NEW YORK UNIVERSITY

JOURNAL OF INTELLECTUAL PROPERTY AND ENTERTAINMENT LAW

VOLUME 7 FALL 2017 NUMBER 1

FROM MAILROOM TO COURTROOM: THE LEGALITY OF UNPAID INTERNSHIPS IN ENTERTAINMENT AFTER GLATT V. FOX SEARCHLIGHT INC.

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In Glatt v. Fox Searchlight Pictures Inc., the Second Circuit established a new test – the "primary beneficiary" test – for determining when unpaid internships may be provided by employers. In doing so, the Second Circuit rejected a strict "all-or-nothing" six-factor test from the Department of Labor, and held that unpaid internships do not offend the Fair Labor Standards Act so long as the intern, and not the employer, is the "primary beneficiary" of the employment relationship. This Note primarily argues that the "primary beneficiary" test is superior to the rigid test proposed by the Department of Labor. This is because the "primary beneficiary" test provides a practical, flexible, and well-guided approach in analyzing the totality of the employee-intern relationship, thereby allowing employers to continue to provide meaningful unpaid opportunities while providing adequate safeguards from exploitation. In making this conclusion, this Note analyzes the problem through the lens of the entertainment industry, where unpaid internships are often a necessary prerequisite to finding fulltime employment.

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INTRODUCTION

The entertainment industry has engendered an almost-mythical culture surrounding unpaid internships. Though highly romanticized, the journey from unpaid intern to Hollywood executive is well known and has spawned some of Hollywood's most famous players.[1] Michael Ovitz,[2] David Geffen,[3] Rich Ross,[4] and countless others – the list of Hollywood moguls who began their careers as unpaid interns in the infamous "mailroom" is striking.[5] Perhaps these were the career paths

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[1] *See generally*, DAVID RENSIN, THE MAILROOM (2003).

[2] Michael Ovitz co-founded Creative Artists Agency and later served as President of the Walt Disney Company.

[3] David Geffen is the founder of Asylum Records, Geffen Records, and the namesake of the UCLA David Geffen School of Medicine.

[4] Rich Ross is the Group President of Discovery Channel, Animal Planet, and Science Channel. He is the former president of entertainment of Disney Channel, and chairman of Walt Disney studios.

[5] Ramona Rosales, *The Secrets of Hollywood Agency Mailrooms*, THE HOLLYWOOD REPORTER, http://www.hollywoodreporter.com/news/hollywood-mailroom-secrets-caa-icm-uta-wme-257222 (Nov. 11, 2011).

envisioned by plaintiffs Eric Glatt, Alexander Footman, and Eden Antalik when they agreed to work as unpaid interns for Fox Searchlight's blockbuster film, *Black Swan*, before filing a class action lawsuit demanding wages and challenging their status as unpaid interns.

Indeed, the controversy surrounding the legality of unpaid internships has only grown louder in recent years, and for good reason.[6] In an increasingly competitive job market, internships have become a crucial aspect of the modern employment process in the United States as a way for students to obtain valuable experience and training in the field of their choosing.[7] For employers, internships provide access to a deep hiring pool of students who demonstrate talent. Because internships play such a key role in education, most universities now offer academic credit for participation in them.[8] In 2015, a survey of college graduates revealed that nearly sixty percent of college students have participated in an internship program and that students who participate in internships are far more likely to receive job offers after graduating from their undergraduate institutions.[9]

However, not all internships are created equal. While most internship programs are now paid, nearly forty percent of internships are unpaid.[10] In fact, somewhere between 500,000 and 1 million people intern for free each year.[11] In industries like entertainment, where demand for available jobs far outweighs the supply, unpaid internships are hardly uncommon.[12] Unsurprisingly, there are many critics who view the practice of unpaid internships as illegal, claiming that interns should be considered "employees" who are owed at least minimum wage under the Fair Labor Standard Act ("FLSA"). As the discussion has progressed, so have the number of lawsuits filed by unpaid interns asserting that they were unlawfully denied

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[6] *See* Amanda Becker, *Unpaid Intern Lawsuit 'Trend' Is Likely To Expand, Legal Experts Say*, THE HUFFINGTON POST, http://www.huffingtonpost.com/2013/06/14/unpaid-intern-lawsuit_n_3443430.html (Aug. 14, 2013).

[7] *See infra* notes 8-9.

[8] *See generally* Kathrin Neyzberg, *Unpaid Internships in Entertainment: Unethical Pages Behind a Glossy Cover*, BERKELEY MEDIA REVIEW (Nov. 22, 2015).

[9] NAT'L ASS'N OF COLLS. AND EMP'RS, THE CLASS OF 2015 EXECUTIVE SUMMARY 5 (2015), https://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2015-student-survey-executive-summary.pdf

[10] *Id.*

[11] Blair Hickman, *What We Learned Investigating Unpaid Internships*, PRO PUBLICA (July 23, 2014).

[12] ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY 170 (2011).

wages, especially in the entertainment industry.[13] In the midst of a circuit split[14] about how to interpret the question of whether interns must be paid, the Department of Labor ("DOL") has informally promulgated *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* ("*Fact Sheet #71*"): an "all-or-nothing" six factor test to help with the inquiry.[15]

In *Glatt v. Fox Searchlight Pictures*,[16] overturning the district court's decision, the Second Circuit neglected to adopt the FLSA test regarding when it is lawful to classify employees as "unpaid interns." Instead, the Second Circuit adopted a flexible, individualized test allowing for an employer to maintain an unpaid internship program so long as the potential intern is the "primary beneficiary" of the test.[17] The touchstone of this test, as instructed by the Second Circuit, is to consider the totality of the circumstances regarding the "economic realities" of the intern-employer relationship.[18]

This Note will argue that the "primary beneficiary" test adopted by the Second Circuit is well-suited for the entertainment industry because the individualized assessment of the employer-intern relationship helps to preserve the cultural role of unpaid internships in the entertainment industry while simultaneously providing a flexible and contemporary framework that helps to ensure the integrity of the modern internship. Analysis proceeds in three parts.

Part I provides context to the argument with a brief history and overview of internships in the entertainment industry. Although unpaid internships are common in other industries, they hold special significance in the entertainment business due to the high demand and low supply of entrance level opportunities. A brief discussion on the background and cultural significance of these internships will help to frame the proceeding legal analysis.

Part II discusses both the judicial and administrative legal frameworks that precipitated the Second Circuit's decision in *Glatt*. This will necessarily include a

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[13] Eriq Gardner, *How All Those Intern Lawsuits Are Changing Hollywood,* THE HOLLYWOOD REPORTER (Nov. 6, 2014).

[14] *See infra* Part II.

[15] U.S. DEP'T OF LABOR WAGE AND HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), *available at* https://www.dol.gov/whd/regs/compliance/whdfs71.htm [hereinafter FACT SHEET #71].

[16] 811 F.3d 528 (2d. Cir. 2015).

[17] *Id.* at 536.

[18] *Id.*

discussion on the FLSA, *Fact Sheet #71*, and *Walling v. Portland Terminal*.[19] Only by thoroughly analyzing what preceded the *Glatt* decision can its significance be fully understood.

Lastly, through the lens of the entertainment industry, Part III defends the *Glatt* decision as a crucial step forward in unpaid internship jurisprudence because its flexibility provides the best framework for balancing the diverse set of interests involved in each unique internship. This section necessitates a close analysis of the unworkability of *Fact Sheet #71*, a comparison between the circumstances that inspired *Portland Terminal* and those of the modern entertainment internship, and an examination of the practical effects since the Second Circuit's decision. This paper will conclude that the Second Circuit's "primary beneficiary" test in *Glatt* provides a practical amount of flexibility in assessing unpaid internships without sacrificing its ability to protect the integrity of the modern employment relationship in the entertainment industry.

I
UNPAID INTERNSHIPS IN ENTERTAINMENT

"The best advice anyone ever gave to me is, 'Take the job. Get in the door and you'll meet somebody who'll get you in the next door.'" [20]

This quote from Kristieanne Groelinger, a director of production for Jerry Bruckheimer Films, reflects the very real quandary those hoping to gain access to the entertainment industry face: everybody almost always starts at the bottom, and even entry-level positions are difficult to come by. It is within this context of a high demand for jobs and a low supply of opportunities that the problem of the unpaid intern arises.[21]

Unpaid internships, and internships in general, are not a unique concept to the entertainment industry. No other industry, however, depends so intensely on free labor.[22] Because "getting your foot in the door" is the key to finding long-term employment in the industry, internships are among the only viable options for those without connections to bypass the metaphoric myrmidon guarding the industry

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[19] 330 U.S. 148 (1947).

[20] FREDERICK LEVY, HOLLYWOOD 101: HOW TO SUCCEED IN HOLLYWOOD WITHOUT CONNECTIONS 31 (2000).

[21] *See id*.

[22] *Id.* at 38.

doors.[23] Unpaid internships are so pervasive in entertainment that in the late 1990s nearly 100% of internships in the entertainment industry were unpaid.[24]

Including industries other than entertainment, it is apparent that internships have become an integral part of the modern-day educational and recruiting experience.[25] In fact, internships have become even more pervasive and important than ever before. As increasing numbers of college graduates and young professionals flood the hiring pools, interning to gain the requisite experience necessary for one's dream job has become nearly mandatory. Employers have come to expect new hires to have internship experience as a prerequisite for getting hired, and human resource professionals have recently ranked internship experience as the single most important factor in hiring a candidate.[26] As the significance of obtaining an internship grows, companies are now utilizing internship programs as recruiting tools to attract the best students.[27] In other words, across all industries, internships have become a necessary part of any job seeker's resume.[28]

This growth and dependency on internships has reached a fever pitch over the last decade.[29] The Great Recession of 2008 caused hiring levels to plummet, and thus, internships became essential for most students and recent graduates.[30] Although

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[23] *Id.*

[24] Dawn Gilbertson, *Glamour Internships With a Catch: There's No Pay*, N.Y. TIMES , Oct. 19, 1997, at BU16, *available at* http://www.nytimes.com/1997/10/19/business/earning-it-glamorous-internships-with-a-catch-there-s-no-pay.html.

[25] *See generally* PHIL GARDNER, ET AL., RECRUITING TRENDS 2012-2013 33 (42d ed. 2012), *available at* http://www.ceri.msu.edu/wp-content/uploads/2012/11/FRecruiting-Trends-2012-2013.pdf.

[26] *See* Joanna Venator & Richard Reeves, *Unpaid Internships: Support Beams for the Glass Floor*, BROOKINGS INSTITUTE (July 7, 2015 2:18 PM). https://www.brookings.edu/blog/social-mobility-memos/2015/07/07/unpaid-internships-support-beams-for-the-glass-floor/.

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

[28] Andrew Mark Bennett, *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).

[29] *See generally* Gardner, *supra* note 25, at 33.

[30] *See* Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection – Reforming the Regulation of Student Internships*, ECON. POL'Y INS T. (Apr. 9, 2010), http://www.epi.org/publication/pm160/ ("The increasingly competitive labor market for college graduates, combined with the effects of the recession, has intensified the trend of replacing full-time workers with unpaid interns." (citations omitted)).

the hiring market has steadily improved since 2008, it has still not returned to pre-recession hiring levels.[31] As jobs were reduced, the unemployment pool grew with experienced workers who were now also seeking entry-level positions.[32] To the detriment of students and recent graduates, employers often choose to hire workers with more experience.[33] Thus, internships became even more pervasive as the only means for a student or recent graduate to gain the necessary experience employers demand.

In the entertainment industry in particular, internships such as unpaid "mailroom" jobs, have become deeply embedded in the industry's culture as an irreplaceable rite of passage.[34] Indeed, "uncompensated minions are as central to the movie business as private jets, splashy premieres and $200 lunches."[35] Competition for unpaid internships in the entertainment sector is particularly intense, as entry-level positions in the industry indicate a potential for upward mobility.[36] Entry-level mailroom interns become assistants, who then become agents, managers, and executives. One prominent entertainment industry publication even issues an annual list of "10 Assistants to Watch," to spotlight those assistants likely to be promoted in the near future.[37] Historically, unpaid internships have been the first step toward becoming a mogul and have become essentially prerequisites for assistant positions.[38]

Thus, the relationship is ideally mutually beneficial. For students in higher education seeking jobs in the entertainment, media, and arts industries, internships are a necessary stepping-stone to full-time employment.[39] Internships provide

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[31] *See* Bureau of Labor Statistics, Household Data Annual Averages: Employment Status of the Civilian Noninstitutional Population, 1943 to Date 2, *available at* http://www.bls.gov/cps/cpsaat01.pdf.

[32] *See, e.g.*, Cliff Collins, *Slowly but Surely: Lawyer Hiring is Returning-Tentatively-After the Downturn*, OR. ST. B. BULL. (Apr. 2012), http://www.osbar.org/publications/bulletin/12apr/slowly.html.

[33] *Id*.

[34] *See* RENSIN, *supra* note 1, at xii.

[35] Daniel Miller & John Horn, *Lawsuit challenges a Hollywood pillar: Unpaid internships*, L.A. TIMES (Apr. 6, 2014), http://articles.latimes.com/2014/apr/06/business/la-fi-ct-hollywood-interns-unpaid-internships.

[36] *See* RENSIN, *supra* note 1, at xii.

[37] *See* Ramona Rosales, *Hollywood's New Leaders: 10 Assistants to Watch*, VARIETY (Oct. 23, 2013, 8:30 AM), http://variety.com/2013/biz/news/hollywoods-new-leaders-10-assistants-to-watch-1200752599/.

[38] *See generally* RENSIN, *supra* note 1, at xiii.

[39] *Id.* at xvii-xviii.

students with an experiential learning opportunity that introduces them to the industry, enables them to develop workplace skills, and fosters professional networking that could lead to full-time employment. Alternatively, an employer benefits from the internship by having access to motivated students, and the ability to evaluate their performance as potential employees in a non-binding environment with a reduced, or non-existent, financial commitment. Research indicates that the majority of students interning in the entertainment sector are not paid for their work.[40]

Accordingly, it is no surprise that the first unpaid internship case to reach a U.S. court of appeals involved the entertainment industry.[41] The notoriety of unpaid internships in entertainment might be blamed for the current debate surrounding unpaid internships across all industry sectors – and with good cause.[42] Internships, whether paid or unpaid, are typically offered as a one-time work or service experience related to the student's major or career goals.[43] An internship program generally involves students working in professional settings under the supervision of practicing professionals.[44] In many cases where the internship is unpaid, students are often offered academic credit for their services.[45] Essentially, in an ideal world, internships offer students opportunities to learn practical skills in a professional environment in industries of their choosing while improving their resume and gaining valuable industry connections.[46] It is the former category where entertainment internships flounder and the latter that they flourish.

While Hollywood internships have certainly spawned some of the industry's biggest players, it has also spawned some of its more infamous stories.[47] There are a plethora of films, television shows, and literature documenting and highlighting the

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[40] Daniel, R. & Daniel, L., *Enhancing the transition from study to work: Reflections on the value and impact of internships in the creative and performing arts*, Arts & Humanities in Higher Educ. (2013), http://journals.sagepub.com/doi/pdf/10.1177/1474022212473525.

[41] Raquel Nieves, Still A Hot Topic: Unpaid Internships In The Entertainment Industry, DLR Reporter (Aug. 26, 2014), http://archive.is/quTNY.

[42] Eriq Gardner, *How All Those Intern Lawsuits Are Changing Hollywood*, THE HOLLYWOOD REPORTER (Nov. 6, 2014).

[43] *What is an Internship?* INTERNSHIPS.COM, http://www.internships.com/student/resources/basics/what-is-an-internship (last visited 1/29/2017).

[44] *Id*.

[45] *See* PERLIN, *supra* note 12, at 8.

[46] *See What is an Internship?*, *supra* note 43.

[47] *See generally* PERLIN, *supra* note 12, at 1.

life of interns in entertainment.[48] Take for example a famous excerpt from Ross Perlin's book, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy*:

> The curtain rises on Disney World, interns are everywhere. The bellboy carrying luggage up to your room, the monorail "pilot" steering a Mark VI train at forty miles per hour, the smiling young woman scanning tickets at the gate. Others corral visitors into the endless line for Space Mountain, dust sugar over funnel cake, sell mouse ears, sweep up candy wrappers in the wake of bewitched four-year olds. Even Mickey, Donald, Pluto and the gang - they may well be interns, boiling in their furry costumes in the Florida heat.
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> Visiting the Magic Kingdom recently, I tried to count them, scanning for the names of colleges on the blue and white name tags that all "cast members" wear . . . They came from public schools and private ones, little-known community colleges and world-famous research universities, from both coasts and everywhere in between. International interns, hailing from at least nineteen different countries, were also out in force. A sophomore from Shanghai, still bright-eyed a week into her internship, greeted customers at the Emporium on Main Street, U.S.A. She was one of hundreds of Chinese interns, she told me, and she was looking forward to "earning her ears."
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> . . .
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> Disney runs one of the world's largest internship programs. Each year, between 7,000 and 8,000 college students and recent graduates work full-time, minimum-wage, menial internships at Disney World.[49]

Certainly, the mentioned sophomore from Shanghai was not learning practical skills that she could use to further her perceived career in entertainment. Yet the concept of "earning her ears" – getting a foot in the door in one of the most prestigious companies in the business – is why internship experiences at Disney and other entertainment titans are not just tolerated, but celebrated.[50] It is also why, however, these internships are often

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[48] *Id.*
[49] *Id.* at 1-2.
[50] *Id.*

criticized as sham programs driven by the company's manpower needs.[51] Even the academic credit that is offered, Perlin argues, results in a financial windfall for the schools – schools are paid for the credit, by the students, and provide almost nothing to enhance the experience.[52]

However, not all internship programs are as bleak as Disney's colloquially, and infamously, coined "Mousecatraz,"[53] at least on the surface. In this Note's principal case, Eric Glatt, the named plaintiff, worked in the production phase of *Black Swan*, performing menial tasks but actually gaining an understanding of how a production office works.[54] In fact, Glatt's first stint as an unpaid intern led him to receive a second job in the post-production phase of the film. In an industry where companies would seemingly offer unpaid internship opportunities or no internship opportunities at all,[55] those opportunities may never have been made available to Eric Glatt and the hundreds of other interns working to find their niche in an ultra-competitive industry.

II
THE LEGAL FRAMEWORK GOVERNING UNPAID INTERNSHIPS

When the Fair Labor Standards Act (FLSA) was adopted in the early 20th century, Congress presumably did not contemplate unpaid internships. Because the increase in pervasiveness and criticism of unpaid internships is fairly recent, federal employment regulations do not directly address internships. Before analyzing the *Glatt* case, it is important to understand the underlying legal framework that *Glatt* sought to clarify, beginning with the Fair Labor Standards Act of 1938.

A. The Fair Labor Standards Act

Congress enacted the FLSA in 1938 in response to the exploitation of employees during the Great Depression.[56] Initially controversial, the FLSA's goals were to establish better working conditions and provide more protections to the

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[51] *Id.* at 2.

[52] *Id.* at 8.

[53] *See generally* WESLEY JONES, MOUSECATRAZ (2006).

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

[55] *See generally*, Dana Schuster & Kirsten Fleming, *Condé Nast Intern: 'I Cried Myself To Sleep,'* N.Y. Pos T (Nov. 21, 2013, 6:36 AM), http://nypost.com/2013/11/21/conde-nast-interns-speak-out-on-program-shutdown.

[56] Fair Labor Standards Act of 1938, Pub. L. No. 75-718, § 2(a)-(b), 52 Stat. 1060, 1060 (discussing the policy behind adopting the Act as providing greater protections for the average worker) [hereinafter "FLSA"].

American worker.[57] The law, authored by charismatic Alabama senator and eventual Supreme Court Justice Hugo Black, stated its aim – the "elimination of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and well being *(sic)* of workers."[58] When President Franklin Roosevelt signed the FLSA into law, he proudly called the FLSA "the most far reaching, far-sighted program for the benefit of workers ever adopted in this or any other country."[59]

The effects of the FLSA have, indeed, been far reaching. For example, the FLSA outlaws most forms of child labor,[60] establishes maximum working hours,[61] guarantees extra pay for overtime work, and finally establishes a minimum wage.[62] Specifically regarding wage protections, the FLSA purports "to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage."[63] As Ross Perlin eloquently puts it, "[i]t was a dizzying triumph for unions and progressives – the culmination of a half-century's struggle to protect America's new legions of industrial laborers."[64]

For the last 79 years, the FLSA has been remarkably resilient in maintaining its status as a far-reaching law. With little conflict, its underlying architecture has become a bedrock consensus, as "few people would openly advocate the return of young children to factories."[65] The law's stated aim – the elimination "of labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and well-being of workers"[66] – still sounds heroic, but the FLSA's vague definitions have led to major problems with consistently

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[57] *See* PERLIN, *supra* note 12, at 65.

[58] *Id.*

[59] *Id.* at 64-65.

[60] 29 U.S.C. § 212 (2016).

[61] 29 U.S.C. § 207 (2016).

[62] 29 U.S.C. § 206 (2016).

[63] Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947); *see also* Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 n.18 (1945) (stating that Congress enacted the FLSA "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage").

[64] PERLIN, *supra* note 12, at 64.

[65] *Id.* at 65.

[66] § 2, 52 Stat. at 1060.

achieving its purpose.[67] Historically, however, judges have interpreted the FLSA very broadly.[68]

Congress has expressly delegated executive authority over the FLSA to the Secretary of Labor.[69] The FLSA grants the Secretary broad power to "define and delimit the scope of [wage requirements] for executive, administrative, and professional employees."[70] Included within this broad authority, the Secretary has oversight over internal investigations of violating employers.[71] Investigators from the "Wage and Hour Division" (WHD), present in every jurisdiction across the United States, are specifically responsible for enforcing the act.[72] However, some argue that the Department of Labor fails to "use its full authority to enforce the FLSA with respect to unpaid internships."[73] As a result, Courts have recognized a private right of action in employee lawsuits, which can be quite costly to employers if a plaintiff is successful due to awards of liquidated damages and back pay.[74] Accordingly, the utmost clarity on which employees are covered by the FLSA is owed to employers, as misclassifying an employee can have expensive consequences.

Under the FLSA, the term "[e]mploy" is defined as "to suffer or permit to work."[75] An "employee" is broadly defined as "any individual employed by an employer."[76] Hence, unless a person is an "employee" under the FLSA, he or she will not receive the plethora of protections guaranteed by the FLSA.[77] The broad definitions of "employee" and "employ" provide courts with little guidance to

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[67] PERLIN, *supra* note 45, at 64.

[68] *See, e.g.*, Falk v. Brennan, 414 U.S. 190, 205 n.3 (1973); Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597-98 (1944); Bureerong v. Uvawas, 922 F. Supp. 1450, 1466 (C.D. Cal. 1996).

[69] *See* 29 U.S.C. § 202 (2012).

[70] Auer v. Robbins, 519 U.S. 452, 456 (1997).

[71] *Fair Labor Standards Act Advisor: Enforcement Under the Fair Labor Standards Act*, U.S. Dep't of Lab., http://webapps.dol.gov/elaws/whd/flsa/screen74.asp (last visited Apr. 15, 2016).

[72] *Id.*

[73] Rachel P. Willer, *Waging the War Against Unpaid Labor: A Call to Revoke Fact Sheet #71 in Light of Recent Unpaid Internship Litigation*, 50 U. RICH. L. REV. 1361 (2016) (quoting Andrew M. Bennett, *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 RELIG. GENDER & CLASS 293 (2011)).

[74] *See* 29 U.S.C. § 216(b) (2012).

[75] 29 U.S.C. § 203(g) (2012).

[76] § 203(e)(1).

[77] *See, e.g.*, Walling v. Portland Terminal Co., 330 U.S. 148 (1947).

determine whether student interns are entitled minimum wage and overtime benefits when agreeing to participate in an unpaid internship program with an employer.[78] The lack of clarity on this point has led to a variety of issues in classifying student workers under the FLSA.

Where the act may be vague in some areas, in others it is clearer. Congress has amended the FLSA to exempt individuals who volunteer their time at a government agency, for example.[79] According to this 1985 amendment, those who volunteer to work at a public state agency, an interstate governmental agency, or a subdivision of the state may do so without being classified as "employees" for purposes of the FLSA.[80] Thus, the term "employee" specifically excludes *some* workers by classifying them as volunteers. Additionally, the FLSA implicitly exempts some nonprofits and food banks, because these workers can also be classified as volunteers.[81] Lastly, an employee cannot waive his right to minimum wage or overtime pay because doing so would "nullify the purposes of the [FLSA] and thwart the legislative policies it was designed to effectuate."[82]

The FLSA does not specifically exempt, or even define, interns. Rather, as stated above, the Act's protections apply to *employees*. Thus, the threshold question in considering the legality of unpaid internships is whether or not interns should be classified as an "employee" for purposes of the FLSA.[83] The circular definition provided by the FLSA – "any individual employed by an employer" – cannot answer the question, as it is clear that while interns and employees share many commonalities, interns also differ from employees in many respects.[84] While the Supreme Court has never *directly* addressed the question, the Department of Labor and the lower courts have wrestled with it.[85] Unfortunately, all three sources of interpretation have only served to muddy the doctrine.

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[78] *Id*.

[79] Fair Labor Standards Amendments of 1985, Pub. L. No. 99-150, § 4(a), 99 Stat. 787, 790 (1985) (amending the Act to exclude public service volunteers).

[80] *See* 29 U.S.C. § 203(e)(4)(A).

[81] *See* 20 U.S.C. § 203(e)(5).

[82] Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 740 (1981) (quoting Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945)).

[83] *See, e.g.*, *Portland Terminal*, 330 U.S. 148.

[84] *See* Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528, 534 (2d Cir. 2016).

[85] *See infra* Part II, Section B.

B. Pre-FLSA "Employee" Determinations by the Supreme Court

Before delving into the Court's analysis of the term "employees" as it applies to the FLSA, it is important to discuss the early Supreme Court cases that help to frame the proceeding analysis. Although the FLSA was enacted in 1937, debate surrounding the scope of the term "employee" was hardly considered until 1947.[86] A few cases, which predated the FLSA, help to frame the scope of the definitional analysis of "employee" within the context of federal labor statutes such as the National Labor Relations Act and the Social Security Act.

In *NLRB v. Hearst Publications*,[87] the Supreme Court considered the term "employees" under the National Labor Relations Act as it applied to newspaper boys. In this case, the Court held that the scope of the term "employee" was "to be determined not exclusively by reference to common-law standards, local law, or legal classifications made for other purposes, but with regard also to the history, context and purposes of the Act and to the economic facts of the particular relationship."[88] The Court considered a number of factors in determining that the newspaper boys were employees, including the fact that wages earned served as the newspaper boy's primary income, the hours of supervised work, the sales equipment provided to the newspaper boys for the principal's (Hearst's) benefit, and the regularity of the individual's work.[89] No factor was dispositive in itself.[90]

Likewise, in *United States v. Silk*,[91] the Supreme Court examined the term "employees" under the Social Security Act. In this case, the Court considered whether a particular group of coal workers should be classified as employees.[92] In determining that the coal workers were employees under the act, the Court focused on the skill required to perform the job, the permanency of the employment relationship, as well as the degree of control the employer exercised over the coal workers.[93] Both this case and *NLRB v. Hearst Publications* are important because similar factors were considered when the Court finally considered the term "employee" in the context of the FLSA.

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[86] *See Portland Terminal*, 330 U.S. at 148.
[87] 322 U.S. 111 (1944).
[88] *Id.* at 111-12.
[89] *Id.* at 131.
[90] *See id*.
[91] 331 U.S. 704 (1947).
[92] *Id*.
[93] *Id.* at 716.

C. Walling v. Portland Terminal Co.

Initially, the FLSA declared only well-paid, white-collar workers to be exempt from the law's provisions: the familiar distinction between exempt and nonexempt employees.[94] Although the Supreme Court has yet to directly consider the issue of whether unpaid interns should be considered employees under the FLSA, it provided some guidance in an unpaid *trainee* case.[95] In *Portland Terminal*, a 1947 case, the Department of Labor's WHD brought an action against Portland Terminal Company, a railroad company, on behalf of a group of unpaid brakeman trainees for not providing them with minimum wage or overtime compensation while participating in a practical training program to become yard brakemen.[96] The training program, which was required for potential railroad brakemen, typically lasted a week or more without any compensation other than the training.[97] This training required applicants to shadow the yard crew before qualifying for the position due to the dangerous nature of the position.[98] Applicants who participated in this program did so with the express purpose of qualifying for employment as railroad brakemen.[99] After the training, trainees were not automatically hired but put on a list and subsequently hired as became necessary for the company.[100] Although immediate employment was not guaranteed, only individuals placed on the aforementioned list were considered for employment.[101]

The Supreme Court's question was whether these railroad trainees should be considered "employees" for purposes of the FLSA.[102] Accordingly, if the individuals were deemed employees, the railroad company would be compelled to pay minimum wages for the time spent in the training program.[103] As noted above, the FLSA provides little clarity in this area, providing only a broad definition of "employee" as "any individual employed by an employer."[104] The vague definition of "employ," "to suffer or to permit to work," only serves to obstruct congressional intent further.[105] Working with the limited guidance provided by the statute, the Court, in

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[94] *See* PERLIN, *supra* note 12, at 65.
[95] *See* Walling v. Portland Terminal Co., 330 U.S. 148 (1947).
[96] *Id.* at 151.
[97] *Id.* at 149.
[98] *Id.*
[99] *Id.* at 150.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 149.
[103] *Id.* at 150.
[104] 29 U.S.C. § 203(e)(1) (2012).
[105] § 203(g).

an opinion written by the FLSA's own author in Hugo Black, ruled that "the definition of 'suffer or permit to work' was obviously not intended to stamp all persons as employees who, without express or implied compensation agreement, might work for their own advantage on the premises of another."[106]

Thus, the Supreme Court in *Portland Terminal* created what is now known as the "trainee exception." The Court stated that:

> The [FLSA] cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction . . . . [Because the FLSA] was not intended to penalize [employers] for providing, free of charge, the same kind of instruction [as a vocational school] at a place and in a manner which most greatly benefit the trainees.[107]

Essentially, the Court noted that what the training program provided was similar to what one might pay for in a vocational school course. The fact that the training program did not lead to guaranteed employment, and instead only created a labor pool, was not necessarily dispositive, especially in light of the hands-on, practical learning experience provided to the trainees. The most important factor the Court recognized was that Portland Terminal Co., the defendant-railroad company, did not receive an "immediate advantage" from these trainees. The Court noted that because the trainees required regular employee supervision, the training program actually impeded the regular employees' daily work.[108] The Court also considered the fact that the trainees did not displace any of the regular employees.[109] It is important to highlight that, in reaching their decision, none of the aforementioned factors were dispositive, and the Court instead looked to the totality of the circumstances of the training program to determine that the railroad brakemen trainees were not employees for purposes of the FLSA.[110]

D. Fact Sheet #71

As noted above, the FLSA does not exempt, or even define, interns. Since *Portland Terminal*, it has been difficult for courts to determine the appropriate test to apply to interns under the FLSA. Before creating a test for unpaid internships, the Department of Labor first issued informal guidelines to provide a framework for

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[106] *Portland Terminal*, 330 U.S. at 152.
[107] *Id.* at 152-53.
[108] *Id.* at 150.
[109] *Id.* at 149-50
[110] *Id.*

analyzing whether certain employees fall into the trainee exception.[111] In 1967, the Department of Labor issued informal guidance on trainees as part of its Field Operations Handbook.[112] The handbook enumerated six criteria, which must all be met in order for a trainee to not be considered an employee. [113]

The tests within the informal guidelines merely restate the factors noted in *Portland Terminal*, and apply them to trainees via administrative guidance.[114] Because of the similarities between internships and trainee programs, the Department of Labor applied the same test to analyze both employment relationships.[115] However, to avoid ambiguity, and likely in response to the political climate, the Department of Labor finally issued an informal opinion letter in 2010, which essentially applied the same trainee analysis to more specifically deal with internships.[116] The informal opinion letter is known as "Fact Sheet #71."[117]

In cases concerning unpaid internships, courts sometimes look to Fact Sheet #71.[118] Published in 2010, Fact Sheet #71 was the major precursor to the recent boom in unpaid intern litigation.[119] The Fact Sheet's guidelines merely attempt to codify the holding in *Portland Terminal* and apply it to determinations of whether interns are owed pay.[120] Although Fact Sheet #71 merely restates the law that has been in

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[111] *See* FACT SHEET #71, *supra* note 15.

[112] S*ee* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, Ch. 10, ¶ 10b11 (1993), http://www.dol.gov/whd/FOH/FOH_Ch10.pdf.

[113] *Id*.

[114] Gregory S. Bergman, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 569 (2014).

[115] *See* U.S. Dep't of Labor, Wage & Hour Div., Opinion Letter on FLSA Status of Student Interns (May 17, 2004), http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm (applying the six-factor trainee framework to analyze a student internship inquiry and noting that the Department of Labor "has consistently applied this test in response to questions about the employment status of student interns").

[116] *See* FACT SHEET #71, *supra* note 15.

[117] *Id*.

[118] *See, e.g.*, Glatt v. Fox Searchlight Pictures Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015), *vacated*, 811 F.3d 528 (2d Cir. 2016); Xuedan Wang v. Hearst Corp., 293 F.R.D. 489, 493 (S.D.N.Y. 2013), *aff'd in part, vacated in part, remanded*, 617 F. App'x 35 (2d Cir. 2015).

[119] *See* Stephen Suen & Kara Brandeisky, *Tracking Intern Lawsuits*, PROPUBLICA, http://projects.propublica.org/graphics/intern-suits#corrections (last updated July 2 , 2014).

[120] *See* Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) ("The six criteria in the Secretary's test were derived almost directly from Portland Terminal and have appeared in Wage and Hour Administrator opinions since at least 1967.").

effect since 1947 *Portland Terminal*, and rigidly applies the trainee test to interns, the issuance of Fact Sheet #71 was widely seen as the Department of Labor cracking down on unpaid internships.[121]

Within Fact Sheet #71, the Department of Labor has published an "all-or-nothing" six-factor test to determine whether or not an intern should be classified as an employee.[122] If *any one factor* is not met, the Department of Labor will consider the intern to be an employee. Thus, in order for the trainee exception to apply under the Department of Labor's six-factor test, each of the following factors must be met:

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.[123]

Although it is well settled that some administrative actions are granted judicial deference, Fact Sheet #71 is not owed any deference. The term "*Chevron* deference" applies to administrative actions that are intended to carry the force of law.[124] Fact Sheet #71 specifically states that it is not intended to carry such force: "This publication is for general information and is not to be considered in the same light

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[121] Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 2, 2010), http://www.nytimes.com/2010/04/03/business/03intern.html.

[122] *See* FACT SHEET #71, *supra* note 15.

[123] *Id.*

[124] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (giving "substantial weight to an agency's interpretation of a statutory scheme" when Congress "leaves a gap" for the agency to fill).

as official statements of position contained in the regulations."[125] Accordingly, courts generally agree that Fact Sheet #71 is not entitled to *Chevron* deference.[126]

Even if some agency decisions are not entitled to *Chevron* deference, the decision may be entitled to a lower level of deference under *Skidmore v. Swift.*[127] Under *Skidmore*, agency interpretations should be given deference when they are persuasive, meaning they had "all those factors which give [the agency interpretation] power to persuade, if lacking power to control."[128] According to the Court, the factors giving an agency's interpretation "power to persuade" include the (1) consistency in the agency's interpretation over time, (2) the thoroughness of the agency's consideration, and (3) the soundness of the agency's reasoning.[129] In other words, the more thoroughly considered and reasoned an agency's interpretation is, the more a court should defer to that interpretation. As will be discussed below, the reasoning behind Fact Sheet #71 has been subject to much scrutiny and criticism.[130]

E. Examining the Circuit Split

Because Fact Sheet #71 is not a formal agency regulation, courts disagree about whether to adopt the test at all and to what level its analysis is owed deference.[131] This confusion has led to a circuit split and therefore a lack of uniformity in the analysis of exempted employees. Before examining the Second Circuit's *Glatt* decision more closely, it is important to consider how the decision compares to those of its sister circuits. The circuit courts generally take one of two approaches. While some circuits have instituted a "totality of the circumstances"

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[125] FACT SHEET #71, *supra* note 15, at 2.

[126] *See, e.g.*, Owsley v. San Antonio Indep. Sch. Dist., 187 F.3d 521, 525 (5th Cir. 1999) (citing Kilgore v. Outback Steakhouse of Fla., Inc., 160 F.3d 294, 302 (6th Cir. 1998)); Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026 (10th Cir. 1993) (finding Fact Sheet #71's test was not entitled to *Chevron* deference); *but see* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (stating that the DOL's interpretation in Fact Sheet #71's predecessor was entitled to substantial deference).

[127] 323 U.S. 134 (1944).

[128] *Id.* at 140.

[129] *Id.*

[130] *See infra* Part III.

[131] *Compare* Atkins v. Gen. Motors Corp., 701 F.2d 1124, 1128 (5th Cir. 1983) (holding that the Department of Labor guidelines are entitled to "substantial deference"), *with* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 525 (6th Cir. 2011) (holding that the Department of Labor guidelines were not entitled to deference because they were a "poor method for determining employee status in a training or educational setting").

test, as opposed to the all-or-nothing test from Fact Sheet #71, others have adopted their own versions of the "primary beneficiary" test in place of Fact Sheet #71.

1. Totality of the Circumstances Approach

Some circuit courts utilize the "totality of the circumstances" approach in determining employee status under the trainee exception. Under this approach, courts will balance the factors proposed by the WHD of the Department of Labor considering the totality of the circumstances.

In an illustrative case, *Reich v. Parker Fire Protection Dist.*,[132] the Tenth Circuit analyzed an opinion letter from the WHD identical to Fact Sheet #71, except as applied to trainees. The Tenth Circuit rejected the argument that the Court was bound to the all-or-nothing standard advocated by the Secretary of Labor in determining when certain trainees could be classified as "employees."[133] In *Reich*, potential fire fighters underwent a ten-week training program with no pay.[134] This training program involved classroom learning, as well as practical training with the fire department's equipment. [135]Although a job was not guaranteed upon completion of the program, the training was a necessary prerequisite for employment.[136]

After performing a *Chevron* analysis to determine that the WHD's opinion letter was not entitled to deference, the Tenth Circuit elected to utilize a totality of the circumstances approach and assessed the proposed factors for employee-trainee distinctions.[137] Noting that "determinations of employee status under FLSA in other contexts are not subject to rigid tests but rather to consideration of a number of criteria in their totality," the court rejected the WHD's all-or-nothing approach and instead examined the proposed six-factors in totality.[138] In doing so, the Tenth Circuit ruled that the trainees were not employees. The Fifth Circuit, in *Donovan v. American Airlines, Inc.*, has taken a similar approach.[139]

2. Pre-Glatt Primary Beneficiary Test

Although some circuits have adopted the WHD's approach in a totality of the circumstances form, many circuits have rejected the proposed approach, inventing

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[132] Reich v. Parker Fire Prot. Dist., 992 F.2d 1023 (10th Cir. 1993).
[133] *Id.* at 1026-27.
[134] *Id.* at 1025.
[135] *Id.*
[136] *Id.*
[137] *Id*. at 1026-27.
[138] *Id.*
[139] *See* Donovan v. Am. Airlines, Inc., 686 F.2d 267, 272 (5th Cir. 1982).

their own balancing analysis to determine who is the "primary beneficiary" of the employment relationship. Under this approach, an intern will only be considered an "employee" for purposes of the FLSA when the employer, and not the intern, is the primary beneficiary of the employment relationship. Conversely, if the intern is the primary beneficiary of the relationship, then they are not considered to be employees under the FLSA and thus can continue on an unpaid basis.

The Sixth Circuit's approach in *Solis v. Laurelbrook Sanitarium & School, Inc.*[140] provides a representative example. In *Solis*, the Department of Labor was investigating child labor law violations at a boarding school.[141] The issue addressed was whether or not the children, who received "practical training" in many real world skills, could be classified as employees for purposes of the FLSA.[142] Again, the "trainee exception" was examined.[143] Instead of deferring to the WHD's proposed factored approach to the inquiry, the Sixth Circuit relied on its own assessment of the totality of the circumstances, noting the WHD's test to be inconsistent with *Portland Terminal*.[144]

The Sixth Circuit in *Solis* adopted a "primary beneficiary" analysis to review the employment relationship. The court's analysis circled around the "benefits flowing to each party."[145] Considering factors such as whether the relationship displaces employees, whether there is educational value derived from the relationship, and the amount of supervision imposed on the supposed trainees, the Court ultimately held that the students were the primary beneficiary of the relationship and therefore not employees for purposes of the FLSA.[146]

The Sixth Circuit thought this approach, where the focus of the analysis is centered on the benefits the intern receives, was more consistent with *Portland Terminal*:

> Courts have read *Portland Terminal* as focusing principally on the relative benefits of the work performed by the purported employees. *See, e.g.*, *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1309 (4th Cir.1971) ("The rationale of *Portland Terminal* would seem to be that

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

[141] *Id.* at 519.

[142] *Id.* at 521 (noting that, in order to teach real world skills, the school provided practical training for four hours a day in jobs such as working in a cafeteria).

[143] *Id.* at 524.

[144] *Id.* at 525.

[145] *Id.* at 529.

[146] *Id.* at 530-32.

> the railroad received no 'immediate advantage' from the trainees' services. To state it otherwise, the principal purpose of the seemingly employment relationship was to benefit the person in the employee status."). [147]

The court also mentioned that the primary beneficiary test "provides a helpful framework for discerning employee status in learning or training situations."[148] It is precisely under this line of logic that the Second Circuit in *Glatt* outlined their analysis.

F. Glatt v. Fox Searchlight Pictures, Inc.

Prior to *Glatt*, the Second Circuit had not addressed the "trainee" exception to the FLSA as it applied to interns.[149] In *Glatt*, the Second Circuit overturned the district court's summary judgment determination that the plaintiffs had been illegally classified as interns by Fox Searchlight Pictures.[150] At the district court level, the court used a totality of the circumstances approach to analyze the factors under Fact Sheet #71 and ruled that the plaintiffs should have been classified as employees.[151] Finding that the interns satisfied four of the conditions, but failed two, the district court found that the test in Fact Sheet #71 could not be met.[152] In overturning the district court's decision, the Second Circuit remanded their claims back to the district court for further proceedings under the newly formulated "primary beneficiary" test.[153] The court noted that it agreed with defendants "that the proper question is whether the intern or the employer is the primary beneficiary of the relationship." [154]

In analyzing the district court's decision, the Court first noted the ambiguity in this area of the law, recognizing that the Supreme Court has yet to definitively address the issue of internships in regards to the FLSA.[155] The bulk of the Second Circuit's analysis, however, was related to the district court's incorrect reliance on Fact Sheet #71 in making its decision.[156] The Second Circuit declined to adopt the

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[147] *Id.* at 526.
[148] *Id.* at 528.
[149] Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516, 531 (S.D.N.Y. 2013), *vacated*, 791 F.3d 376 (2d Cir. 2015), *vacated*, 811 F.3d 528 (2d Cir. 2016).
[150] 811 F.3d 528, 536 (2d Cir. 2016).
[151] *Glatt*, 293 F.R.D. at 531-32.
[152] *Id.* at 539.
[153] *Glatt*, 811 F.3d at 538.
[154] *Id.* at 536.
[155] *Id.* at 534.
[156] *Id.*

test advocated by the plaintiffs, the district court, and the Department of Labor because Fact Sheet #71's rigid all-or-nothing approach is inconsistent with *Portland Terminal*, as it "attempts to fit *Portland Terminal's* particular facts to all workplaces."[157]

Instead of adopting the rigid approach, the Second Circuit implemented a flexible test that better encompasses the nature and circumstances of the "modern internship."[158] Accordingly, the Second Circuit adopted the flexible "primary beneficiary" because of "three salient features."[159] First, the court liked that the primary beneficiary test focuses on what the intern receives in exchange for his work.[160] This factor recognizes that interns may receive intangible benefits for their work. Next, the Second Circuit highlighted the flexibility of the test, arguing that employment is a "flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances." [161] This flexible review allows courts to better examine the "economic reality as it exists between the intern and employer."[162] In fact, the "economic reality" of the employment relationship is the "touchstone of the analysis."[163] Lastly, because unpaid internships require an understanding between employer and intern that the intern will not be paid, the Second Circuit argues that the primary beneficiary test better "acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment[.]"[164] This factor recognizes that the issue of paying interns is fundamentally different from whether or not an employee is protected by the FLSA because, as internships have become a more important part of the employment process, individuals now enter unpaid internships with the expectation of experience rather than payment. Together, these three factors illustrate the flexibility and individualized approach the Second Circuit embraces in the primary beneficiary test.

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[157] *Id.* at 536.

[158] *Id.* at 537 ("This approach we adopt also reflects a central feature of the modern internship--the relationship between the internship and the intern's formal education[.]").

[159] *Id.* at 536.

[160] *Id.*

[161] *Id.* (citing Barfield v. NYC Health & Hosps. Corp., 537 F.3d 132, 141-42 (2d. Cir. 2008)).

[162] *Id.*

[163] *Id.* at 537.

[164] *Id.* at 536.

The Second Circuit, however, did not leave their flexible test unalloyed.[165] The court articulated a non-exhaustive set of considerations to consider when discerning the primary beneficiary of the employment relationship. Considering these factors requires balancing and weighing of all the circumstances. The list of factors includes:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[166]

The Court noted that no one factor was dispositive, and, in stark contrast to Fact Sheet #71, "every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to the minimum wage."[167]

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[165] *Id.*
[166] *Id.* at 537.
[167] *Id.*

Additionally, in certain cases, the Second Circuit allows for consideration of the internship program as a whole rather than the experience of a specific intern.[168]

Finally, the Second Circuit restricts this test to analyzing unpaid internships, noting its factors do not apply to training programs in other contexts.[169] In doing so, the Court therefore acknowledges the growing difference between modern internships and trainee programs of the past.[170] In fact, the Second Circuit specifically distinguishes the situation in *Portland Terminal* from internships of today.[171] Although the circuit court declined to rule on the specific situation of the plaintiffs in *Glatt*, it is because of the flexibility of the primary beneficiary test that internships in entertainment, like those of the *Glatt* plaintiffs, have better chances to survive FLSA challenges moving forward.

III
IMPROVING WITH GLATT

The Second Circuit's primary beneficiary test stands as an important step forward in internship jurisprudence. By adopting the primary beneficiary test to analyze unpaid internships, the Second Circuit introduced a workable standard that is clear, flexible, and practical enough to equitably analyze internships. Critics of the test argue that it is "overly subjective" and that "application of the primary beneficiary test in the unpaid internship context will prove an unpredictable undertaking."[172] What these critics fail to consider, however, is that the subjective nature of the test empowers courts to consider a wider array of internships. Internships across industries, and even within the same industry, vary wildly. Similarly, students may have varying goals and reasons in agreeing to an unpaid

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[168] *Id.*

[169] *Id.*

[170] *See id.* at 537-538 ("The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education—and is confined to internships and does not apply to training programs in other contexts. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting, and, unlike the brakemen at issue in *Portland Terminal*, all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education. By focusing on the educational aspects of the internship, our approach better reflects the role of internships in today's economy than the DOL factors, which were derived from a 68–year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen.").

[171] *Id.*

[172] Michael A. Hacker, Comment, *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.*, 57 B.C. L. REV. E. SUPP. 67, 83 (2016).

internship. Thus, a flexible standard like the primary beneficiary test allows the courts to better consider all the relevant facts and circumstances surrounding an internship.

In a competitive industry like entertainment, where unpaid internships are major means of access to full-time employment, the Second Circuit's decision helps to preserve unpaid internships within the industry without sacrificing its ability to police exploitative programs. This is even more apparent when comparing it to Fact Sheet #71.

A. Fact Sheet #71: Impractical, Inconsistent, and Illogical

Before being overturned by the Second Circuit, the district court had used Fact Sheet #71 to rule that the plaintiffs were improperly classified as interns.[173] As the Second Circuit revealed, Fact Sheet #71's six-factor test is not consistent with *Portland Terminal* nor practical in application. This becomes even more apparent when applied to the entertainment industry.

1. Impractical: Fact Sheet #71 is Too Rigid

Because interns must be paid unless every factor is met, the Department of Labor's six-factor test becomes an insurmountable obstacle for most companies who would want to provide unpaid internship opportunities.[174] In fact, in regards to Fact Sheet #71, Department of Labor Deputy WHD Administrator Nancy Leppink admitted, "[t]here aren't going to be many instances where you can have an internship for a for-profit employer and not be paid and still be in compliance with the law."[175] Indeed, it is difficult to envision any internship in the entertainment industry that would survive such rigid scrutiny.

Consider the fourth factor, for example, that "the employer . . . derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impede."[176] This factor is overinclusive and senseless, especially when considered in the context of Fact Sheet #71's rigid test. For example, assume an unpaid production intern assists with an editing project for his major television

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[173] *See Glatt*, 811 F.3d at 528-29.

[174] *See* Brief for American Council on Education, et al. as Amicus Curiae Supporting Neither Party, Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528 (2d Cir. Apr. 3, 2014) (No. 13-4478).

[175] John R. Carrigan Jr., *Overworked, Underpaid, Illegal? Hollywood Interns Fight Back*, HOLLYWOOD REP., (Oct. 24, 2012, 2:00 PM), http://www.hollywoodreporter.com/thr-esq/hollywood-interns-overworked-underpaid-illegal-382190.

[176] FACT SHEET #71, *supra* note 15.

studio employer. It is undoubtedly valuable experience unobtainable outside a production office, yet this experience would almost certainly fail the fourth factor and the unpaid internship would be ruled illegal. By applying this factor, an internship devolves into a job shadowing experience.[177] While job shadowing certainly provides benefits to an intern, it certainly is not as beneficial as an internship.[178] Revisiting the hypothetical production office intern, it is far better for him or her to actively participate in the editing process under the supervision of professionals than to simply observe it from afar.

Accordingly, it is apparent that the primary beneficiary test is better suited for analyzing internships in the entertainment industry. By considering all the benefits an intern may receive, and balancing them against the benefits an employer receives, the primary beneficiary test demands a more flexible, yet still applicable, inquiry into the unpaid internship program. Additionally, instead of focusing on benefits toward the employer, the Second Circuit's test centers the inquiry on the benefits the *intern* receives. Thus, if the hypothetical production intern had learned how to use complex video editing software, made valuable industry connections, and gained hands-on experience through participating on an editing project, it could easily be said that the intern benefitted more from the employment relationship than the employer. The problem with Fact Sheet #71 is that it would rule this invaluable internship experience illegal because no amount of benefit to the hypothetical production intern could save the internship program if any single factor were lacking. Such a narrow view of internships severely undercuts their effectiveness, as hands-on experience is among the most valuable aspects of an internship.[179]

2. Inconsistent: Fact Sheet #71 Is Inconsistent with the FLSA, Portland Terminal, and Itself

Fact Sheet #71 is riddled with inconsistencies that undermine its effectiveness. Fact Sheet #71 is inconsistent with the FLSA, *Portland Terminal*, and itself. For example, Fact Sheet #71's fifth factor, that the "intern is not necessarily entitled to a job at the conclusion of the internship," runs contrary to one of the FLSA's primary purposes – increasing opportunities for gainful employment.[180] Indeed, this requirement as applied in Fact Sheet #71 undermines this purpose in favor of

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[177] Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER EDUC. (July 13, 2010), http://www.insidehighered.com/views/2010/07/13/aoun #ixzz2fUhBdQm7.

[178] *Id.*

[179] Sarah Braun, *The Obama "Crackdown": Another Failed Attempt to Regulate the Exploitation of Unpaid Internships*, 41 SW. L. REV. 281, 294 (2012).

[180] *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 202 (2015).

ensuring a minimum wage – in contravention of the Supreme Court's guidance in *Portland Terminal*. As the Supreme Court explained in *Portland Terminal*:

> Many persons . . . have so little experience in particular vocations that they are unable to get and hold jobs at standard wages. Consequently, to impose a minimum wage as to them might deprive them of all opportunity to secure work, thereby defeating one of the Act's purposes, which was to increase opportunities for gainful employment.[181]

Thus, in the principal case from which Fact Sheet #71 is derived, the Supreme Court expressly made superior the FLSA's goal of increasing opportunities for gainful employment as opposed to wage regulations. Furthermore, although Fact Sheet #71 replicates the factors *Portland Terminal* and applies them to interns, courts criticize it for being inconsistent with *Portland Terminal* because *Portland Terminal* calls for a totality of the circumstances approach, whereas Fact Sheet #71 demands an all-or-nothing standard.[182] This inconsistency raises major issues for interns.

Indeed, across all industries, students participate in internship programs to improve their chances at long-term employment.[183] In fact, internships are often seen as an extensive interview process.[184] Furthermore, if employers are discouraged from hiring interns at the conclusion of their internship, then employers may not be incentivized to spend the time and resources on training and educating potential new hires through internship programs at all. In the entertainment industry, where internships are seen as a prerequisite to employment, this requirement would have undesirable effects on an industry already considered difficult to access.[185] The Second Circuit's test also includes a similar factor, but, unlike Fact Sheet #71, no one factor is dispositive.[186] As seen from this example, Fact Sheet #71 runs contrary to both of its sources of authority: the FLSA and *Portland Terminal*. It is, however, also internally inconsistent.

For example, it is difficult to reconcile Fact Sheet #71's fourth factor, that "the employer . . . derives no immediate advantage from the activities of the intern" (discussed above), with its second factor, that "[t]he internship is for the benefit of

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[181] Walling v. Portland Terminal Co., 330 U.S. 148, 151 (1947).
[182] *See id.*
[183] Braun, *supra* note 179, at 296.
[184] *Id.* at 284.
[185] *See supra* Part I.
[186] *See* Glatt v. Fox Searchlight, Inc., 811 F.3d 528, 537 (2d Cir. 2014).

the intern."[187] These two requirements make it illegal for an intern to participate meaningfully in the employer's business and therefore eliminate perhaps the most important benefit of internships: practical, hands-on experience.[188] Through this inconsistency, one can see that the test in Fact Sheet #71 does not adequately embrace the realities of the modern internship. Internships are intended to introduce students to industries and to give them an opportunity to study a career.[189] Disallowing a student from participating in any activity that benefits the employer, while demanding that the internship benefit the intern, is a counterintuitive combination that does little to serve the goals and interests of the modern intern.

3. Illogical: Fact Sheet #71 Illogically Extends a Test Regarding Trainees to Interns

The problems with Fact Sheet #71 extend further than its own rigidity inconsistencies. However, even if these inconsistencies were cured, the test still should not be used to analyze internship programs. Even if one applies a totality of the circumstances approach to the factors present in Fact Sheet #71, as the district court did in *Glatt*,[190] the test would still fail to adequately account for internships with substantial intangible benefits – such as those in the entertainment industry. Indeed, one of the most significant problems with Fact Sheet #71 is its overreliance, however incorrect, on the holding of *Portland Terminal*.

Portland Terminal dealt with trainees, not interns, and the word "intern" is never used in the opinion. Nevertheless, it is well settled that *Portland Terminal* is the seminal case on the legality of unpaid internships. Fact Sheet #71 simply replicated the factors considered by the Court in *Portland Terminal*, replacing the word "trainee" with "intern."[191] The differences between railroad trainees in 1947 and a modern-day internship at a major entertainment corporation could not be starker. Where internships had not yet even gained traction in 1947,[192] they are an integral part of today's education system.[193] Altogether, applying the trainee test to

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[187] FACT SHEET #71, *supra* note 15.

[188] Braun, *supra* note 179, at 294.

[189] *See supra* Part I.

[190] *Glatt*, 811 F.3d at 535.

[191] *See* Walling v. Portland Terminal, 330 U.S. 148, 148 (1947) (applying the term "trainee" to persons training for a railroad job); FACT SHEET #71, *supra* note 15.

[192] *See* Meaghan Haire & Kristi Oloffson, *Brief History: Interns*, TIME (July 30, 2009), http://content.time.com/time/nation/article/0,8599,1913474,00.html.

[193] PHIL GARDNER, ET AL., RECRUITING TRENDS 2012-2013 33 (42d ed. 2012), *available at* http://www.ceri.msu.edu/wp-content/uploads/2012/11/FRecruiting-Trends-2012-2013.pdf.

interns, especially in the entertainment industry, is like trying to fit a square peg in a round hole.

For example, internships today are often inextricably tied into one's college education.[194] Indeed, one of the plaintiff-interns in *Glatt* entered the internship as part of her degree program through her university.[195] This is not uncommon, as academic credit is often offered for internships through a student's university.[196] Despite the significant connection between an intern's academic progress and her internship, the issue is not even remotely considered in *Portland Terminal*. This only accentuates the problem with basing a test for modern-day internships on a 1947 Supreme Court opinion about railroad brakemen. The primary beneficiary test, as applied by the Second Circuit, focuses on the educational aspects of internships because this "approach better reflects the role of internships in today's economy than the Department of Labor Factors, which were derived from a 68-year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen."[197] By including factors that force employers to "accommodate[] the intern's academic commitments by corresponding to the academic calendar"[198] and provide "significant educational benefits to the intern,"[199] the primary beneficiary test provides sufficient protection against exploitive employment relationships, while viewing the internship relationship through a modern lens.

Partly because of the educational aspects of internships, the goals of trainee programs like the one in *Portland Terminal* are totally different than those of modern-day students seeking internships. For instance, the trainees in *Portland Terminal* underwent the training program for the purpose of obtaining a specific job within the Portland Terminal Railroad Company.[200] Trainee program benefits were thus narrow in scope. Today many interns enter their programs for the purpose of learning about entire industries.[201] Internships provide a broad array of invaluable intangible benefits to students without any real work experience by providing them

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[194] *See generally* Kathrin Neyzberg, *Unpaid Internships in Entertainment: Unethical Pages Behind a Glossy Cover*, BERKELEY MEDIA REV. (Nov. 22, 2015).

[195] *Glatt*, 811 F.3d at 532.

[196] *See supra* Part I.

[197] *Glatt*, 811 F.3d at 537.

[198] *Id.*

[199] *Id.*

[200] *See* Walling v. Portland Terminal, 330 U.S. 148, 150 (1947).

[201] *See* Heather Huhman, *Why You Should Get A Summer Internship*, U.S. NEWS AND WORLD REPORT (Apr. 29, 2011), http://money.usnews.com/money/blogs/outside-voices-careers/2011/04/29/why-you-should-get-a-summer-internship.

with experiential opportunities in a professional environment, basic work skills, and a foray into the industry they may wish to eventually find full-time employment. Compared to internships, the trainee program in *Portland Terminal* was extremely narrow in its benefit to participants. The Department of Labor, because of its overreliance on *Portland Terminal*, simply fails to account for many of the benefits interns may receive through an unpaid internship.

The primary beneficiary test, on the other hand, serves the entertainment industry well by encapsulating these intangible benefits. Its flexibility and ability to consider a wide array of factors allows entertainment companies to continue to offer unpaid internship opportunities. For example, in the entertainment industry, one of the most important benefits of an unpaid internship is that it gets the intern's proverbial foot in the door.[202] Relevant experience in the industry, whether paid or unpaid, is invaluable for those looking for full time employment.[203] Adopting the test advanced by Fact Sheet #71, as the district court did in *Glatt*, would eliminate several unpaid internship programs and thus eliminate a student's ability to find employment in the entertainment industry at all. In fact, after the district court used Fact Sheet #71 to rule against Fox Searchlight in *Glatt*, Condé Nast, a major mass media company with brands such as *GQ* and *Vogue*, abruptly shut down its internship program.[204] However, in adopting the primary beneficiary test, the Second Circuit has made it easier for entertainment companies to maintain their unpaid internship programs, so long as they are implemented in a way that benefits the intern.

B. Post-Glatt Landscape

The Second Circuit's decision in *Glatt* changed the legal landscape for analyzing unpaid internships, and indeed, its effects are already being felt. Following the *Glatt* decision, two cases out of the Southern District of New York illustrate the effect the primary beneficiary test is having in entertainment and media companies. The first, *Wang v. Hearst Corp.*,[205] involves the Hearst Corporation – the magazine empire that includes *Esquire*, *Marie Claire*, *Seventeen*, and *Good Housekeeping*. The second, *Mark v. Gawker Media LLC*,[206] involves Gawker Media Company, the

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[202] *See* Daniel Miller & John Horn, *Showbiz Interns in Legal Spotlight*, L.A. TIMES, Apr. 6, 2014, at A16.

[203] *See id.*

[204] Dana Schuster & Kirsten Fleming, *Condé Nast Intern: 'I Cried Myself To Sleep'*, N.Y. POST (Nov. 21, 2013, 6:36 AM), http://nypost.com/2013/11/21/conde-nast-interns-speak-out-on-program-shutdown.

[205] Xuedan Wang v. Hearst Corp., 203 F. Supp. 3d 344 (S.D.N.Y. 2016).

[206] No. 13-CV-4347(AJN), 2016 WL 1271064 (S.D.N.Y. Mar. 29, 2016).

parent company for several popular blogs such as *Deadspin, Gizmodo, Kotaku,* and *Jezebel*. Through a brief overview of both cases, one can see the effects of *Glatt* in action.

The facts in *Wang* are very similar to those of *Glatt*. The plaintiffs, unpaid interns for various Hearst Corporation magazines, brought suit against their former employer claiming they were improperly classified as interns during their time there.[207] Across a variety of departments, interns performed various jobs, from menial administrative tasks, errands, and cataloging, to holding casting calls, interacting with clients, and writing blurbs and blog posts for the publication.[208] After conducting the primary beneficiary analysis, the district court concluded that the interns were the primary beneficiaries of the relationship because the interns had learned practical skills and gained the benefit of job references, hands-on training, and exposure to the inner workings of industries in which they had expressed an interest."[209]

In conducting the primary beneficiary balancing act, the court noted that the internships "involved varying amounts of rote work" and that the internship "could have been more ideally structured," but decided that each Plaintiff benefitted in tangible and intangible ways.[210] Additionally, the Court was sure to emphasize the educational focus of the internships, as most of the interns provided proof that they were receiving academic credit to the employers.[211] The court made this determination after a very in-depth look at all the facts and circumstances surrounding the intern's experiences, as the primary beneficiary test demands. This decision likely saved Hearst's internship program, which had utilized more than 3,000 interns over the past six years.[212]

Under Fact Sheet #71, this internship program likely would have been ruled illegal. The fact that interns were benefitting Hearst at all would have been sufficient, as any benefits the interns may have obtained are irrelevant so long as the employer received a benefit. Not only did the Hearst interns gain the tangible and intangible benefits above, the court also made note of the lasting benefits some interns received

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[207] *Wang*, 203 F. Supp. 3d at 346-49.
[208] *Id.*
[209] *Id.* at 355.
[210] *Id.*
[211] *Id.* at 352.
[212] Xuedan Wang v. Hearst Corp., 293 F.R.D. 489, 491 (S.D.N.Y. 2013).

as a result of being able to list Hearst on their resume as they continued to seek jobs in fashion and publishing.[213]

In a similar case, *Mark v. Gawker Media LLC*,[214] former unpaid interns for Gawker Media brought suit alleging that they were improperly classified as interns during their time at Gawker. Again, the primary beneficiary test was applied. In its analysis, the district court primarily focused on "what the intern receives in exchange for his work."[215] The court noted several benefits received by the interns. For example, the court noted that the journalism student interns were supervised by mentors who helped them produce a full reported piece for their portfolio that was published on Gawker's websites.[216] Even though the interns indeed benefitted the company, as one of the intern's reporting "garnered thousands of page views with attendant advertising revenue," the Court recognizes that this exposure "benefitted Mark as a journalism student at least as much."[217] Unsurprisingly, the court ruled that Gawker's internship program was legal, as the interns were indeed the primary beneficiaries of the relationship. Just as with *Glatt* and *Wang*, if this internship program had been examined under Fact Sheet #71 it would have assuredly been condemned as an illegal labor practice.

Together, these cases illustrate the substantial effect the *Glatt* decision is having in unpaid internship jurisprudence. Both cases highlight the courts' newfound flexibility in analyzing unpaid internship programs. Although, in both cases, the employers benefitted from the intern's work, the court reasoned that the organizations were not taking advantage of their interns simply by that fact. The primary beneficiary test instead directed the court's attention to the benefits the interns were receiving for their work as well as the extent to which the internship complemented the intern's education program. Although interns in both cases did some rote work for their employer, they also obtained invaluable hands-on experience and significantly bolstered their resume. In allowing the court to consider both these tangible and intangible benefits, the primary beneficiary test allows courts to protect internship programs and interns alike by only legitimizing those programs that truly benefit the intern. In the entertainment industry, this means the likely

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[213] 203 F. Supp. 3d. at 355.

[214] Mark v. Gawker Media LLC, No. 13-CV-4347(AJN), 2016 WL 1271064 (S.D.N.Y. Mar. 29, 2016).

[215] *Id.* at *8.

[216] *Id.* at *13.

[217] *Id.*

preservation of a key institution, as the intangible benefits of unpaid internships are often substantial.[218]

CONCLUSION

The debate over the legality of unpaid internships has surely intensified over the past few years.[219] As internships in general are beginning to play a larger role in today's economy and education, there are questions as to how interns are to be compensated. While most internships are paid, many remain unpaid. This is especially true in the entertainment industry, where unpaid internships are pervasive, but create thousands of opportunities per year for students pursuing an entertainment-related career. In the entertainment industry, unpaid internships serve a valuable purpose to students looking for full-time employment. Not only do they provide the relevant experience largely seen as a prerequisite to finding employment, but they also provide knowledge of the inner-workings of the industry, valuable industry connections, and a wide variety of skills specific to their prospective careers.[220]

Fact Sheet #71, created by the Department of Labor, provided an unworkable framework for examining internship programs for the entertainment industry. Opportunities to access the industry would have dwindled as internship programs would have been found illegal under the strict standards of Fact Sheet #71. Prior to the Second Circuit's decision in *Glatt v. Fox Searchlight Pictures*, the future of these unpaid internship programs was in jeopardy.[221]

Indeed, after the district court used Fact Sheet #71 to rule Fox Searchlight's internship program illegal, many companies such as Condé Nast shut down their internship programs for fear of liability.[222] This consequently led to fewer opportunities for students hoping to find employment in entertainment.[223] However, the Second Circuit overturned the district court's decision, and created a new test to analyze unpaid internships: the primary beneficiary test. In doing so, the Second Circuit adopted a flexible, individualized test allowing an employer to maintain an

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[218] *See supra* Part I.

[219] *See supra* Part I.

[220] *See supra* Part I.

[221] *See* Dana Schuster & Kirsten Fleming, *Condé Nast Intern: 'I Cried Myself To Sleep,'* N.Y. Post (Nov. 21, 2013, 6:36 AM), http://nypost.com/2013/11/21/conde-nast-interns-speak-out-on-program-shutdown (describing Condé Nast's plan to shut down its internship program).

[222] *Id.*

[223] *Id.* (interviewing students affected by the elimination of the Condé Nast internship program).

unpaid internship program so long as the potential intern is the "primary beneficiary" of the relationship.[224] This flexible test empowers courts to take an in-depth analysis of unpaid internship programs to ensure the intern is receiving benefits for his or her work, even though he or she may not be paid.[225]

Unlike Fact Sheet #71, the primary beneficiary test keenly recognizes that those who agree to unpaid internships are not volunteers, "trainees," or employees.[226] Instead, it creates its own modern test to analyze internships in today's economy.[227] In doing so, the Second Circuit respects the varied goals and interests students may have in agreeing to an internship.[228] By considering all of the benefits an unpaid internship provided an intern, and balancing this against the benefit to the employer, the court ensures interns are receiving value for their work while protecting them against the potential for an exploitative employment relationship. In the entertainment industry, this analysis helps preserve opportunities for potential interns moving forward, while preserving the integrity of the intern-employer relationship.

The effects of *Glatt* are already becoming apparent. A few cases have utilized the primary beneficiary test, and the results have been favorable for interns and employers alike.[229] Interns are able to benefit from invaluable experience, training, and knowledge, while employers are able to maintain their unpaid internship programs. Indeed, the law should strive for such mutually beneficial solutions. For the entertainment industry, the primary beneficiary test allows for the preservation of a tradition that has created countless opportunities for thousands of students.

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[224] Glatt v. Fox Searchlight Pictures Inc., 811 F.3d 528, 536 (2d Cir. 2016).
[225] *See id.*
[226] *Id.*
[227] *Id.* at 537-38.
[228] *Id.*
[229] *See, e.g.*, Mark v. Gawker Media LLC, No. 13-CV-4347(AJN), 2016 WL 1271064 (S.D.N.Y. Mar. 29, 2016); Xuedan Wang v. Hearst Corp., 203 F. Supp. 3d 344 (S.D.N.Y. 2016).