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UNPAID INTERNSHIPS: FREE LABOR OR VALUABLE LEARNING EXPERIENCE?

Robert J. Tepper & Matthew P. Holt†*

I. INTRODUCTION

Over the last decade, internships have become an integral part of the college curriculum. Many degree programs either strongly recommend or require that students complete one or more internships.¹ Current business and accounting accreditation standards require evidence substantiating a curriculum where “students engage in experiential and active learning designed to improve skills and the application of knowledge in practice.”² Internships, particularly those offered in private firms, have long been thought to advance those objectives.

This paper discusses the perceived advantages and disadvantages of internships. It then discusses current legal

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¹ See Karel A. Updyke & James Sander, *A Survey of AACSB Accredited Institutions and the Use of Work Experiences as Part of the Business Curricula*, Fall 2005 J. ACAD. BUS. EDUC. at 118, 120, 125, available at http://digitalcommons.butler.edu/cgi/viewcontent.cgi?article=1018&context=cob_papers (reporting that despite the benefits of internships, only 26 of 133 responding AACSB schools required an internship). Recent survey data suggests that 63.2% of graduating seniors participated in an internship or co-op program. Nat'l Ass'n of Colls. & Emp'rs, *Class of 2013: Majority of Seniors Participated in Internships or Co-ops*, NACEWEB.ORG (June 26, 2013), <https://www.naceweb.org/s06262013/internship-co-op-during-college.aspx>. Of that number, 52.2% were paid; 47.8% were unpaid. NAT'L ASS'N OF COLLS. & EMP'RS, *THE COLLEGE CLASS OF 2013: EXECUTIVE SUMMARY 6* (Nov. 2013), available at <http://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2013-student-survey-executive-summary.pdf>.

² AACSB, *2013 Business Standards, Learning and Teaching Standards*, AACSB.EDU, <http://www.aacsb.edu/accreditation/standards/2013-business/learning-and-teaching/> (last visited July 31, 2014); see also AACSB, *2013 Accounting Standards, Learning and Teaching Standards*, AACSB.EDU, <http://www.aacsb.edu/accreditation/accounting/standards/2013/learning-and-teaching/> (last visited July 31, 2014).

challenges involving unpaid internships primarily in the private sector.³ These challenges involve application of the Fair Labor Standards Act (“FLSA” or “Act”). The FLSA requires, with certain exceptions, that employees engaged in interstate commerce are paid minimum wage and time-and-a half for workweek hours over forty, and that employers maintain adequate records. Courts employ different standards to assess whether an unpaid intern is an employee subject to the Act. Most apply a fact-intensive “totality of the circumstances” approach and conclude that if the primary beneficiary of the arrangement is the intern, then the intern is not an employee. However, a minority of courts requires the employer to satisfy all elements of a six-factor test developed by the Department of Labor’s Wage and Hour Division currently in a “Fact Sheet.”

This article argues that the Fact Sheet should be accorded little deference because it merely interprets a Supreme Court decision. Further, it is ambiguous as to the extent that all six factors must be met. Additionally, unpaid internships are a minefield of potential liability for employers for several reasons: (1) uncertainty regarding the applicable standard for whether the intern is subject to the Act, (2) non-waivable character of the Act,⁴ (3) opt-in procedures for FLSA claims that are fairly easy, (4) potential for fee shifting, and (5) existence of similar state-law provisions with similar remedies.⁵

³ “Internship” is a term used to describe a variety of arrangements between a sponsor, a student, and an academic institution. Sponsors may include for-profit employers, as well as private, not-for-profit, and governmental entities. Moreover, internships may be paid or unpaid, full-time or part-time, for academic credit or not, and required by an academic institution or merely recommended. NAT’L ASS’N OF COLLS. & EMP’RS, POSITION STATEMENT: UNPAID INTERNSHIPS (June 2010), *available at* <http://www.nacweb.org/advocacy/position-statements/unpaid-internships.aspx?land-intern-lp-1-adv-ps-ui-08152014> (last visited Aug. 17, 2014). The variety of arrangements sometimes “makes it difficult to apply common and consistent standards, guidelines, and applicable policies.” *Id.* This article primarily addresses for-profit, private sector internships (rather than the large number of public and non-profit internships that are not part of the analysis) though our suggestions for improving internships may well apply to all internships.

⁴ Though the Act is non-waivable, it has a two-year limitations period with a three-year period for willful violations. 29 U.S.C.A. § 255(a) (West 2014); *Haro v. City of Los Angeles*, 745 F.3d 1249, 1258 (9th Cir. 2014). These limitation periods should serve to limit liability.

⁵ *See, e.g.*, CAL. LAB. CODE § 510(a) (West 2014) (overtime); CAL. LAB. CODE § 1182.12 (West 2014) (minimum wage); N.Y. LAB. LAW § 232 (McKinney 2014) (overtime for certain employees); N.Y. LAB. LAW § 652 (McKinney 2014). Of course, a State minimum wage may exceed the federal minimum wage, thereby increasing

More significantly, assuming that an unpaid internship falls within a safe harbor with respect to the Act, is it ethical to ask students to work for no pay? We conclude that it is, when adequate safeguards are in place that ensure a meaningful educational experience open to all who are qualified. Finally, the paper discusses what steps both schools and employers should take to limit liability and provide a better internship experience for students.

II. WHY INTERNSHIPS?

In many fields, students are encouraged to seek out internships, preferably the paid variety.⁶ Students, schools, and employers all have reasons for favoring internships.

A. *Student Perspectives*

Internships are widely believed to expose the student to the practical side of a discipline and provide relevant work experience. Students see internships as a way to gain much-needed experience, improve job skills, and potentially receive an offer of future employment with a firm or government entity, even if not with their specific employer.⁷ College credit is often an additional benefit necessitating little extra work beyond the internship itself.

Even where there is not potential employment, students expect to gain valuable contacts through networking and to build a stronger resumé. This may take the form of professional references or public recognition for projects, e.g., being listed in a film's end credits or a published work's acknowledgements. Students also likely improve job-hunting skills in the process of applying and interviewing for internships. Further, obtaining a competitive internship is often viewed as an achievement in and of itself, distinguishing a student from his or her peers.

liability.

⁶ A recent survey of 2013 graduates suggests that a higher percentage of those completing paid internships received at least one job offer (63.1%) compared to those who completed unpaid internships (37%) or no internship at all (35.2%). Nat'l Ass'n of Colls. & Emp'rs, *Class of 2013: Paid Interns Outpace Unpaid Peers in Job Offers, Salaries*, NACEWEB.ORG (May 29, 2013), <http://www.naceweb.org/s05292013/paid-unpaid-interns-job-offer.aspx>. The results may not be surprising given that paid internships are increasingly becoming a "tryout" for paid positions.

⁷ David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 241 (1998).

B. School Perspectives

From a school's perspective, an internship program demonstrates that it is pursuing active and experiential learning for its students. Moreover, supplying students for internships may improve a school's relationship with an employer and encourages the employer to look to the school as a source for future interns and full-time employees. Outside the classroom, faculty members often are called upon to consult with industry. An internship program can solidify a relationship between individual professors and a firm and pave the way for future consulting opportunities. A school can also charge tuition in exchange for college credit for internships, often with reasonable levels of faculty involvement, making it unnecessary to deploy additional faculty to manage internships.

Concerns include placing too much emphasis on internships where less time is spent with the actual academic content of the degree program. Additionally, by requiring unpaid internships as a prerequisite for paid employment, employers may essentially be imposing an unpaid training period on all students who apply. Most faculty do not want to participate in programs that might exploit students and interns lack the protection that even a probationary employee might have.

C. Employer Perspectives

Employers can often be motivated by altruistic reasons—paying it forward. Taking on an intern is a way to introduce a new entrant to an industry, or to a profession and to cultivate a future colleague. It is a way for employers to give something back to a school, or at least sample what the school has to offer in terms of prospective employees. Employers may like the opportunity, or feel pressure to have an internship program, to have first choice among highly qualified students. Students are probably more likely to accept an offer from an employer known through an internship than pursue the unknown.

Possibly the greatest incentive internships offer employers is a low risk and inexpensive method of appraising suitability for eventual hire.⁸ Many firms extend entry-level offers to interns who successfully complete an internship. Finally, an intern may provide help with the tasks at hand, although most

⁸ *Id.* at 241–42.

professional employers recognize that in a meaningful internship, the investment in training the intern generally exceeds an intern's contribution.

Given such advantages, what can go wrong? The next section discusses common problems with internships.

III. THE TROUBLE WITH INTERNSHIPS

Student complaints include: internships rarely lead to jobs, training is poor or non-existent, supervision is minimal, tasks are mundane, hours are often long, and the work has little applicability to professional pursuits. Perhaps reminiscent that “no good deed goes unpunished,” providing an internship opportunity has generated complaints that unpaid internships in the for-profit, private sector⁹ are just that: unpaid, but in violation of the Fair Labor Standards Act (“FLSA” or “Act”). This is because interns are alleged to be “employees” under the Act, and thus entitled to minimum wage and overtime. Employers may take no comfort in knowing that an intern fully understands that the internship is unpaid. The protections of the Act cannot be waived.¹⁰ There are cases where courts have held that people who willingly worked without compensation were

⁹ Generally, volunteers who perform services for state or local governmental agencies are not considered employees under the FLSA if they receive no compensation (or merely expenses, reasonable benefits, or a nominal fee). 29 U.S.C.A. § 203(e)(4)(A) (West 2014); *see* 29 C.F.R. §§ 553.100, 553.106(a) (2013). The FLSA also contains an exemption from minimum wage and maximum hour provisions for employees “employed in a bona fide executive, administrative, or professional capacity,” 29 U.S.C.A. § 213(a)(1) (West 2014), but that exemption requires that the employee be paid a salary, 29 C.F.R. §§ 541.200(a)(1), 541.300(a)(1), 541.600 (2013). The FLSA has a provision for employment under a special certificate which might enable an employer to pay less than minimum wage (95%) to learners, apprentices, and messengers. 29 U.S.C.A. § 214(a) (West 2014); 29 C.F.R. §§ 520.300 (definitions), 520.400–520.412 (2013). The certificate is dependent upon prevention of curtailment of employment opportunities, 29 U.S.C.A. § 214(a), so an employer would have to demonstrate an effort to recruit experienced workers, 29 C.F.R. §§ 520.403(a)(1), 520.404(e) (2013). A similar provision (at 85% of the minimum wage) exists for employment of student learners enrolled in an accredited educational program and employed part-time pursuant to a bona-fide vocational training program. 29 U.S.C.A. § 214(b) (West 2014); 29 C.F.R. § 530.300 (2013); *see* 29 C.F.R. §§ 520.500–520.508 (2013). Of course, these provisions require compensation, which is inconsistent with an unpaid internship, and depend upon a demonstrated need for employees (a shortage of applicants not in need of training).

¹⁰ *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 302 (1985); *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981); *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945); *Boaz v. FedEx Customer Info. Servs., Inc.*, 725 F.3d 603, 605–06 (6th Cir. 2013).

in fact employees and entitled to compensation.¹¹ Obviously, the potential for litigation over a claim for unpaid wages and overtime may dampen employers' enthusiasm to participate in unpaid internships.

A. *Employer Responsibilities Under the Act*

Under the Act, with certain exceptions, employers must pay employees engaged in interstate commerce at least minimum wage¹² and time-and-a half for hours worked over forty in a workweek.¹³ The Act has several purposes, including protection for workers from long hours and substandard wages, protection for employers from unfair competition from employers who might pay their workers substandard wages, and the reduction of unemployment by requiring overtime compensation.¹⁴ Requiring that all employees be paid ensures fair wages are paid to others in the industry by reducing the incentive to hire those who would work for substandard or non-monetary compensation.¹⁵

Employers are also required to keep adequate records concerning the hours worked by their employees.¹⁶ In a successful claim for unpaid wages, an intern is entitled to an additional, equal amount as liquidated damages unless the

¹¹ See, e.g., *Tony & Susan Alamo Found.*, 471 U.S. at 306 (holding religious foundation workers were entitled to compensation); *McLaughlin v. Ensley*, 877 F.2d 1207, 1208 (4th Cir. 1989) (finding uncompensated trainees were employees); *Bailey v. Pilots' Ass'n*, 406 F. Supp. 1302, 1307 (E.D. Pa. 1976) (concluding pilot-boat apprentice was employee).

¹² 29 U.S.C.A. § 206(a) (West 2014); *Genesis Healthcare Corp. v. Symczyk*, ___ U.S. ___, 133 S. Ct. 1523, 1527 (2013).

¹³ 29 U.S.C.A. § 207(a)(1) (West 2014).

¹⁴ 29 U.S.C.A. § 202(a) (West 2014); *Brooklyn Sav. Bank*, 324 U.S. at 710, n.25; *United States v. Rosenwasser*, 323 U.S. 360, 361 (1945); *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 936 (8th Cir. 2013).

¹⁵ *Tony & Susan Alamo Found.*, 471 U.S. at 302 ("If an exception to the Act were carved out for employees willing to testify that they performed work 'voluntarily,' employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act."); *Lucas*, 721 F.3d at 936–937 (applying same rationale to undocumented aliens); *Patel v. Quality Inn South*, 846 F.2d 700, 704 (11th Cir. 1988) (same).

¹⁶ 29 U.S.C.A. § 211(c) (West 2014); 29 C.F.R. §§ 516.2(a)(7), 516.5 (2013). Where an employer has not kept adequate records, the employee may prove the amount of time by "just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946); *Kuebel v. Black & Decker, Inc.*, 643 F.3d 352, 363–64 (2nd Cir. 2011). The burden then shifts to the employer to prove the precise amount by negating the reasonableness of the inference; lacking that, a court may award an approximate amount. *Anderson*, 328 U.S. at 687–88.

employer can demonstrate that its non-compliance was in good faith and it had reasonable grounds to believe its conduct was not in violation of the law.¹⁷ Where the employer has not kept adequate records, an employee need only prove approximate amounts.¹⁸

Under the Act, “employer” and “to employ” are defined broadly.¹⁹ An employee is “any individual employed by an employer.”²⁰ “Employ” means “to suffer or permit to work.”²¹ “Work” incorporates “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer.”²² It can be on-site or off-site and the employer has the responsibility to ensure that any work it does not want is not performed.²³ Not surprisingly, paid interns engaged in interstate commerce are considered employees subject to the Act.²⁴ The question remains as to whether interns who are not paid are employees, and therefore entitled to the protections of the Act.²⁵

¹⁷ 29 U.S.C. §§ 216(b), 260 (West 2014). The burden is on the employer to show subjective good faith and the objective reasonableness of its conduct, and liquidated damages are the norm in these types of cases. *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 70–71 (2d Cir. 1997). A successful claimant also is entitled to a reasonable attorney’s fee. 29 U.S.C.A. § 216(b) (West 2014); *Black v. SettlePou, LLC*, 732 F.3d 492, 502 (5th Cir. 2013).

¹⁸ *Anderson*, 328 U.S. at 687–88.

¹⁹ *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *Rosenwasser*, 323 U.S. at 362 (“A broader or more comprehensive coverage of employees . . . would be difficult to frame.”); *Lucas*, 721 F.3d at 934 (noting the “sweeping definitions of ‘employer’ and ‘employee’”).

²⁰ 29 U.S.C.A. § 203(e)(1) (West 2014).

²¹ 29 U.S.C.A. § 203(g) (West 2014).

²² *Tenn. Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944); *see also Chao v. Gotham Registry, Inc.*, 514 F.3d 280, 285 (2nd Cir. 2008).

²³ 29 C.F.R. §§ 785.12, 785.13 (2013).

²⁴ *See* 29 U.S.C.A. §§ 206(a) (minimum wages) & 207(a) (maximum hours) (West 2014). Paid interns do not appear to come within any exemptions. *See* 29 U.S.C.A. § 213 (exemptions) (West 2014).

²⁵ The definition of an employee under the FLSA is the same as for the Family and Medical Leave Act (“FMLA”). 29 U.S.C.A. § 2611(3) (West 2014). Thus, if an unpaid intern is an employee under the FLSA, she may be entitled to protection under the FMLA provided she meets length of service requirements. 29 U.S.C.A. § 2611(2)(A) (West 2014). Courts look at common law employment concepts, including the right to control the means and manner of performance, in deciding whether a volunteer is an employee under Title VII. *O’Connor v. Davis*, 126 F.3d 112, 115–16 (2d Cir. 1997). Most circuits would require some kind of remuneration to consider an intern an employee entitled to protections under various anti-discrimination statutes including Title VII, the ADA and ADEA. *See Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 435 (5th Cir. 2013); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974, 979 (10th Cir.

B. Tests for Determining Employee status

The Act does not define “intern” or “extern,” so the analysis of whether an unpaid intern is an employee begins with *Walling v. Portland Terminal Co.*, which considered unpaid trainees.²⁶ The Portland Terminal Co. offered a course in practical training for prospective yard brakemen. The course involved seven to eight days of training, during which time the trainee was instructed and supervised by the working yard crew. The trainees were not compensated for their time.²⁷

The Department of Labor brought suit against Portland Terminal, alleging that the trainees were employees under the FLSA, and should have been paid for the time they spent training. Portland Terminal denied that the trainees were its employees.

The Supreme Court ultimately held that the trainees were not employees under the Act. In coming to this conclusion, the Court made several observations:

1. The trainees did not displace any regular employees.²⁸
2. The trainees’ work did not expedite the company’s business, and in fact it actually impeded the company’s work.²⁹
3. The trainees were not guaranteed a job, though they became eligible for employment if they successfully completed the program.³⁰
4. The trainees were not paid, and did not expect to be paid for the time spent training.³¹

1998); *O’Connor*, 126 F.3d at 116; *Graves v. Women’s Prof’l Rodeo Ass’n*, 907 F.2d 71, 73 (8th Cir. 1990). *But see* *Bryson v. Middlefield Volunteer Fire Dep’t., Inc.*, 656 F.3d 348, 353–54 (6th Cir. 2011) (considering remuneration but one factor to consider in whether an employment relationship exists); *Fichman v. Media Center*, 512 F.3d 1157, 1160 (9th Cir. 2008) (same). Other statutory schemes, however, may have different definitions of “employee,” so that an employee for purposes of the FLSA may not be entitled to other statutory protections. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (distinguishing the scope of “employee” under ERISA as not being as broad as it is under the FLSA).

²⁶ 330 U.S. 148, 150 (1947). *Portland Terminal* had a companion case that reached the same result. *Walling v. Nashville Chattanooga & St. Louis Ry.*, 330 U.S. 158 (1947).

²⁷ The trainees who successfully completed the course and were certified as competent were eligible to be hired by Portland Terminal. Beginning in 1943, if the trainees were hired, Portland Terminal then gave them a retroactive allowance of \$4.00 per day for their training period. *Portland Terminal*, 330 U.S. at 150.

²⁸ *Id.* at 149–50.

²⁹ *Id.* at 150.

³⁰ *Id.*

³¹ *Id.*

The Court analogized the situation to a public or private vocational school:

Had these trainees taken courses in railroading in a public or private vocational school, wholly disassociated from the railroad, it could not reasonably be suggested that they were employees of the school within the meaning of the Act. Nor could they, in that situation, have been considered as employees of the railroad merely because the school's graduates would constitute a labor pool from which the railroad could later draw its employees. The Fair Labor Standards Act was not intended to penalize railroads for providing, free of charge, the same kind of instruction at a place and in a manner which would most greatly benefit the trainees.³²

The Court closed by noting that the railroad received no “immediate advantage” from the work done by the trainees, and then held that the trainees were not employees.³³

1. Regulatory interpretation of Portland Terminal – Fact Sheet #71

In 2010, the Department of Labor issued Fact Sheet #71, to provide “general information to help determine whether interns must be paid the minimum wage and overtime under the Fair Labor Standards Act.”³⁴ The substance of Fact Sheet has appeared in response to inquiries about interns and a 1980 Wage and Hour publication concerning the employment relationship.³⁵ Although claiming only to provide “general information,” the current Fact Sheet sets the tone early when it articulates an assumption that interns are employees:

Internships in the “for-profit” private sector will most often be viewed as employment, unless the test described below relating to trainees is met. Interns in the “for-profit” private

³² *Id.* at 152–53.

³³ *Id.* at 153.

³⁴ U.S. DEPT OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (April 2010), *available at* <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>.

³⁵ U.S. Dep't of Labor Op. Letter, 2004 WL 5303033, at *2 (May 17, 2004) (“The Department of Labor has consistently applied this test in response to questions about the employment status of student interns.”); WH Pub. 1297, at 4–5 (Rev. 1980, Reprinted Aug. 1985), *available at* http://www.cobar.org/repository/Inside_Bar/Labor/Employment%20Relationship.pdf.

sector who qualify as employees rather than trainees must be paid at least the minimum wage and overtime compensation for hours worked over forty in a workweek.

The Fact Sheet itself claims that the Supreme Court held that the phrase “suffer or permit to work” cannot be interpreted “so as to make a person whose work serves only his or her own interest an employee of another who provides aid or instruction.” This appears to be a reference to *Portland Terminal*, which did in fact hold that a person who serves only his own interest is *not* the employee of a business that provides aid or instruction. Note, however, that *Portland Terminal* never held that someone who serves his own interest—and benefits another in the process—becomes an employee of the person benefitted.

The “guidance” from Fact Sheet #71 is embodied in six criteria that it sets forth.³⁶ The Department of Labor gives conflicting instructions on the import of the criteria. Before listing the criteria, the Fact Sheet acknowledges that the determination of whether an intern is an employee “depends on all the facts and circumstances,” suggesting a “totality of the circumstances” type of analysis. After listing the criteria, however, the Fact Sheet suggests that the criteria provide a bright line test: “if **all** of the factors” are met, the intern is not an employee under the FLSA. In addition to insisting upon application of all the factors, the Fact Sheet explains that the exclusion is “quite narrow” implying that the failure to meet one is determinative.

The Fact Sheet’s factors parallel, but do not exactly mimic, points raised by the Court in *Portland Terminal*, as illuminated in the following table.

Fact Sheet #71	<i>Portland Terminal</i>
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;	1. Had a vocational school offered the same training, the school would not be deemed the students’ employer.

³⁶ The six criteria have been used by the Department of Labor since 1967, *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993), although “intern” has sometimes been substituted for “trainee” and “internship” for “training period.”

2. The internship experience is for the benefit of the intern;	2. The training would most greatly benefit the trainees. ³⁷
3. The intern does not displace regular employees, but works under close supervision of existing staff;	3. The trainees did not displace any regular employees.
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;	4. The railroad received no immediate advantage by providing the training.
5. The intern is not necessarily entitled to a job at the conclusion of the internship; and	5. The trainees were not guaranteed a job, though they were eligible for employment if they successfully completed the training.
6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.	6. The trainees were not, and did not expect to be, paid for the time spent training.

It is not surprising that most courts reject a literal application of the Fact Sheet's criteria and instead adopt a "totality of the circumstances" or an "economic realities" test. Perhaps more importantly, courts appear to have uniformly

³⁷ New employees are not always entitled to be compensated for training time, particularly where the training is a pre-condition of employment and does not involve productive work. 29 C.F.R. § 785.27 (2013); *Chao v. Tradesmen Int'l., Inc.*, 310 F.3d 904, 910 (6th Cir. 2002); *Ballou v. Gen. Elec. Co.*, 433 F.2d 109, 111–12 (1st Cir. 1970).

rejected the suggestion that an intern must be working “solely” for his own benefit or will otherwise be deemed an employee. Instead, courts focus on who is the “primary beneficiary” of the relationship.

2. *Totality of the circumstances*

The totality of the circumstances approach seems to be mandated by the Supreme Court itself. Just a few months after the decision in *Portland Terminal*, the Supreme Court issued its decision in *Rutherford Food Corp. v. McComb*,³⁸ which also dealt with the question of what constituted an “employee” under the Act. More specifically, the issue was whether the worker was an employee or whether he was an independent contractor, a frequent issue under the Act. The Court reviewed the traditional tests for differentiating between employees and independent contractors, and then noted:

We think, however, that the determination of the relationship does not depend on such isolated factors but rather upon the circumstances of the whole activity.³⁹

A number of cases have cited to *Rutherford* in support of the proposition that the totality of the circumstances should be used to determine whether someone is an employee. For example, in *Mendel v. Gibraltar*⁴⁰ the issue was whether firefighters were employees under the Act. The firefighters were referred to as volunteers. They could decide what calls to respond to, but received an hourly “stipend” when they were on call. Quoting from *Rutherford*, the court stated that the “circumstances of the whole activity” had to be evaluated and that the determination of whether the firefighters were employees hinged on the economic realities of the situation.⁴¹ Because the hourly “stipend” paid the firefighters approximated typical wages paid to professional firefighters, the court determined that they were, in fact, employees.

In a similar case, the Tenth Circuit was called on to determine whether firefighters were entitled to compensation for the time they spent in firefighter academy.⁴² Specifically

³⁸ 331 U.S. 722 (1947).

³⁹ *Id.* at 730.

⁴⁰ 727 F.3d 565 (6th Cir. 2013).

⁴¹ *Id.* at 569–70.

⁴² *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023 (10th Cir. 1993).

rejecting a rigid application of the criteria contained in the Fact Sheet, the court found that the process of distinguishing between an employee and an independent contractor (as was at issue in *Rutherford*) was analogous, and agreed that no one factor was dispositive, but instead a decision should be based on the economic realities after looking at the total situation.⁴³ Looking to the “economic realities,” the court concluded that the potential firefighters attending the academy were not employees.

The Supreme Court has made clear that no single factor is controlling, instead the economic realities of the situation have to be understood. The Tony and Susan Alamo Foundation had a number of unpaid “associates” working for it in a variety of capacities.⁴⁴ The Department of Labor brought suit, claiming that the associates were employees. The Foundation, however, argued that it was a charitable and religious organization that was helping the less fortunate with behavioral problems by providing them with a place to work. The associates themselves testified that they were volunteers and not employees. The Court said that the test of employment was one of “economic reality”⁴⁵ and analyzed all of the circumstances before concluding that the associates were employees, largely because the work that they were doing directly supported a commercial enterprise that was in direct competition with businesses that paid their workers.⁴⁶

3. Deference to the Fact Sheet

Some courts have afforded the Fact Sheet substantial deference,⁴⁷ while a small minority of courts completely reject the Fact Sheet.⁴⁸ Other courts have decided that it is entitled to

⁴³ 992 F.2d at 1026–27.

⁴⁴ *Tony and Susan Alamo Found.*, 471 U.S. at 292.

⁴⁵ *Id.* at 301; *accord* *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 33 (1961).

⁴⁶ The Department of Labor took a similar position in response to charity bagging as a fundraiser: students carried shoppers’ groceries to their cars for donations only. U.S. Dep’t of Labor Op. Letter, 2002 WL 32406599, at *2–3 (Oct. 7, 2002).

⁴⁷ *See* *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1127–28 (5th Cir. 1983).

⁴⁸ *See, for example, Solis v. Laurelbrook Sanitarium and School*, which noted that the Fact Sheet was “a poor method for determining employee status in a training or education setting. For starters, it is overly rigid and inconsistent with a totality-of-the-circumstances approach, where no one factor (or the absence of one factor) controls.” 642 F.3d 518, 525 (6th Cir. 2011).

some deference.⁴⁹ However, of those that have given the Fact Sheet deference, only a few have explained the reasoning for such deference.

In contrast, the Supreme Court has addressed the issue of the deference. The Court has found that a reviewing court must give deference to the rules, actions, and decisions by administrative agencies in *Skidmore v. Swift & Co.*⁵⁰ and *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,⁵¹ which set forth two distinct standards that are generally referred to as *Skidmore* deference and *Chevron* deference.⁵²

Skidmore deference and *Chevron* deference are markedly different in several important regards. *Chevron* deference requires courts to give controlling deference to an agency interpretation of a statute if the statute is ambiguous and the agency's interpretation reasonably resolves the ambiguity.⁵³ *Chevron* deference, however, is applicable only if (a) Congress intended to confer authority on the agency to issue interpretations having the force of law and (b) the interpretation in question was issued according to the format Congress contemplated would be eligible for *Chevron* deference.⁵⁴

If an agency's interpretation of a statute is not entitled to deference under *Chevron*, then the interpretation must be analyzed under *Skidmore*. Under *Skidmore*, a court can consider, but is not bound by, the agency's interpretation. In deciding whether to apply *Chevron* deference or *Skidmore* deference, the first step is typically to determine whether

⁴⁹ See, e.g., *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993) (giving *Skidmore* deference); *McLaughlin v. Ensley*, 877 F.2d 1207, 1211 (4th Cir. 1989) (giving *Chevron* deference); *Kaplan v. Code Blue Billing & Coding*, 504 F. App'x 831 (11th Cir. 2013) (unpublished). Referring to the Fact Sheet, the court in *Kaplan* noted that the "rulings, interpretations and opinions of the Administrator under [the FLSA], while not controlling upon courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Kaplan*, 504 F. App'x at 834–35 (quoting *Dade County v. Alvarez*, 1234 F.3d 1380, 1385 (11th Cir. 1997)).

⁵⁰ 323 U.S. 134 (1944).

⁵¹ 467 U.S. 837 (1984).

⁵² A third type of deference, *Auer* deference, has no application in this matter. In *Auer v. Robbins*, the Court held that an agency's interpretation of its own ambiguous regulation should be deferred to by the courts as long as that interpretation was not clearly erroneous. 519 U.S. 452, 461 (1997). The Fact Sheet, however, is not a regulation, and is not subject to *Auer* deference.

⁵³ *Chevron*, 467 U.S. at 842–43.

⁵⁴ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

Congress intended to confer on the agency the authority to issue interpretations that have the force of law. In this case, determining whether Congress intended for the Department of Labor to issue interpretations of the Fair Labor Standards Act that would have the force of law is critical. Fortunately, the Supreme Court seems to have already answered this question, as *Skidmore* itself involved an interpretive bulletin adopted by the Department of Labor to implement the Fair Labor Standards Act.

In *Skidmore*, seven employees of Swift & Co. filed suit, seeking to recover compensation for time they spent waiting for work. The trial court found that the waiting time was not compensable. Apparently the trial court felt “restricted by its notion that waiting time may not be work.” This conclusion was based solely on the position the administrator of the Department of Labor took in a bulletin it had issued.⁵⁵ The Supreme Court reversed and remanded, noting that it was up to the courts, and not to the Department of Labor, to authoritatively interpret the law.

Seguing from deciding whether the courts *must* defer to the Department of Labor’s interpretive bulletin⁵⁶ to evaluating whether the interpretive bulletin should be *instructive*, the Court clearly agreed that the administrative agency’s interpretation was entitled only to some deference. The weight of the deference should depend

[U]pon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.⁵⁷

Given that *Skidmore* involved the Fair Labor Standards Act, and that the Supreme Court ruled that the courts could be guided by, but were not bound by, the interpretive bulletins adopted by the Department of Labor, it seems settled that *Skidmore* deference, and not *Chevron* deference, should apply to the Department of Labor’s interpretation of the Fair Labor Standards Act. In fact, some courts giving deference to the Fact Sheet have cited to *Skidmore* as the reason for giving it

⁵⁵ *Skidmore*, 323 U.S. at 140.

⁵⁶ The Court, of course, did not refer to such deference as *Chevron* deference, as *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, would not be decided for another 40 years.

⁵⁷ *Skidmore*, 323 U.S. at 140.

deference.⁵⁸

Skidmore, however, seems to concern itself with situations in which an administrative agency is interpreting a statute (or even regulations).⁵⁹ In contrast, the Fact Sheet does not seem to interpret the statute so much as it interprets the Supreme Court's decision in *Portland Terminal*.⁶⁰ There is nothing to suggest that the Department of Labor is in a better position to interpret case law than a judge, and therefore little, if any, deference should be given to the Fact Sheet.

An analogous issue, raised in *Melvin v. Astrue* was whether and how much deference should be given to an Acquiescence Ruling that had been made by the Social Security Administration.⁶¹ An Acquiescence Ruling ("AR") is a ruling that the Social Security Administration issues that interprets a holding of a United States Circuit Court of Appeals concerning the Social Security Act. The Social Security Administration argued that an AR was ignored and claimed that the AR was entitled to deference under *Skidmore*. The district court disagreed:

Further, *Skidmore* deference is tempered where the administrative official lacks expertise in the area. See *Gonzales*, 546 U.S. at 269. Plaintiff fails to explain why the Commissioner is better able to interpret a federal appellate decision than a United States District Court. No rational explanation appears to exist. Accordingly, the court rejects plaintiff's argument that *Skidmore* deference applies to ARs.⁶²

Similarly, there is nothing to suggest that the Wage and Hour

⁵⁸ Some courts have given deference to the Department of Labor's factors based upon *Chevron* deference, which provides that, where Congress intended for the agency to complete a legislative scheme, the agency's interpretation will be upheld unless "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. Perhaps these cases consider the Fact Sheet as interpretative of FLSA, in addition to *Portland Terminal*. See *McLaughlin v. Ensley*, 877 F.2d 1207, 1211 (4th Cir. 1989); *Archie v. Grand Cent. P'ship*, 997 F. Supp. 504, 532 (S.D.N.Y. 1998) (Sotomayor, J.). Generally, *Chevron* deference is afforded regulations where there has been notice and comment and adjudications; the Tenth Circuit has held that the factors are entitled to *Skidmore*, but not *Chevron* deference. *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993).

⁵⁹ See *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008).

⁶⁰ Of course, the argument can be made that the Fact Sheet is really interpreting the terms "employer," "employee," and "employ" as used in the FLSA. 29 U.S.C.A. § 203(d), (e)(1), (g) (West 2014).

⁶¹ 602 F. Supp. 2d 694, 702-03 (E.D.N.C. 2009).

⁶² *Id.* at 703; *accord Carter v. Astrue*, Civ. A. CBD-11-2980, 2013 WL 4461579, at *5 (D. Md. Aug. 19, 2013).

Division of the Department of Labor is better able to interpret a decision from the United States Supreme Court than another court.

Moreover, the Department of Labor has taken positions inconsistent with a strict interpretation of the Fact Sheet. Although the Fact Sheet claims that if all six factors are met the intern or trainee is not an employee, the prefatory comments in the Fact Sheet expressly say a determination of whether participants in a particular program would be employees “depends upon all of the facts and circumstances.” A “facts and circumstances” analysis negates the idea of a bright-line rule.⁶³ A bright-line rule is also inconsistent with a position previously taken by the Department of Labor. In an opinion it issued in 1967, the administrator clearly set forth a totality of the circumstances approach:

The Court has made it clear that there is no single rule or test for determining whether an individual is an employee, but that the total situation controls. The Court has indicated a number of factors which help to determine whether an employment relationship exists.⁶⁴

Notwithstanding the language of the Fact Sheet, at oral argument in a case involving the question whether trainees were employees, the Department of Labor agreed that the court was not bound to an all-or-nothing standard.⁶⁵

Given the fact that the Department of Labor’s Fact Sheet really does not interpret the statute, and given the fact that the Department of Labor has taken inconsistent positions on this very issue, the Fact Sheet is entitled to little deference. An “all or nothing” approach may have the virtue of simplicity, i.e., not meeting any one factor means the intern is an employee.⁶⁶ In

⁶³ See Susan Harthill, *Shining the Spotlight on Unpaid Law-Student Workers*, 38 VT. L. REV. 555, 591 (2014).

⁶⁴ Reich v. Parker Fire Protection Dist., 992 F.2d 1023, 1027 (10th Cir. 1993) (quoting Op. Wage–Hour Adm’r No. 638 (July 18, 1967)).

⁶⁵ *Id.* at 1026–27. Despite this, the position of the Department of Labor since promulgation of the Fact Sheet seems to advance an “all-or-nothing” approach, i.e., if any of the six factors are *not* met, the intern will be deemed an employee. See, e.g., U.S. Dep’t of Labor Op. Letter, 2004 WL 2146931, at *2 (May 17, 2004) (“[P]rovided the six criteria listed below are met . . . the students will not be considered employees.”); U.S. Dep’t of Labor Op. Letter, 1994 WL 1004761, at *2 (Mar. 25, 1994) (concluding interns were employees under FLSA because “criterion number 4 discussed above would not be met”).

⁶⁶ David C. Yamada, *The Employment Rights of Student Interns*, 35 CONN. L. REV. 215, 233 (2002). But even with an “all or nothing” approach, the Department of

contrast, a “totality of the circumstances” or “economic reality” test calls for more factual development and nuanced ad-hoc balancing.⁶⁷ The latter approach, however, is consistent with Supreme Court law. If there is a dispute, the parties should be able to stipulate to the basic facts of any internship arrangement. If they do not, trial courts are adept at factual findings. Given those findings, courts are capable of applying the law. Though the “economic reality” test may involve ad-hoc balancing, most judges are generalists and engage in ad-hoc balancing on a regular basis.

4. *Immediate benefit v. primary benefit*

Many of the cases involving trainees and interns may turn on a question that some may call semantic, whether “benefit of the intern/trainee” means “sole benefit”. According to the Fact Sheet, the trainee/intern is an employee unless the internship experience is for the benefit of the intern, which certainly implies that it must be for the sole benefit of the intern. Thus, the Department of Labor concluded that an employer offering a youth hostel internship must comply with the minimum wage and overtime provisions of the FLSA; the employer would derive an immediate advantage from the activities of the intern in operating the hostel.⁶⁸ On the other hand, a one-week internship program where students shadowed employees did not benefit the employer, and indeed may have reduced productivity.⁶⁹ Informal opinions for the Department of Labor suggest that an important determinant of benefit is “whether

Labor often forgoes providing an answer for want of adequate factual development regarding the factors. *See* U.S. Dep’t of Labor Op. Letter, 2004 WL 2146931, at *2 (May 17, 2004); U.S. Dep’t of Labor Op. Letter, 2002 WL 32406598, at *2–3 (Sept. 5, 2002); U.S. Dep’t of Labor Op. Letter, 1995 WL 1032496, at *2 (July 11, 1995); U.S. Dep’t of Labor Op. Letter, 1995 WL 1032473, at *1 (Mar. 13, 1995). Of course, there are cases where the facts so clearly indicate the “intern” is an employee, the matter can be decided as a matter of law regardless of the test. *See* *Pfunk v. Cohere Commc’ns, LLC*, 2014 WL 2208012, at *9–10 (S.D.N.Y. May 28, 2014) (applying FLSA test to Uniformed Services Employment and Reemployment Rights Act (“USERRA”) claim and holding that a compensated employee was not an intern under the totality of the circumstances or the six-factor test).

⁶⁷ Yamada, *supra* note 66, at 233 (contending that a “totality of the circumstances” approach requires subjective judgment and analysis by the trier of fact and will result in inconsistent results).

⁶⁸ U.S. Dep’t of Labor Op. Letter, 1994 WL 1004761, at *1–2 (Mar. 25, 1994); *see also* U.S. Dep’t of Labor Op. Letter, 1995 WL 1032497, at *1 (July 17, 1995) (noting that if all of the factors are met the students are not considered employees).

⁶⁹ U.S. Dep’t of Labor Op. Letter, 2006 WL 1094598, at *4 (Apr. 6, 2006).

the productive work performed by the interns would be offset by the burden to the employer from the training and supervision provided.”⁷⁰

However, courts have found that even if the entity providing the opportunity obtains some benefit, that does not necessarily mean that persons availing themselves of the opportunity are employees.⁷¹ For example, in *Portland Terminal* the railroad was benefitted to the extent that by training brakemen it created a qualified pool of potential employees. Rather than looking to whether the alleged employer obtained any benefit, the courts that more narrowly view the issue to instead ask whether the “employer” obtained any “immediate benefit.”⁷²

The Court clearly relied on the fact that the railroad did not receive any immediate benefit in coming to the conclusion that the trainees were not employees: “Accepting the unchallenged findings here that the railroads receive no ‘immediate advantage’ from any work done by the trainees, we hold that they are not employees within the Act’s meaning.”⁷³ Some courts have looked to this language finding that the question of immediate benefit becomes dispositive. For example, *Donovan v. American Airlines* relied upon what it saw as “the simple and direct language of Justice Black’s opinion in *Portland Terminal*” to question (1) whether the trainee displaces other workers, and, (2) whether the company derives any immediate benefit from the trainee’s labor.⁷⁴

In contrast, other courts do not resolve the issue on the “immediate benefit” analysis, and have instead looked to see who is the “primary beneficiary” of the relationship.⁷⁵ If it is the trainee, the balance tips in favor of finding that he is not an

⁷⁰ U.S. Dep’t of Labor Op. Letter, 1995 WL 1032473, at *1 (Mar. 13, 1995).

⁷¹ See *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 272 (5th Cir. 1982).

⁷² See, e.g., *Atkins v. Gen. Motors Corp.*, 701 F.2d 1124, 1128 (5th Cir. 1983); *Wirtz v. Wardlaw*, 339 F.2d 785, 787–88 (4th Cir. 1964).

⁷³ *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947).

⁷⁴ *Donovan*, 686 F.2d at 271–72. The court also affirmed the district court’s finding that the trainees benefitted more than the company. *Id.* at 272.

⁷⁵ See, e.g., *Blair v. Wills*, 420 F.3d 823, 829 (8th Cir. 2005) (finding chores required of boarding school student primarily benefitted the student); *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989) (“[T]he general test used to determine if an employee is entitled to the protections of the Act is whether the employee or the employer is the primary beneficiary of the trainees’ labor.”); *Archie v. Grand Cent. P’ship*, 997 F. Supp. 504, 535 (S.D.N.Y. 1998) (finding work by homeless persons in a training program benefitted employer more than the plaintiffs).

employee. If it is the “employer,” the balance tips in favor of finding an employment relationship. For example, in *Solis v. Laurelbrook Sanitarium and School*, the Sixth Circuit reasoned that the primary beneficiary analysis is the proper framework under *Portland Terminal*:

We find that a primary benefit test provides a helpful framework for discerning employee status in learning or training situations. By focusing on the benefits flowing to each party, the test readily captures the distinction the FLSA attempts to make between trainees and employees. See *Portland Terminal*, 330 U.S. at 152 (stating that FLSA is not intended to reach persons “who, without any express or implied compensation agreement, might work for their own advantage on the premises of another.”).⁷⁶

Solis, of course, does not directly deal with the language used by the Court in *Portland Terminal*, which other courts have relied upon in adopting the “immediate benefit” analysis. Perhaps the only court to recognize and directly address the issue was a district court in the Southern District of New York. In *Wang v. Hearst Corp.*,⁷⁷ the court pointed out that the dispute between “immediate benefit” and “primary beneficiary” analysis was rooted in the language used by the Court in *Portland Terminal*:

Although the Supreme Court held in *Walling* that the men in that case were not employees because the defendant railroads received “no immediate advantage” from the trainees, 330 U.S. at 153, it does not logically follow that the reverse is true, i.e. that the presence of an “immediate advantage” alone creates an employment relationship under the FLSA. Moreover, Plaintiffs’ reading of *Walling* as establishing the test for an employer-employee relationship solely based on “direct or immediate benefit” is misplaced. There is no one-dimensional test; rather, the prevailing view is the totality of circumstances test.⁷⁸

The court’s simple yet sound conclusion is compelling. Complete reliance on the immediate benefit test is simply inconsistent with the totality of the circumstances test. And because the “economic reality” or totality of the circumstances

⁷⁶ *Solis*, 642 F.3d at 529.

⁷⁷ *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013).

⁷⁸ *Id.* at 493.

test has been clearly embraced by the Supreme Court itself,⁷⁹ the only explanation for the “immediate advantage” language used in *Portland Terminal* is that it was relevant to that case (there was no immediate advantage to the railroad). The Court simply was not saying that someone receiving training would be an employee if the company providing the training receives some immediate benefit.

C. Recent Cases in the Context of Post-Secondary Education

In *Kaplan v. Code Blue Billing & Coding, Inc.*, the Eleventh Circuit considered whether unpaid externs who were required to complete an externship as part of their medical coding and billing studies were actually employees.⁸⁰ The plaintiffs argued that the work was repetitive, they received little educational benefit, and that they conferred an economic benefit upon the employer.⁸¹ The court applied the factors in the Fact Sheet and concluded that the students: (a) received similar training to that offered by a school, (b) satisfied a requirement of graduation, thereby benefitting personally, (c) were supervised closely and did not displace other workers.⁸² The court further held that the employer did not receive an immediate advantage; indeed, its operations were impeded by the training.⁸³ Accordingly, a grant of summary judgment in favor of the employer was upheld.⁸⁴ The court was not required to decide if some advantage to the employer would have been sufficient to invoke the Act.⁸⁵

Two recent district court cases in the Southern District of

⁷⁹ See, e.g., *Tony and Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 301 (1985). Indeed, even before *Portland Terminal* was decided, the Supreme Court recognized that something might be done both for the benefit of a worker and for a company, and held that it was compensable if it was primarily for the benefit of the employer. See *Tennessee Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 599, 603 (1944).

⁸⁰ 504 F. App’x at 832–33.

⁸¹ *Id.* at 833.

⁸² *Id.* at 835.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Cooperative education programs (with arrangements like that in *Kaplan*) would seem to be the paradigmatic case for not considering students employees. Thus, fire protection technology students enrolled in a community college, who received part of their training and experience in a fire protection district, were not considered employees after application of the six-factor test. U.S. Dep’t of Labor Op. Letter, 1986 WL 1171130, at *1–2 (Mar. 27, 1986).

New York considered whether college student interns are within the coverage of the Act. One case, *Glatt v. Fox Searchlight Pictures Inc.*, concluded that the interns were really employees entitled to the protections of the Act.⁸⁶ The other case, *Wang v. Hearst Corp.* discussed above, determined that a trial would be necessary using a “totality of the circumstances” test.⁸⁷ Both district courts certified the issue of the proper test to the Second Circuit Court of Appeals,⁸⁸ which granted leave to consider both cases in a consolidated appeal.⁸⁹

In *Glatt*, the district court rejected application of the “primary beneficiary” test.⁹⁰ Instead, the court concluded that the trainee exception should be interpreted narrowly and the six factors in the Fact Sheet were entitled to deference as a reasonable interpretation by the agency charged with enforcing the statute.⁹¹

In pertinent part, the work involved internships in the accounting and production departments on the film *Black Swan*. The lead plaintiff worked in the accounting department for three months, later moving to the production department. Services that were performed while working with the accounting department included obtaining personnel documents, picking up paychecks, tracking and reconciling purchase orders and invoices, and obtaining signatures.⁹² Production department work by the lead plaintiff and another intern included drafting cover letters, organizing file cabinets, running errands, assembling furniture, making travel arrangements, taking lunch orders, removing trash, answering phones, and making deliveries.⁹³

Analyzing the factors suggested in the Fact Sheet, the court evaluated whether the benefits were to the intern resulting in academic or vocational training; building a résumé, gaining

⁸⁶ *Glatt v. Fox Searchlight Pictures Inc.*, 293 F.R.D. 516, 534 (S.D.N.Y. 2013).

⁸⁷ *Wang v. The Hearst Corp.*, 293 F.R.D. 489, 493–94 (S.D.N.Y. 2013).

⁸⁸ *Glatt v. Fox Searchlight Pictures, Inc.*, 1:11-cv-06784-WHP, 2013 WL 5405696 (S.D.N.Y. Sept. 17, 2013); *Wang v. Hearst Corp.*, 2013 WL 3326650, at *3 (S.D.N.Y. June 27, 2013).

⁸⁹ *Wang*, No. 13-2616 (2d Cir. Nov. 27, 2013); *Glatt*, No. 13-2467 (2d Cir. Nov. 27, 2013). As of this writing, briefing and argument have yet to occur in these appeals.

⁹⁰ *Glatt*, 293 F.R.D. at 531–32. Under the primary beneficiary test, the intern would not be considered an employee if the benefits to the intern outweighed those to the company.

⁹¹ *Id.* at 532.

⁹² *Id.* at 533.

⁹³ *Id.*

references, versus the incidental benefits of learning the operation of an office.⁹⁴ The court concluded that the internship was for the benefit of the employer, where the internship did not impede its operations, and resulted in an immediate advantage to the employer.⁹⁵ Had the interns not performed these tasks, the employer would have had to hire others; thus the interns displaced other workers.⁹⁶ The court highlighted the complete lack of training comparable to what one would receive in an academic or vocational program, as well as the comparable work received by employees and interns.⁹⁷

In contrast to *Glatt*, the district court in *Wang v. Hearst Corp.* used the “totality of the circumstances” test—including which party is the primary recipient of benefits—to determine whether an unpaid intern was an employee.⁹⁸ As previously discussed, the court carefully explained why the presence of an immediate advantage to the employer does not automatically create an employment relationship.⁹⁹ The court reasoned that the six factors in the Fact Sheet provided a framework for analysis based on *Skidmore* deference, but were not conclusive.¹⁰⁰ The court rejected “a winner-take-all test,” and because the employer had shown “some educational training, some benefit to individual interns, some supervision, and some impediment to [its] regular operations,” the court found that summary judgment was improper and that a jury should resolve the issue.¹⁰¹

Unpaid internships are common in media industries and a national media company may have hundreds of interns

⁹⁴ *Id.* at 534.

⁹⁵ *Id.*

⁹⁶ *Id.* at 533.

⁹⁷ *Id.* at 534.

⁹⁸ *Wang*, 293 F.R.D. at 493

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 493–94.

¹⁰¹ *Id.* at 494. To the extent a totality of the circumstances test applies and the six-factor test in the Fact Sheet is pertinent, summary judgment for either the employer or the intern may be difficult to obtain. For example, in *Griffiths v. Parker*, the plaintiff performed clerical duties for a lawyer for several months and thereafter claimed she was an employee. 2014 WL 2095205, at *5 (S.D. Fla. May 20, 2014). The lawyer contended that she was an unpaid intern seeking to become a paralegal, though she was not enrolled in any formal course of study. *Id.* The court determined that a trial was necessary to determine whether the training benefitted the trainee or the employer, whether the trainee displaced an employee given the office staffing history, and whether the parties contemplated whether the trainee would be uncompensated. *Id.* at *5–6.

working in a variety of departments. Under the FLSA, these cases may proceed as a collective action given a showing of a common unlawful policy, which should not be difficult to make given a national employer with an internship program.¹⁰² Of course, the certification procedure could multiply liability by allowing all interns subject to the allegedly unlawful policy to opt in.¹⁰³

In addition to federal and state unpaid wage claims, these cases also may involve claims of employment discrimination which may affect how the case is perceived by a jury (potential employer exploitation) and settlement value. By way of example, *Alladin v. Paramount Management, LLC*, involves an unpaid intern who performed secretarial tasks for two weeks and thereafter was paid \$300 per week regardless of hours worked.¹⁰⁴ She brought federal claims for unpaid wages and overtime as well as race discrimination.¹⁰⁵ Although the defendant admitted that the intern was an “employee,” the district court clarified why the two-week internship was employment.¹⁰⁶ The court considered the nature of the tasks performed, such as “sending packages, answering phones, making coffee, running errands, and performing other administrative tasks,” the absence of any training or benefit beyond that provided to employees, the immediate advantage to the employer, and the fact that the employer received the primary benefit.¹⁰⁷

Though the wages at stake may be relatively small, it is

¹⁰² See 29 U.S.C.A. § 216(b) (West 2014). Thus, conditional certification to proceed as a FLSA action was granted in *Glatt and Wang*. *Glatt*, 293 F.R.D. at 538–39; *Wang*, 2012 WL 2864524, at *1–3; see also *Grant v. Warner Music Group*, 2014 WL 1918602, at *8 (S.D.N.Y. May 13, 2014) (granting motion for court-authorized notice). In *Grant*, the plaintiffs claim that they and 3,000 other unpaid interns should have been paid given that they performed work similar to paid employees, received little or no supervision, and received neither academic credit nor compensation for at least part of the time. *Id.* at *2, *4–5. On the other hand, in *Fratlicelli v. MSG Holdings, L.P.*, the court determined that the action could not proceed as a collective action given that the interns worked in about 100 different departments with varying experiences. 2014 WL 1807105, at *2 (S.D.N.Y. May 7, 2014).

¹⁰³ In *O’Jeda v. Viacom, Inc.*, the district court left open the possibility that after discovery the defendant could seek to de-certify and dismiss the opt-in plaintiffs if not similarly situated. 2014 WL 1344604, at *2 (S.D.N.Y. April 4, 2014).

¹⁰⁴ *Alladin v. Paramount Management, LLC*, 2013 WL 4526002, at *1 (S.D.N.Y. Aug. 27, 2013).

¹⁰⁵ Race-discrimination is actionable under 42 U.S.C.A. § 1981 (West 2014).

¹⁰⁶ *Alladin*, 2013 WL 4526002, at *3.

¹⁰⁷ *Id.*

likely to be less expensive to settle a case than to litigate it. Thus, in *Bickerton v. Rose*, a class action claiming PBS host Charlie Rose and his production company utilized unpaid interns in violation of federal and state law, defendants reportedly settled for an estimated \$110,000, with interns receiving \$110 per week for up to ten weeks and the rest going to attorneys' fees.¹⁰⁸ Given the potential for collective action, an employer may want to consider an early offer of judgment (with attorney's fees and costs) to an FLSA plaintiff.¹⁰⁹ As a preventive measure, an employer may want to add an arbitration provision to the internship agreement so as to minimize downside risk of a collective action and the expense of litigation.¹¹⁰

IV. ARE UNPAID INTERNSHIPS ETHICAL?

As noted, an internship can offer an excellent opportunity to gain exposure to a profession and work with outstanding individuals. It is a popular option among students. At the same time, there are obvious concerns about exploitation and access. Concerning the former, in the absence of monetary compensation, an intern should receive useful training that will supplement formal education. For example, many students receive college credit for internships, paid or unpaid.

¹⁰⁸ *Bickerton v. Rose*, No. 650780 (N.Y. Sup. Ct., Mar. 14, 2012); Amanda Becker, *Charlie Rose Settles with Unpaid Interns as Lawsuits Spread*, REUTERS (July 1, 2013), <http://www.reuters.com/article/2013/07/01/entertainment-us-interns-lawsuit-charlie-idUSBRE9601E820130701>.

¹⁰⁹ Fed. R. Civ. P. 68. In *Genesis Healthcare*, 133 S. Ct. at 1528–29, the Court did not decide whether an unaccepted Rule 68 offer of judgment that fully satisfies a plaintiff's FLSA claims can moot the individual claim when collective action allegations remain. It did hold that *if* the individual FLSA claim is moot and no other plaintiffs have opted in, the action is moot notwithstanding collective action allegations. *Id.* at 1529. In those circumstances, a FLSA plaintiff has no personal interest in representing others. *Id.*

¹¹⁰ There is a strong federal policy in favor of arbitration. See 9 U.S.C. § 2; *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308–09 (2013). Courts are expected to enforce arbitration agreements consistent with their terms. *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Statutory claims are subject to arbitration absent a contrary legislative directive. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). Courts have repeatedly held that an enforceable arbitration agreement may cover both individual and collective FLSA claims. See *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1334–37 (11th Cir. 2014); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 295–99 (2d Cir. 2013); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 297–300 (5th Cir. 2004); *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319–20 (9th Cir. 1996); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002).

However, there is still a fairness aspect. Asking someone to do all of the work of a paid employee (but without the pay) for any significant length of time takes undue advantage of the disparity in bargaining power between the internship holder and seeker. This proves too much, no matter how beneficial the training or career opportunities.¹¹¹

To provide equal access to internship opportunities, unpaid internships should be announced broadly. Further, schools should verify that employers have and abide by clear anti-discrimination policies that govern their selection process and supervision of interns, particularly where applicability of anti-discrimination statutes is an open question given lack of remuneration.

Many students simply may not be able to afford to complete an unpaid internship or pay for extra college credits. However, this concern accompanies many extracurricular activities (study abroad comes to mind) and does not seem a valid reason to discourage unpaid internships.¹¹²

V. BETTER INTERNSHIPS AND AVOIDING EMPLOYER LIABILITY

Based upon the cases and the six factors in the Fact Sheet, employers are well advised to consider whether an arrangement constitutes an employment relationship and to maintain adequate record keeping to verify their good faith efforts. Because the protections of the Act cannot be waived, an employer should consider the potential exposure from a claim if the internship was in fact subject to the Act.

If an employer has many unpaid internship positions, the possibility of a collective action and subsequent liability for attorney's fees magnifies this concern. While the primary benefit test seems more consistent with "economic reality" and would encompass the considerable intangible benefits often

¹¹¹ This seems particularly true when the internship is subsequent to graduation. See U.S. Dep't of Labor Op. Letter, 1988 WL 1534561, at *1-2 (Jan. 28, 1988) (noting that an after-graduation internship would not meet the six-factor test); see also Paul Campos, *A Judge Searches for Free Labor*, SALON (Nov. 21, 2012), http://www.salon.com/2012/11/21/a_judge_searches_for_free_labor/ (criticizing offer of one-year, post-graduate gratuitous service appointment).

¹¹² Cf. *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1028 (10th Cir. 1993) ("Nor is it dispositive that the trainees made financial sacrifices in order to attend the academy. A vocational or associate degree program in fire science would have entailed similar burdens.")

gained from an internship,¹¹³ the six factors contained in the Fact Sheet are still important, particularly if a court insists on full compliance with each factor.

Given the uncertainty, an employer should also document the decision-making process to establish its good faith effort to comply with the law as understood. This includes cataloguing the transferable skills the intern should learn¹¹⁴ and supporting evidence that placing an intern in the organization is not a means to reduce hours of existing staff or avoid hiring additional employees. The training program must be more than the work itself, particularly where the provider will obtain an economic advantage. Merely imparting basic job skills, such as attendance, sustained effort, and the like will not be enough no matter how laudable the program.¹¹⁵

Moreover, merely performing “entry level” routine tasks will not suffice.¹¹⁶ Special precaution should be taken when the provider and the intern have a social relationship apart from the internship.¹¹⁷

¹¹³ The primary benefit test better recognizes that relationships often involve mutual benefits and rarely are internships completely one-sided. It also promotes internships; a test that is too complex and difficult to satisfy will discourage most employers who might otherwise be willing to explore an unpaid internship.

¹¹⁴ The Department of Labor has indicated:

Where educational or training programs are designed to provide students with professional experience in the furtherance of their education and the training is academically oriented for the benefit of the students, it is our position that the students will not be considered employees of the institution to which they are assigned, provided the six criteria referred to above are met. For example, where certain work activities are performed by students that are but an extension of their academic programs, we would not assert that an employer-employee relationship exists for the purposes of the FLSA. In situations where students receive college credits applicable toward graduation when they volunteer to perform internships under a college program, and the program involves the students in real life situations and provides the students with educational experiences unobtainable in a classroom setting, we do not believe that an employment relationship exists between the students and the facility providing the instruction. Where there is no employment relationship under the FLSA, the minimum wage and overtime pay provisions of the FLSA have no application U.S. Dep’t of Labor Op. Letter, 1996 WL 1031777, at *1–2 (May 8, 1996); U.S. Dep’t of Labor Op. Letter, 1995 WL 1032496, at *1–2 (July 11, 1995). Indicating what work activities fulfill the academic objectives and what experiences are not available in a classroom would seem paramount.

¹¹⁵ See *Archie v. Grand Cent. P’ship*, 997 F. Supp. 504, 533 (S.D.N.Y. 1998).

¹¹⁶ See *Okoro v. Pyramid 4 Aegis*, 2012 WL 1410025, at *10 (E.D. Wis. April 23, 2012).

¹¹⁷ See *id.* (finding a personal relationship with the employer is no bar to holding that the plaintiff was an employee); *Griffiths v. Parker*, 2014 WL 2095205, at *1, *5 (May 20, 2014) (same; defendant claimed that he accommodated plaintiff’s boyfriend in allowing her to help out in defendant’s office).

The design of an unpaid internship should make it clear that there is a benefit to the student through learning transferable skills, not just general office procedure. This can be accomplished through an academic component for college credit. The internship could be structured around a college course (perhaps dealing with internships) rather than the workplace. Ideally, the internship incorporates course objectives, measurable outcomes, and student deliverables. The learning component may be demonstrated by staff supervision of the intern and meaningful work.¹¹⁸

Merely learning about the business is not enough.¹¹⁹ Execution is also important. For example, in *Marshall v. Baptist Hospital, Inc.*, the court affirmed a finding that a hospital was the primary beneficiary of a student clinical arrangement in no small part due to a deficient training program that shortchanged the students.¹²⁰ Given the requirement of an educational component, care must be taken in internships of limited duration, for example, four weeks as opposed to six months, to work closely with the coordinating academic institution.

Useful unpaid internships require a commitment upon the part of the employer to supervise and work with the interns, thereby impeding the operations of the employer. It requires a time commitment, i.e., the intern “shadowing” a staff member. However, the suggestion that interns cannot work independently on the same projects as the paid staff overreaches.¹²¹ After all, the essential subject matter of the internship is exposure to work customarily done in the profession.

Once the structure of the internship is determined, the employer should commit to a fixed duration. It would also be useful to document that the student’s decision to accept an unpaid internship was voluntary and consensual.¹²² In addition, it is important to clarify that the internship includes

¹¹⁸ See *Griffiths*, 2014 WL 2095205, at *3–4

¹¹⁹ See *Wirtz v. Wardlaw*, 339 F.2d 785, 787 (4th Cir. 1964) (holding employees were subject to the Act even though employer claimed they were learning the business).

¹²⁰ 668 F.2d 234, 236 (6th Cir. 1981).

¹²¹ See *Yamada*, *supra* note 66, at 233 (noting that the six-factor test “draws an unrealistic line between ‘training’ and ‘work’”).

¹²² Though waiver of FLSA protection is not a complete defense to possible liability.

no guarantee of a job afterward. Finally, if employers are not in a position to create an internship whose primary benefit is to the intern, and the potential for liability is too great, employers should wisely pass on offering unpaid internships.

VI. CONCLUSION

Internships can provide students with invaluable practical experience and skills, and provide employers with the opportunity to give back. When schools and employers collaborate effectively, they can create successful internships even under the *Portland Terminal* factors.

Despite these advantages and the popularity of internships with students and schools, employers must carefully consider whether the unpaid internships comply with the Act. If not, employers face lurking liability under the FLSA for employees engaged in interstate commerce, specifically minimum wage, overtime, and record-keeping requirements. Because the provisions of the Act cannot be waived, an employer faces considerable liability (and a potential collective action and liability for attorney's fees) from an erroneous interpretation of the Act.

The majority of federal circuit courts favor a "totality of the circumstances" test that considers which party receives the primary benefit from the internship, and hold that the Act is applicable only if the employer receives the primary benefit. Further, the majority do not find the fact that the employer receives an immediate benefit to be dispositive.¹²³

Though we argue Fact Sheet #71 should receive little deference, the factors identified by Department of Labor are important if only because they guide the courts' decisions. Though the factors are not dispositive; they provide a framework, for the majority of courts, for analyzing the primary benefit question.

Even assuming that unpaid internships fall within a safe harbor with respect to the Act, there are concerns about exploitation of free labor and uneven access to internship opportunities. These concerns can be remedied by structuring an internship to provide a valid educational benefit over a

¹²³ See, e.g., *Reich v. Parker Fire Protection Dist.*, 992 F.2d 1023, 1026–1027 (10th Cir. 1993).

limited period, and by taking care to broadly publicize the availability of the opportunity. Further, schools must ensure that non-discrimination policies are followed both in the selection process and subsequent supervision by employers.

Internships can provide invaluable practical experience and skills. By collaborating effectively and being mindful to the *Portland Terminal* factors schools and employers can continue to create and administer successful internships programs.