, 811 F.3d at 538; see FED. R. CIV. P. 23.

⁵⁹ FED. R. CIV. P. 23(b)(3).

⁶⁰ *Glatt III*, 811 F.3d at 538 (quoting *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 118 (2d Cir. 2013)).

⁶¹ *Id.* at 539. The Second Circuit, however, did note that a court may consider evidence of an internship program as a whole, rather than that of a singular intern's experience. *Id.* at 537. In the Second Circuit's original opinion, the court noted that the "proper test" is one that recognizes that determining an intern's employment status is "a highly individualized inquiry" whereas the amended decision changed this language to read: "a highly context-specific inquiry." *Id.* at 539; *Glatt II*, 491 F.3d at 386.

⁶² See No. 14. Civ. 6770(AT), 2015 WL 5821629, at *3 (S.D.N.Y. Sept. 30, 2015).

stantial evidence of common internship policies, which demonstrated that many of the *Glatt III* factors could be answered with “generalized proof.”⁶³

III. THE PRIMARY BENEFICIARY TEST FAILS TO ADDRESS THE REALITIES OF THE AVERAGE UNPAID INTERNSHIP

Unpaid interns are in a unique and lamentable position because they often lack the resources to bring claims for unpaid wages, attorneys refuse to take such cases, or the interns decide not to bring such claims because it will reflect poorly on their reputation, possibly damaging their career.⁶⁴ In addition, most unpaid internships involve menial tasks and provide little educational value.⁶⁵ This is not to imply, however, that all unpaid internships should be illegal.⁶⁶ Some internships do provide interns with valuable educational experiences.⁶⁷ But many do not, and as such, unpaid interns in these unfortunate positions should be entitled to minimum wage and workplace protections.⁶⁸

⁶³ See No. 14-cv-8004 (AJN), 2015 WL 5945846, at *4 (S.D.N.Y. Oct. 13, 2015). *But see* Fratelli v. MSG Holdings, L.P., No. 6518 (HBP), 2015 WL 8491038, at *11 (S.D.N.Y. Dec. 10, 2015) (appointing class counsel but denying motions for proposed settlement and class certification, finding plaintiff failed to present sufficient evidence to meet *Glatt III* factors). FLSA claims must be litigated under the collective action mechanism, but because most state labor laws do not provide similar mechanisms, courts allow state labor law claims to proceed under the class action mechanism of Federal Rule of Civil Procedure 23. Sari M. Alamuddin et al., *Differences Between Rule 23 Class Actions and FLSA § 216(B) Collective Actions; Tips for Achieving Class and Collective Action Certification; and Certification Post-Dukes*, 890 PRACTISING L. INST. 293, 295 (2012).

⁶⁴ See Chrysler, *supra* note 14, at 1595 (noting that interns are unlikely to have the means to bring actions for unpaid wages); *cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (noting that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting their rights and acknowledging that lawyers likewise have little incentive to take cases that involve small sums of money).

⁶⁵ See PERLIN, *supra* note 1, at 66–69 (noting that most internships involve menial tasks and lack dedicated training or educational components and providing anecdotal evidence of menial internship experiences); Bennett, *supra* note 2, at 297 (comparing internships to apprenticeships and noting that internships rarely include supervision and provide “a less than ideal educational environment”); Chrysler, *supra* note 14, at 1562 (noting that most interns receive “little to no educational benefit” from internships); Greenhouse, *The Unpaid Intern*, *supra* note 6 (arguing that many internships do not involve educational components).

⁶⁶ Magaldi & Kolisnyk, *supra* note 5, at 206.

⁶⁷ *Id.*

⁶⁸ *Id.* In 2015, in *Schuman v. Collier Anesthesia, P.A.*, the Eleventh Circuit held that a student-registered nurse anesthetist enrolled in a training program was not an employee, finding that modern internships are different from traditional employment positions in that students, not employers’ business requirements, drive the need for internships. 803 F.3d 1199, 1213 (11th Cir. 2015). Employers do, however, receive considerable business benefits from the work performed by interns. See David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 225 (2002) (describing one study, which estimated that employers gain an annual \$40 million in illegal employment from unpaid interns); see also *supra* note 17 (noting that companies such as Disney hire thousands of interns every year). True, interns take unpaid positions in the hopes of advancing their careers, but, presumably, employers would not continue to offer unpaid internships if the interns did not produce value for the companies. See *id.*

The primary beneficiary test, as articulated and applied by the U.S. Court of Appeals for the Second Circuit on January 25, 2016 in *Glatt v. Fox Searchlight Pictures, Inc.* (*Glatt III*), fails to account for the lack of educational value in the majority of unpaid internships.⁶⁹ The rationale of the primary beneficiary test is that workers who obtain educational benefits from their internships have thereby received de facto compensation, while those who obtain no educational benefit should receive compensation just like any other worker.⁷⁰ Although the “primary beneficiary” test is a step in the right direction because it focuses the inquiry on the educational benefits of the internship, the test is unnecessarily subjective.⁷¹ It requires a discrete quantification of the value received by each party to the internship arrangement, which is inherently a subjective and difficult calculation and will lead to unpredictable results.⁷²

In 1947, in *Walling v. Portland Terminal Co.*, the U.S. Supreme Court held that “[t]he 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.”⁷³ In the context of unpaid internships, the “advantage” referred to by the Court is the education gained by unpaid interns during their internship.⁷⁴ But unlike the training program at issue in *Portland Terminal*, most unpaid internships do not include dedicated educational programs, and the training received is no different than that provided to normal employees.⁷⁵

⁶⁹ See *Glatt v. Fox Searchlight Pictures (Glatt III)*, 811 F.3d 528, 536 (2d Cir. 2016) (holding that the “primary beneficiary” test controls the inquiry of an intern’s employment status); cf. Ortnor, *supra* note 4, at 2647 (arguing that the Fact Sheet No. 71 factors require the party offering the internship to “act more as an educator than an employer”).

⁷⁰ Chrysler, *supra* note 14, at 1581 n.130.

⁷¹ See *id.* at 1591 (discussing the unpredictable nature of the primary beneficiary test); see also *Glatt v. Fox Searchlight Pictures (Glatt I)*, 293 F.R.D. 516, 532 (S.D.N.Y. June 11, 2013), *vacated*, *Glatt v. Fox Searchlight Pictures (Glatt III)*, 811 F.3d 528 (discussing how the primary beneficiary test could lead to different classifications for two students in the same internship program).

⁷² See PERLIN, *supra* note 1, at 67 (discussing how a test that balances the benefits received by both parties to the internship would lead to an impossible calculation and produce inconsistent results).

⁷³ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947) (quoting 29 U.S.C. § 203(g)).

⁷⁴ See *Glatt III*, 811 F.3d at 537–38.

⁷⁵ Magaldi & Kolisnyk, *supra* note 5, at 204 (“Many internships are not only unpaid, but also provide no explicit academic or training experience, or involve menial work.”); see *Portland Terminal*, 330 U.S. at 149–50 (noting that the training received by the trainees was necessary for them to be hired by the railroad); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 268–71 (5th Cir. 1982) (describing extensive educational programming offered to airline’s trainees). The trainees in *American Airlines* were enrolled in a four to five week, full-time training program, similar to that in *Portland Terminal*, in order to learn how to become flight attendants or reservation sales agents for American Airlines. *Am. Airlines*, 686 F.2d at 268–70. In contrast, many other interns “famously shuttle coffee in a thousand newsrooms, Congressional offices and Hollywood studios . . .” PERLIN, *supra* note 1, at xi.

Structured programming and mentoring within an unpaid internship is the best way for employers to provide their interns with educational value.⁷⁶ Simply offering college credit in lieu of pay, however, should not be an appropriate, or legal, alternative.⁷⁷ In *Glatt III*, after holding that the primary beneficiary test controls the employee inquiry, the Second Circuit found that the district court's analysis failed to adequately take into account the educational benefit the plaintiffs received from their internships.⁷⁸ The court noted that all of the plaintiffs were enrolled in or had recently completed their post-secondary educations, contrasted with the plaintiffs in *Portland Terminal*, whose work was not tied to any educational institution.⁷⁹ This distinction, however, is misguided because even if internships are completed for college credit, interns may not be the primary beneficiary of the arrangement.⁸⁰ For example, they may perform tasks necessary for the operation of the employer's business, they may not learn skills applicable across an industry, or the internship may not complement their formal education.⁸¹

The primary beneficiary test is subjective and over-individualized, which will lead to unpredictable results in future analogous cases.⁸² The qualitative

⁷⁶ Magaldi & Kolisnyk, *supra* note 5, at 193 (explaining that the more an internship program is structured to provide a "classroom or academic experience," the more likely it is to be viewed as an extension of or complement to the intern's formal education). A paid employee would undoubtedly receive compensation if they were given training on new technology or training due to a change in their duties, such as a promotion. Yamada, *supra* note 68, at 234. An unpaid intern would likely go through the same process of learning employer-specific skills but would not receive compensation. *See id.* (suggesting that "the cost of getting a foot in the door must be borne by the worker herself").

⁷⁷ *See* Magaldi & Kolisnyk, *supra* note 5, at 202 (noting that academic credit alone does not guarantee employment status, especially when an internship lacks training); Opinion Letter from Barbara R. Releford, Office of Enforcement Policy, Fair Labor Standards Team, U.S. Dep't of Labor (May 17, 2004), http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm [<https://perma.cc/5DL6-GWL8>] (finding for-credit marketing internship program potentially subject to FLSA where interns worked up to ten hours a week collecting marketing data).

⁷⁸ *See Glatt III*, 811 F.3d at 537–38 (noting that the primary beneficiary test, as opposed to the district court's reliance on Fact Sheet No. 71, better takes into account the intern's formal education).

⁷⁹ *Id.*

⁸⁰ *See* Magaldi & Kolisnyk, *supra* note 5, at 202 ("[F]ederal regulators state that providing academic credit alone does not necessarily free employers from paying interns, or provide assurance that the internships comply with law, especially when an internship involves little training and mainly benefits the employer.").

⁸¹ *Cf.* Opinion Letter from Daniel F. Sweeney, Office of Enforcement Policy, Fair Labor Standards Team, U.S. Dep't of Labor (May 8, 1996), 1996 WL 1031777, at *1 (opining that an unpaid intern is not an employee under the FLSA where the internship is academically-oriented and in furtherance of the intern's formal course of study).

⁸² *See Glatt III*, 811 F.3d at 539 (finding that the question of an intern's employment status is a "highly context-specific inquiry"). *Compare* Tart v. Lions Gate Entm't Corp., No. 14-cv-8004 (AJN), 2015 WL 5945846, at *4 (S.D.N.Y. Oct. 13, 2015) (granting preliminary approval of class and collective action settlement and finding that the plaintiff interns provided substantial evidence of common internship policies, which demonstrated that many of the *Glatt* factors could be answered with "generalized proof" (quoting *Glatt v. Fox Searchlight Pictures, Inc. (Glatt II)*, 791 F.3d 376, 386–87 (2d Cir. 2015), *superseded and amended by Glatt III*, 811 F.3d 528)), *with* Klein v. Octagon, Inc., No. 14. Civ.

benefits received by completing an internship are hard, if not impossible, to quantify.⁸³ A legal standard should provide predictability and equity of results in order to provide stability to the judicial system.⁸⁴ Without predictability and equity, potential litigants would be dissuaded from bringing meritorious cases because they are unable to predict the outcomes.⁸⁵ Application of the Second Circuit's primary beneficiary test will produce inconsistent and unpredictable results.⁸⁶

Instead of a subjective, particularized balancing test, a better test would be one that objectively determines whether an internship program provides an unpaid intern with structured educational programs, materials, and industry-specific, as opposed to employer-specific, training.⁸⁷ A set of factors to consider could be as follows: (1) whether the employer has a specific, defined, and regular internship program;⁸⁸ (2) whether an internship program focuses on a classroom or other educational experience as opposed to the company's process;⁸⁹ (3) whether an internship program provides interns with knowledge and expertise applicable to a number of employers, rather than only the internship

6770(AT), 2015 WL 5821629, at *3 (S.D.N.Y. Sept. 30, 2015) (finding plaintiff intern did not present sufficient evidence to meet the "generalized proof" standard from *Glatt* (quoting *Glatt II*, 791 F.3d at 386)).

⁸³ Chrysler, *supra* note 14, at 1591.

⁸⁴ *Id.* at 1598.

⁸⁵ *Id.*

⁸⁶ *Glatt I*, 293 F.R.D. at 532 (finding that the primary benefit test is "subjective and unpredictable"); Chrysler, *supra* note 14, at 1599 (arguing that an appropriate test would provide consistency and predictability).

⁸⁷ See *Glatt I*, 293 F.R.D. at 532–33 (noting that *Glatt* and *Footman* received little educational training from their *Searchlight* internships); Magaldi & Kolisnyk, *supra* note 5, at 204 (inferring that because certain internships contain only administrative duties, they do not provide adequate educational value to the interns).

⁸⁸ See *Tart*, 2015 WL 5945846, at *4 (finding that the common internship policies alleged by the plaintiffs demonstrated that many of the *Glatt III* factors could be answered with "generalized proof" (quoting *Glatt II*, 791 F.3d at 386–87)); see also *Pryor v. Aerotek Sci., LLC*, 278 F.R.D. 516, 531 (C.D. Cal. 2011) (finding that the predominance requirement of Rule 23 is more likely to be satisfied if the conduct complained of is the result of a common practice). If an employer does not have a regular internship program, it likely does not hire many interns, and therefore the number of plaintiffs is likely not large enough to constitute a class action. See *Robidoux v. Celani*, 987 F.2d 931, 935–36 (2d Cir. 1993) (finding that a presumption that joinder is impracticable can arise where the prospective class consists of forty members or more).

⁸⁹ See JANE OATS & NANCY LEPPINK, U.S. DEP'T OF LABOR, TRAINING AND EMP'T GUIDANCE LETTER NO. 12-09, JOINT GUIDANCE FOR STATES SEEKING TO IMPLEMENT SUBSIDIZED WORK-BASED TRAINING PROGRAMS FOR UNEMPLOYED WORKERS 8 (Jan. 29, 2010), <http://wdr.doleta.gov/directives/attach/TEGL/TEGL12-09acc.pdf> [<https://perma.cc/3W6X-PX2Q>]; see also Gregory, *supra* note 16, at 204 (explaining that if an internship has a demonstrable "nexus" to an intern's education, courts will likely find it acceptable under the FLSA). The DOL issues guidance letters to provide assistance to states that may be considering implementation of subsidized work-based training initiatives for unemployed workers and describing how to create training programs that conform to the FLSA. See OATS & LEPPINK, *supra*, at 1 (providing guidance to states considering implementation of work-based training programs).

provider;⁹⁰ (4) the extent to which the work performed by interns is an important part of the employer's business operations;⁹¹ (5) the likelihood that the internship program displaces regular employees;⁹² and (6) the length of the internship program.⁹³ All of these factors need not be met and one is not necessarily more important than the others.⁹⁴

The factors incorporate elements from Fact Sheet No. 71, *Glatt III*, and other sources.⁹⁵ What is unique, however, is that the factors proposed herein direct a court to focus on the internship program itself, rather than the individual aspects of each plaintiff-intern's experience.⁹⁶ This expanded inquiry is necessary to allow for class certification but will also still require plaintiffs to plead with particularity facts of common practices in an internship program in order to satisfy a standard of "generalized proof" and meet accepted principles

⁹⁰ See *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1028 (10th Cir. 1993) (noting that a training program may be similar to a vocational school if skills taught are transferrable within an industry); *OATS & LEPPINK*, *supra* note 89, at *8 (noting that the more a training program is centered around a classroom, the more likely it will be found not to be an employment arrangement under the FLSA); *Magaldi & Kolisnyk* *supra* note 5, at 193 (same).

⁹¹ See *Edwards v. Cmty. Enters., Inc.*, 251 F. Supp. 2d 1089, 1098 (D. Conn. 2003) (enumerating this provision in the context of a home-share provider). In 1998, the U.S. District Court for the Southern District of New York decided *Archie v. Grand Central Partnership*, in which then-district judge Sonia Sotomayor found that homeless persons hired by a non-profit organization were employees under the FLSA, in part because they received minimal training and their job duties were specific to the non-profit organization at issue in the case. See 997 F. Supp. 504, 535 (S.D.N.Y. 1998). This factor would ensure that unpaid interns are not performing work that the company relies on for its operation, and thus, that the company does not rely on unpaid interns for its workforce. *Cf. PERLIN*, *supra* note 1, at 62 (describing how startup companies implement interns into their business plans to save money).

⁹² See FACT SHEET NO. 71, *supra* note 30, at 1 (providing this factor).

⁹³ See *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989) (finding one-week training program not subject to FLSA); Opinion Letter from Alfred B. Robinson, Jr., Acting Adm'r, Wage and Hour Div., U.S. Dep't of Labor (Apr. 6, 2006), http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.htm [<https://perma.cc/C4QT-LQKW>] [hereinafter Opinion Letter] (finding not-for-credit internship program where interns shadowed employers for one week and performed little, if any work besides observation was not subject to FLSA). A long-term internship program may be an indication that the employer is attempting to skirt the FLSA and use unpaid interns for essential business operations. See Opinion Letter, *supra* (inferring that because short-term interns were not found to be employees, a long-term internship program is more likely in violation of the FLSA); see also *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199, 1213–14 (11th Cir. 2015) (observing that an internship need not exactly match the timing of an intern's formal education, but an internship that is "grossly excessive" in length is evidence of an employment relationship).

⁹⁴ *Cf. Glatt III*, 811 F.3d at 537 (noting that the seven factors are not exhaustive and explaining that all of the factors need not be met in order to establish an employment relationship); *Schumann*, 803 F.3d at 1214 (noting that the outcome of the primary beneficiary test "may not necessarily be an all-or-nothing determination"); FACT SHEET NO. 71, *supra* note 30, at 1 (noting that an employment relationship does not exist if all of the factors are met).

⁹⁵ See *Chrysler*, *supra* note 14, at 1562 (advocating for a test that mixes the "primary beneficiary" test with the factors from Fact Sheet No. 71).

⁹⁶ See *Glatt II*, 791 F.3d at 386 (noting that the "proper test" is one that recognizes that the determination of an intern's employment status is a "highly individualized inquiry").

of class action certification.⁹⁷ Focusing a reviewing court’s inquiry on the internship program itself will also create an incentive for employers to craft internships that provide unpaid interns with a more complete and transferrable educational experience, which will benefit both interns and employers.⁹⁸ Interns will better supplement their classroom educations and be better prepared for the workforce.⁹⁹ In turn, employers will have access to a pool of potential workers who are trained in the employers’ industries, as opposed to being trained for employer-specific tasks.¹⁰⁰

CONCLUSION

In *Glatt III* the Second Circuit instituted an overly subjective “primary beneficiary” test when it vacated and remanded the district court’s order finding that unpaid interns were employees under the FLSA and therefore, entitled to compensation. Further application of the primary beneficiary test in the unpaid internship context will prove an unpredictable undertaking. Congress or the U.S. Supreme Court should enumerate an objective test that focuses solely on the formal, educational components of a internship in order to ensure that aggrieved unpaid interns can form a class action and that they receive, at the very least, a minimum wage salary and basic workplace protections.

MICHAEL A. HACKER

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⁹⁷ See *Glatt III*, 811 F.3d at 538 (noting that the predominance requirement of Rule 23 requires “generalized proof”).

⁹⁸ See PERLIN, *supra* note 1, at xiv (noting that employers favor candidates with internship experience); Ortnor, *supra* note 4, at 2617 (noting the importance of obtaining work experience prior to graduating).

⁹⁹ See Chrysler, *supra* note 14, at 1567–68 (noting that employers are looking to hire students with real-world skills and on-the-job training).

¹⁰⁰ See *Portland Terminal*, 330 U.S. at 152–53.