

Whaling on *Walling*: A Uniform Approach to Determining Whether Interns Are “Employees” Under the Fair Labor Standards Act

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ABSTRACT: This Note argues that, of the tests currently used by circuit courts to determine who constitutes an “employee” under the Fair Labor Standards Act, the Supreme Court should clarify that the totality of the circumstances test is most consistent with its decision in Walling v. Portland Terminal Co. This issue calls for clarity in light of the influx of litigation surrounding unpaid internships—most prominently, the recent decision in Glatt v. Fox Searchlight Pictures Inc. With this growth in litigation, employers and interns alike deserve a uniform approach in determining “employee” status under the Fair Labor Standards Act.

I. INTRODUCTION.....	752
II. THE FAIR LABOR STANDARDS ACT: WHO CONSTITUTES AN “EMPLOYEE”?	753
A. WALLING’S TRAINEE EXCEPTION.....	754
B. INTERPRETATIONS IN THE WAKE OF WALLING	756
1. Primary Beneficiary Test.....	756
2. Totality of the Circumstances Test.....	758
III. THE IMPENDING QUESTION: ARE INTERNS “EMPLOYEES”?	762
A. THE GLATT DECISION.....	762
B. CONSEQUENCES OF GLATT.....	766

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IV. THE TOTALITY OF THE CIRCUMSTANCES TEST AS THE UNIFORM APPROACH FOR DETERMINING WHETHER INTERNS ARE “EMPLOYEES”	768
A. TOTALITY OF THE CIRCUMSTANCES’ CONSISTENCY WITH WALLING	768
B. BENEFITS OF A UNIFORM TOTALITY OF THE CIRCUMSTANCES TEST.....	771
V. CONCLUSION	773

I. INTRODUCTION

Under the Fair Labor Standards Act (“FLSA”), employees are guaranteed a minimum wage for their work.¹ However, the FLSA provides virtually no guidance for determining who constitutes an employee entitled to minimum wage compensation.² The United States Supreme Court shed light on the FLSA’s definition of “employee” only once, in *Walling v. Portland Terminal Co.*, in 1947.³ Since then, various circuit courts have interpreted the *Walling* opinion and the trainee exception that it created to the FLSA.⁴ These attempts have produced varying and inconsistent tests by which the courts determine whether a worker is an “employee” or a trainee.⁵

Recently, the focus of these cases has shifted to the ever-popular unpaid internship.⁶ Internships provide invaluable experience for students entering the workforce.⁷ Further, it has become increasingly difficult for students to gain post-graduation employment in today’s job market without internship experience in a given industry.⁸ However, with circuit courts using varying tests to determine employee status,⁹ it has proven difficult for employers to

1. 29 U.S.C. § 206(a)(1)–(2) (2013).

2. See *infra* notes 22–23 and accompanying text.

3. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

4. See, e.g., *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 Fed. App’x 831, 834 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 522–23 (6th Cir. 2011); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1025–26 (10th Cir. 1993); *McLaughlin v. Ensley*, 877 F.2d 1207, 1208–11 (4th Cir. 1989); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271 (5th Cir. 1982).

5. See *infra* Part II.B.

6. See Ross Perlin, *Unpaid Interns: Silent No More*, N.Y. TIMES (July 20, 2013), <http://www.nytimes.com/2013/07/21/jobs/unpaid-interns-silent-no-more.html> (stating that over 15 unpaid internship lawsuits have been filed since summer of 2013).

7. See Alison Green, *Why Unpaid Internships Should Be Legal*, U.S. NEWS (July 1, 2013, 8:55 AM), <http://money.usnews.com/money/blogs/outside-voices-careers/2013/07/01/why-unpaid-internships-should-be-legal>.

8. See *id.*

9. See *infra* Part II.B.

know whether their interns are covered by the FLSA, and consequently, whether they must receive pay in conformance with the FLSA's minimum wage requirement.¹⁰ As unpaid internship litigation grows,¹¹ employers may become reluctant to offer internship opportunities for fear of lawsuits and liability for minimum wage back pay.¹² As a result, students seeking these opportunities, and subsequent employment, may be hard-pressed to find these much needed internships.¹³

This Note argues that it is critical for both employers and interns to have a clarifying, uniform test by which to determine the employee versus trainee distinction created in *Walling*. Part II examines *Walling's* trainee exception and the factors the Court used in creating it. Part II further analyzes various circuit courts' interpretations of these factors and their attempts to distinguish between employees and trainees. Part III then analyzes the recent and most prominent unpaid internship case, *Glatt v. Fox Searchlight Pictures Inc.*,¹⁴ and proceeds to discuss the problems flowing from the inconsistent standards used to determine who constitutes an employee under the FLSA. Part IV finally argues for a uniform, totality of the circumstances approach, as this approach is most consistent with the Supreme Court's *Walling* decision and will have the most beneficial effects on both employers and interns.

II. THE FAIR LABOR STANDARDS ACT: WHO CONSTITUTES AN "EMPLOYEE"?

The FLSA requires all employers to pay their employees a minimum wage.¹⁵ This minimum wage requirement applies to every employment relationship where the worker falls under the FLSA's definition of "employee."¹⁶ Once it is established that an employment relationship exists between an employer and employee,¹⁷ the FLSA's requirements apply to that relationship and are enforced by the Department of Labor ("DOL").¹⁸ The DOL enforces the FLSA by conducting workplace investigations to ensure that employers are complying with its requirements.¹⁹ Through an investigation, if an employer is found to be in violation of the FLSA, the DOL "may recommend changes in employment practices to bring an employer into

10. See *infra* Part III.B.

11. See *infra* Part III.B.

12. See *infra* Part III.B.

13. See *infra* Part III.B.

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

15. 29 U.S.C. § 206(a)(1)–(2) (2013).

16. *Id.* § 203(e)(1)–(5).

17. The issue of construing the FLSA in order to determine whether a person is an "employee" is taken up in great detail later in this Part.

18. See *Enforcement Under the Fair Labor Standards Act*, U.S. DEP'T OF LABOR, <http://www.dol.gov/claws/esa/flsa/screen74.asp> (last visited Nov. 12, 2014). The DOL has a specific Wage and Hour Division that "enforces the FLSA for employees." *Id.*

19. *Id.*

compliance.”²⁰ Beyond having to implement these changes, a violating employer may be required to pay back wages to employees as compensation for the work they performed during the relevant period.²¹

Since an employer is subject to the DOL’s enforcement of the FLSA, and since the obligation to pay minimum wage hinges on whether a worker falls under the FLSA’s definition of “employee,” it is essential that an employer knows whether it is truly “employing” an “employee” under the FLSA. However, as this Note addresses, the statutory definition of “employee” is of little help in determining whether or not one is, in fact, an employee under the FLSA. The FLSA simply provides: an “employee means any individual employed by an employer.”²² As the seminal case *Walling v. Portland Terminal Co.* illustrates, this circular definition is of little interpretive assistance.²³

A. WALLING’S TRAINEE EXCEPTION

In *Walling*, the plaintiff brought suit against the railroad company for which he worked in a training program for no pay.²⁴ The defendant company asserted that, as a participant in its training program, the plaintiff was not an employee covered by the FLSA, and therefore, was not entitled to minimum wage.²⁵ The plaintiff’s work consisted of training in order to learn the trade of working on the railroad, with the hope of subsequent employment in the industry after the training period.²⁶ The railroad consistently ran its training program without pay, and the workers never expected compensation under the FLSA or otherwise.²⁷ Despite the mutual understanding that there would be no pay for work performed during the training period, the plaintiff filed suit claiming back wages as an employee.²⁸ In determining whether or not

20. *Id.*

21. *Id.* This investigative process is addressed administratively through the DOL’s Wage and Hour Division; however, if a violating employer continues to fail to comply with the FLSA, a lawsuit may be brought by the employee, or the Secretary of Labor on behalf of the employee, in order to recover the back wages. *See id.*

22. 29 U.S.C. § 203(e)(1) (2013) (internal quotation marks omitted). Furthermore, the FLSA defines “employ” to mean “to suffer or permit to work.” *Id.* § 203(g). It is these ambiguous and circular definitions that give rise to difficulties in determining whether or not one is an “employee” being “employed” by an “employer.”

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

24. *Id.* at 149–50.

25. *See id.* (noting that prospective yard brakemen were hired into an unpaid training program before being able to work as paid employees).

26. *Id.* The worker began by learning through observation and progressed to performing actual railroad work under close supervision. *Id.* This training was an absolute requisite to being able to obtain future employment in the railroad industry, and candidates “for such jobs [were] never accepted until [they] had [completed] this preliminary training.” *Id.* at 149.

27. *Id.* at 150.

28. *See id.* at 148, 150.

these wages were due, the Supreme Court addressed the critical question of who constitutes an “employee” under the FLSA.²⁹

The Court ultimately held the plaintiff to be a trainee of the company.³⁰ As such, he did not fall within the definition of “employee,” and therefore, was not entitled to minimum wage compensation.³¹ In so holding, the Court noted several factors that played a role in its construction of the essential differences between employees and trainees.³² First, the Court noted the importance of the training program in the trainee’s obtainment of subsequent employment in the industry.³³ Second, it relied heavily upon the fact that the trainee’s work performance was closely supervised, and that most of the actual work was done by regular railroad employees.³⁴ Given this fact, the trainee’s work did not “displace” any of the railroad company’s regular employees.³⁵ Along the same lines, the Court noted that the trainee’s “work [did] not expedite the company business, but may [have] . . . actually impede[d] . . . it.”³⁶ The Court also relied on the trainee’s lack of a guaranteed job following completion of the training program, as well as his lack of expectation of compensation.³⁷ Finally, the training program’s educational and instructional benefit to the trainee was also relevant.³⁸ In total, the Court found six considerations relevant in identifying the trainee exception in *Walling*: (1) the program’s importance for the worker’s vocational training in the industry; (2) the close supervision of the worker and his lack of displacement of regular employees; (3) the worker’s impediment of the company’s business; (4) whether the worker was guaranteed post-training employment; (5) the worker’s expectation of compensation; and (6) the worker’s benefits gained from the training program. Based upon all of these observations, the Court determined that the railroad received “no immediate

29. *Id.* at 150. The Court simply framed the issue by stating that the worker unquestionably performed the type of work covered by the FLSA; therefore, if he qualified as an “employee” under the statute, his “employment [was] governed by [its] minimum wage provisions.” *Id.* The Court recognized the importance of this qualification “to the administration of the Act.” *Id.* at 149.

30. *Id.* at 153.

31. *Id.*

32. *Id.* at 149–53.

33. *Id.* at 149–50. However, this subsequent employment with the railroad was not guaranteed based upon the completion of the training program. *Id.* at 150. After completion, the workers were certified and put into a pool from which the railroad could hire employees when necessary. *Id.*

34. *Id.* at 149–50.

35. *Id.*

36. *Id.* at 150.

37. *Id.*

38. *Id.* at 152–53.

advantage”³⁹ from the trainee’s work, and therefore, concluded that he was not an employee within the meaning of the FLSA.⁴⁰

In construing the FLSA’s definition of “employee,” the Court looked to the legislative intent in enacting the statute.⁴¹ The Court noted that its purpose “was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”⁴² The Court elaborated by saying that it would not interpret the statute so as to encompass working relationships where the person’s work serves *only* to his or her own advantage while on the premises of another who provides instruction, but “receives no ‘immediate advantage’ from [the] work done.”⁴³ With this holding, the Court created what has come to be known as the “trainee exception” to the FLSA’s minimum wage requirement.

B. INTERPRETATIONS IN THE WAKE OF WALLING

Since the *Walling* decision in 1947, numerous circuit courts have addressed whether various working relationships give rise to employee status under the FLSA.⁴⁴ In light of *Walling*, employers face the question of whether their workers fall under the limited trainee exception, and are, therefore, exempt from the FLSA’s minimum wage requirement. When circuit courts have been faced with the employee versus trainee distinction, they have applied and adopted varying tests based upon the *Walling* decision.⁴⁵

1. Primary Beneficiary Test

The Fourth Circuit Court applies what is known as the primary beneficiary test.⁴⁶ The court crafted the test based upon a cursory analysis of *Walling*,⁴⁷ concluding that a worker could not be an employee under the FLSA where “the principal purpose of the [work] was to benefit the person in the

39. *Id.* at 153 (internal quotation marks omitted).

40. *Id.*

41. *Id.* at 152.

42. *Id.*

43. *Id.* at 152–53.

44. See, e.g., *Kaplan v. Code Blue Billing & Coding, Inc.*, 504 F. App’x 831 (11th Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013); *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982); *Marshall v. Regis Educ. Corp.*, 666 F.2d 1324 (10th Cir. 1981).

45. 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, 305–06 (2011).

46. *McLaughlin*, 877 F.2d at 1209 (“[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.”).

47. The court did not rely on all of the factors articulated in *Walling*, due to the circuit’s “clear precedent” from which it believed the “proper analysis derive[d].” *Id.* at 1209 n.2.

employee status.”⁴⁸ The court applied this test in a case involving workers who performed various “duties for [a snack distribution company] during a weeklong orientation period.”⁴⁹ During this period, the workers rode alongside experienced routemen and “loaded and unloaded the delivery truck, restocked stores with [defendant’s] product, were [instructed] on how to drive the trucks, . . . were taught basic snack food vending machine maintenance, and occasionally helped . . . prepar[e] orders of goods.”⁵⁰

In applying the primary beneficiary test to the case before it, the court noted that the plaintiffs worked in a very limited learning environment and received little instruction.⁵¹ In addition, the workers greatly advantaged the employer by helping regular employees perform their standard job duties.⁵² The court concluded that the employer received more advantage than the workers since they performed job duties for free while receiving little useful job training.⁵³ Thus, the employer was the primary beneficiary of the relationship, and the workers qualified as employees entitled to minimum wage.⁵⁴

The Sixth Circuit has similarly utilized the primary beneficiary test, stating that “[w]hile the Supreme Court[’s] [*Walling* decision] found various other facets of the [employment] relationship significant, . . . its decision rested upon whether the trainees received the primary benefit of the work they performed.”⁵⁵ In a case involving a boarding school and its students, the court found that the students received both tangible and intangible benefits, including hands-on training similar to that offered in trade and vocational schools, education gained through academic courses, and leadership and responsibility values.⁵⁶ On the other hand, the school received benefits from the students’ productive work, such as car collision repair; however, this work did “not displace compensated workers, and instructors . . . spen[t] extra time supervising the students at the expense of performing [their own] productive work.”⁵⁷ In balancing these relative benefits, the court concluded that the

48. *Id.* at 1209 (quoting *Isaacson v. Penn Cmty. Servs., Inc.*, 450 F.2d 1306, 1308 (4th Cir. 1971)) (internal quotation marks omitted). This language is quoted from the circuit’s “clear precedent” referenced by the court. *See supra* note 47. The court appears to have equated *Walling*’s statement that the employer receives *no* immediate benefit with the principal that the worker receives the *primary* benefit. *See McLaughlin*, 877 F.2d at 1209.

49. *McLaughlin*, 877 F.2d at 1208.

50. *Id.*

51. *Id.* at 1210.

52. *Id.*

53. *Id.* (“[T]he skills learned were either so specific to the [defendant’s own business] or so general to be of practically no transferable usefulness.”).

54. *Id.*

55. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 526 (6th Cir. 2011).

56. *Id.* at 531.

57. *Id.* at 530–31 (citation omitted).

students received the primary benefit,⁵⁸ and thus, were trainees rather than employees.⁵⁹

2. Totality of the Circumstances Test

In contrast to the primary beneficiary test, where courts weigh the relative benefits gained by each party, other courts apply a totality of the circumstances test.⁶⁰ This approach considers all of the factors iterated by the Supreme Court in *Walling*,⁶¹ and balances them to ascertain the totality of the circumstances surrounding the working relationship.⁶²

The DOL endorses a strict version of this test. The DOL promulgated *Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act* (“*Fact Sheet #71*”) in 2010, which is intended to aid employers in determining whether or not unpaid workers are employees under the FLSA.⁶³ *Fact Sheet #71* articulates

58. *Id.* at 531–32.

59. In its discussion of the primary beneficiary test, the Sixth Circuit read one of its older cases as utilizing the same approach. *Id.* at 526–28 (citing *Marshall v. Baptist Hosp., Inc.*, 668 F.2d 234 (6th Cir. 1981)). That case involved a hospital’s student training program. *Id.* at 527–28. The court characterized the students as gaining little educational training, while instead, performing regular hospital employees’ duties without supervision or instruction. *Id.* The court elaborated by noting that perhaps if the training program had been “educationally sound,” the primary benefit may have gone to the students, but since they were “shortchanged educationally,” the hospital was the primary beneficiary. *Id.* at 528. This argument will be explored more thoroughly in Part IV. See *infra* notes 160–64, 178–80 and accompanying text.

In addition to the Fourth and Sixth Circuits explicitly adopting the primary beneficiary rationale, the Fifth Circuit has somewhat implicitly utilized it as well. See *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271–72 (5th Cir. 1982). This court applies a three-pronged approach consisting of: “(1) whether the trainee displaces regular employees; (2) whether the trainee works solely for his or her own benefit; and (3) whether the company derives any immediate benefit from the trainee’s work.” *Id.* (emphasis omitted) (citations omitted). In addressing the second prong, the court noted that if the worker worked *solely* for his or her own benefit, then the company could benefit in no way other than benevolence and altruism. See *id.* at 272. Since such a literal lack of benefit on the part of the company is both unlikely and unrealistic, the court utilized the second prong to weigh the relative benefits to each party. See *id.* In so doing, the court employed a modified primary beneficiary test, but also considered the displacement and immediate advantage factors. See *id.*; Bennett, *supra* note 45, at 305–06. While not as explicit in its application as the Fourth and Sixth Circuits, the Fifth Circuit, at least in part, gives some credence to the primary beneficiary test.

60. See *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1029 (10th Cir. 1993) (stating that the relevant “inquiry [is] into the totality of the circumstances”); Bennett, *supra* note 45, at 305 (explaining that some federal courts apply the DOL’s six-factor test “in a totality of the circumstances analysis”).

61. See *supra* text accompanying notes 32–40.

62. *Reich*, 992 F.2d at 1029.

63. WAGE & HOUR DIV., U.S. DEP’T OF LABOR, FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> [hereinafter FACT SHEET #71].

the DOL's test for determining the employee versus trainee distinction.⁶⁴ The test lays out six factors, drawn directly from *Walling*, that define a trainee:

- (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.⁶⁵

The DOL advocates that these factors are applied in an “all-or-nothing” approach whereby each factor must be met in order for the worker to be considered a trainee by the DOL.⁶⁶ Therefore, where all of these factors are met, the worker falls outside of the FLSA's “employee” definition and is not entitled to minimum wage.⁶⁷ The DOL's strict all-or-nothing approach has not

64. The DOL has little control over how employers actually conduct their workplace policies without the aforementioned investigation and subsequent lawsuit in order to bring the employer into compliance. Therefore, this information disseminated by the DOL merely provides general guidelines by which employers guide their practices. *See supra* notes 19–21 and accompanying text.

65. FACT SHEET #71, *supra* note 63. *Fact Sheet #71* is specifically targeted at interns; however, it is virtually identical to a prior test promulgated by the DOL that articulates the trainee exception in general. The prior test reads:

- (1) The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school; (2) The training is for the benefit of the trainees or students; (3) The trainees or students do not displace regular employees, but work under close supervision; (4) The employer that provides the training receives no immediate advantage from the activities of the trainees or students and, on occasion, his operations may even be impeded; (5) The trainees or students are not necessarily entitled to a job at the conclusion of the training period; and (6) The employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

Trainees, U.S. DEP'T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/docs/trainees.asp> (last visited Nov. 12, 2014).

66. *See* FACT SHEET #71, *supra* note 63. *Fact Sheet #71* provides that all six of the factors must be met in order for an intern to *not* be considered an “employee” under the FLSA. *Id.*; *see also* *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 523–26 (6th Cir. 2011) (stating the Secretary of Labor's argument that the DOL's all-or-nothing approach is the appropriate test).

67. *See* FACT SHEET #71, *supra* note 63.

been adopted by any circuit courts,⁶⁸ although courts explicitly utilize the same six factors in applying the totality of the circumstances test.⁶⁹

The Tenth Circuit has adopted the more flexible⁷⁰ totality test based upon its interpretation of *Walling*,⁷¹ and in doing so, considers all of the foregoing factors.⁷² According to the Tenth Circuit, all of the six factors are relevant,⁷³ but no single factor is dispositive.⁷⁴

In its assessment of the totality of the circumstances, the court analyzed a case in which a firefighting academy trained incoming, potential firefighters.⁷⁵ Applying the first factor, the court recognized the vocational nature of the training program and the fungible skills that it taught the workers.⁷⁶ Next, the court acknowledged that some courts weigh “the relative benefits to each party”⁷⁷ in order to determine whether the training benefitted the workers⁷⁸ and whether the employer received any immediate advantage.⁷⁹ Although the court found the party receiving the primary benefit of the work arrangement was relevant, it examined that factor as a single, non-dispositive component of the broader totality test. In analyzing this factor, the court looked to the workers’ acquisition of fungible skills within the industry and the necessity of the training program in obtaining employment with the fire department.⁸⁰ The court compared these benefits to those of the employer, which included the creation of “a pool of prospective employees.”⁸¹ In weighing these relative benefits, the court determined that the training program benefitted the workers, while conferring no immediate advantage to

68. See, e.g., *Solis*, 642 F.3d at 525 (rejecting the all-or-nothing approach as “overly rigid”); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026 (10th Cir. 1993).

69. See *Reich*, 992 F.2d at 1026–29; *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 531 (S.D.N.Y. 2013).

70. See *Reich*, 992 F.2d at 1025–26. In applying the factors, the court expressly rejected the DOL’s “all or nothing” approach. *Id.* at 1026–27. The court stated that nothing in *Walling* supported such a strict application of the DOL factors and that they were “meant as an assessment of the totality of the circumstances.” *Id.* at 1027.

71. As discussed earlier in this Part, the DOL’s six factors are lifted directly from the Supreme Court’s *Walling* analysis. See *supra* note 65 and accompanying text.

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

73. See *id.* at 1027–28.

74. See *id.* at 1029 (stating that a “single factor cannot carry the entire weight of [the analysis]”).

75. *Id.* at 1027–28.

76. *Id.* at 1028.

77. *Id.* While this language smacks of the primary beneficiary test, the court merely called such an inquiry “both permissible and helpful.” *Id.*

78. Application of the second DOL factor. See FACT SHEET #71, *supra* note 63.

79. Application of the fourth DOL factor. See *id.*

80. Application of the fourth DOL factor. See *id.*

81. *Reich*, 992 F.2d at 1028. While recognizing a pool of prospective employees as an ultimate advantage, the court noted that such a pool “is the intended result of any employer[’s] . . . training program.” *Id.*

the employer, thereby satisfying both the second and fourth factors of the totality test.⁸² Moreover, the court rejected the contention that the workers performed productive work for the fire academy.⁸³ In doing so, it noted that their work was supervised and did not displace any regular employees.⁸⁴ Finally, the court turned to the last two factors and found that the workers expected to be hired upon completing their training,⁸⁵ and that they never contemplated compensation⁸⁶ until the time they were hired.⁸⁷

Although the court applied the DOL's six factors derived from *Walling*, it declined to adopt the DOL's all-or-nothing approach.⁸⁸ Rather, it balanced all of the factors, engaging in a totality of the circumstances inquiry.⁸⁹ Therefore, even though one of the factors was not met⁹⁰—that being the fifth factor—the overall circumstances were such that the workers were not employees under the FLSA.⁹¹

It is clear that the circuits disagree on how to interpret the *Walling* employee versus trainee analysis. It is equally clear that *Walling* is the sole authority controlling this difficult distinction,⁹² and is therefore the framework with which to resolve that question. Because of the variance among courts applying the *Walling* factors, existing case law is not particularly helpful to employers. Employers seeking to determine whether their workers are exempt from the FLSA's minimum wage requirement have no clear test on which to rely.

82. *Id.*

83. *Id.* at 1028–29.

84. Application of the third DOL factor. *Id.* The work done did not provide an advantage to the employer even though the workers performed paramedical services at an accident because their presence did nothing to alleviate the need of regular employees at the scene. *Id.*

85. Application of the fifth DOL factor. *Id.*

86. Application of the sixth DOL factor. *Id.* at 1029.

87. *Id.*

88. *See id.* at 1026–27.

89. *See id.* at 1029.

90. *See id.* at 1025–26. The court found that the workers had every reasonable expectation of securing employment with the fire department upon successful completion of the training program, thereby failing the fifth factor. *Id.* at 1029.

91. *Id.*

92. *See* Natalie Bacon, Note, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71"*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 73 (2011) ("It is widely accepted and unquestioned that [*Walling*] is the case [guiding this analysis].").

III. THE IMPENDING QUESTION: ARE INTERNS “EMPLOYEES”?

Although courts have addressed the issue of who constitutes an employee for years,⁹³ and under numerous fact patterns,⁹⁴ a new group of workers is forcing courts to address this issue in a new context: unpaid interns.⁹⁵ Currently, there is an influx of lawsuits⁹⁶ where interns—typically college students—work for free in order to gain invaluable industry experience,⁹⁷ and then subsequently sue their employers under the FLSA on the theory that they were employees entitled to minimum wage.⁹⁸ This increase in unpaid internship litigation has been prompted by a high-profile case from the summer of 2013: *Glatt v. Fox Searchlight Pictures, Inc.*⁹⁹

A. THE GLATT DECISION

In *Glatt*, the plaintiffs filed a class action lawsuit against the movie production company, Fox Searchlight Pictures, Inc. and its parent company, Fox Entertainment Group, Inc.¹⁰⁰ The plaintiffs sued under both New York state labor law and the FLSA, claiming that they were employees within the meaning of both statutes.¹⁰¹ The plaintiffs were unpaid interns who worked in the production office for the film *Black Swan*.¹⁰² As interns for the production

93. See *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947). This difficult question has been around for well over 60 years.

94. From the railroad trainees in *Walling*, to the boarding school students in *Solis*, there seems to be no limit to the types of workers who sue on the “employee” theory under the FLSA. See *id.*; *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011).

95. See Jack L. Newhouse, *Unpaid Intern Lawsuits May Reduce Job Opportunities*, FORBES (Sept. 24, 2013, 6:28 AM), <http://www.forbes.com/sites/deborahljacobs/2013/09/24/unpaid-intern-lawsuits-may-reduce-job-opportunities/> (“During the summer of 2013 . . . unpaid internships became a hotbed for class action lawsuits.”).

96. See *id.* (listing various companies that are the targets of these lawsuits); see *infra* notes 137, 139–40 and accompanying text.

97. See Jordan Weissmann, *No, the Government Should Not Give Student Loans for Unpaid Internships*, ATLANTIC (Nov. 1, 2013, 5:00 PM), <http://www.theatlantic.com/business/archive/2013/11/no-the-government-should-not-give-student-loans-for-unpaid-internships/281086/> (acknowledging that these internships give students skills that employers are looking for).

98. See Matt Barnidge, *Unpaid Internships Under Fire in Wisconsin, Nationwide*, WIS. WATCH (Sept. 22, 2013), <http://www.wisconsinwatch.org/2013/09/22/unpaid-internships-under-fire-in-wisconsin-nationwide/> (stating that unpaid interns may be “employees . . . entitled to protections under the Fair Labor Standards Act” (quoting Juno Turner, the plaintiffs’ attorney in *Glatt v. Fox Searchlight Pictures, Inc.*) (internal quotation marks omitted)).

99. See Newhouse, *supra* note 95 (attributing the lawsuits to the first successful unpaid internship suit: *Glatt*).

100. *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 521–22 (S.D.N.Y. 2013).

101. *Id.* at 530–31 (“[Plaintiffs] move[d] for summary judgment holding [that] they were ‘employees’ covered by the FLSA and . . . do not fall under the ‘trainee’ exception established by *Walling*.”).

102. *Id.* at 522. The *Glatt* plaintiffs relevant to this Note’s employee versus trainee distinction worked on the film *Black Swan*. Other plaintiffs worked on other films, including the film about Iowa’s own Cedar Rapids. *Id.* at 530. Furthermore, the *Glatt* opinion addresses multiple other

company, they performed chore-like tasks including: obtaining file documents and paychecks, tracking purchase orders and invoices, drafting cover letters, organizing and cleaning the office, making photocopies, arranging travel plans, watermarking movie scripts, taking and delivering lunch orders, running various other errands, and answering telephones.¹⁰³

The central question in the case became whether the interns, performing these tasks without compensation, fell under *Walling's* trainee exception or whether they were employees entitled to minimum wage. In answering this question, the United States District Court for the Southern District of New York summarized *Walling* and its factors before noting that “[t]he Second Circuit ha[d] not addressed the ‘trainee’ exception,” allowing it to apply its own analysis to derive the employee versus trainee distinction.¹⁰⁴ The defendant, Fox Searchlight, argued that the court should utilize the primary beneficiary test,¹⁰⁵ as articulated by the Fourth Circuit in *McLaughlin v. Ensley*,¹⁰⁶ rather than a totality inquiry based on the DOL factors.¹⁰⁷

The court explicitly rejected the use of the primary beneficiary test for two reasons.¹⁰⁸ First, the court noted that the primary beneficiary test “has little support in *Walling*.”¹⁰⁹ Elaborating, it wrote that the *Walling* opinion did not weigh the benefits of both parties,¹¹⁰ “but relied on findings that the training program served *only* the trainees’ interests and that the employer received no immediate advantage from [the] work done.”¹¹¹ Second, the court made a policy argument against the primary beneficiary test, finding it “subjective and unpredictable.”¹¹² The court drew its disapproval from the fact that, in the same internship program run by the same employer, one intern

issues aside from the “employee” distinction, such as a statute of limitations defense, whether the defendants were truly employers of the interns, and class certification. *See id.* at 523–31, 534–38. These issues are not relevant to this Note, and therefore, will not be addressed.

103. *Id.* at 533.

104. *See Glatt*, 293 F.R.D. at 531. The United States District Court for the Southern District of New York is within the Second Circuit Court of Appeals. *See* U.S. DIST. COURT S. DIST. OF N.Y., HOW TO APPEAL YOUR CASE TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, available at http://www.nysd.uscourts.gov/file/forms_instructions/notice-of-appeal-civil-case (last visited Nov. 12, 2014).

105. *Glatt*, 293 F.R.D. at 531.

106. *McLaughlin v. Ensley*, 877 F.2d 1207, 1209–10 (4th Cir. 1989) (considering only the relative benefits to each party with very limited application of the *Walling* factors as promulgated by the DOL); *see supra* Part II.B.1.

107. *Glatt*, 293 F.R.D. at 531–32.

108. *Id.*

109. *Id.* at 531.

110. *Id.* at 531–32. This is in direct opposition with the notions adopted in *McLaughlin*. *Compare id.* (declining to weigh any benefits to the parties), *with McLaughlin*, 877 F.2d at 1209–10 (allowing the employer to benefit from the work as long as the employee receives a *greater* benefit).

111. *Glatt*, 293 F.R.D. at 531–32 (quoting *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947)) (internal quotation marks omitted).

112. *Id.* at 532.

might learn a lot from the experience, while another might gain little.¹¹³ According to the court, the negative policy implications of utilizing the primary beneficiary test would be that “an employer could never know in advance whether it would be required to pay its interns.”¹¹⁴

After its express rejection of the primary beneficiary test, the court opted to assess the totality of the circumstances.¹¹⁵ In doing so, it considered the DOL factors, with no single factor controlling the analysis, as done by the Tenth Circuit.¹¹⁶

In applying the totality test, the court first addressed whether the internships provided training similar to that gained in an educational environment.¹¹⁷ In its opinion, the court wrote that in order to meet this standard, the program must teach skills that are fungible within the industry, but that mere on-the-job training is not enough.¹¹⁸ Because the internship was not “engineered to be [any] more educational than a paid position,” this factor favored a finding that the interns were employees.¹¹⁹

The second factor, whether the experience aimed to benefit the intern, cut against the company as well. The court noted that, while the internship benefitted the interns by providing job references and résumé experience, these benefits were the result of *any* work experience and were not unique to any academic or educational aspects of this particular program.¹²⁰ In discussing this factor, the court pointed out that one could construe the factor as the primary beneficiary test if the analysis accounted for the benefits to the defendant as well.¹²¹ While not applying the primary beneficiary test *per se*, the court noted that even if it were to weigh the relative benefits of the parties, the employer received the benefits of unpaid work that it otherwise would have had to pay regular employees to perform.¹²² Thus, even under the primary beneficiary test, “the [d]efendants were the primary beneficiaries of the relationship.”¹²³

Third, regarding the displacement of regular employees, the court easily came to the conclusion that the interns did, in fact, displace paid

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Application of the first DOL factor. See FACT SHEET #71, *supra* note 63.

118. *Glatt*, 293 F.R.D. at 532.

119. *Id.* at 532–33.

120. *Id.* at 533.

121. *Id.* This is similar to the manner in which the Tenth Circuit treated the second factor. See *supra* text accompanying notes 76–82 (detailing the Tenth Circuit’s acknowledgment that it may be useful to weigh the parties’ relative benefits in order to analyze whether the work was for the benefit of the worker).

122. *Glatt*, 293 F.R.D. at 533.

123. *Id.* (internal quotation marks omitted).

employees.¹²⁴ Even one of the plaintiffs' supervisors testified that if the intern had not done the "work, another member of [the] staff would have been required to work longer hours to perform it."¹²⁵

In applying the fourth factor, the court found that the production company gained "an immediate advantage from [the unpaid interns'] work."¹²⁶ The court based its conclusion on the company's admission that if it had not retained interns, it would have had to pay regular employees to perform the same work.¹²⁷ In that same vein, the company produced no evidence that the interns ever impeded its productivity.¹²⁸

The court summarily dispensed of the last two factors—whether the interns were entitled to a job upon completion of the internship, and whether they understood that they were not entitled to wages.¹²⁹ Neither party produced any evidence that the interns were guaranteed jobs after the internship.¹³⁰ Moreover, the parties agreed that the interns understood that they would not be entitled to wages.¹³¹ The court noted, however, that although there was no expectation of wages, that factor deserves little weight given that "the FLSA does not allow employees to waive their entitlement to wages."¹³² Therefore, the last two factors weighed in favor of the defendants' contention that the interns were trainees, rather than employees.¹³³

After detailing its analysis of the six factors, the court concluded that under the totality of the circumstances, the interns were, in fact, employees under the FLSA.¹³⁴ With this opinion, in June of 2013, the Southern District of New York became the first court to hold that unpaid interns were employees entitled to minimum wage under the FLSA. Referring back to *Walling*, the court concluded that this case was "a far cry from *Walling*, where [the] trainees impeded the regular business of the employer, worked only in their own interest, and provided *no* advantage to the employer."¹³⁵

124. *Id.*

125. *Id.* (citation omitted) (internal quotation marks omitted).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 534.

130. *Id.*

131. *Id.*

132. *Id.* The Supreme Court has held that employees may not waive their rights granted by the FLSA. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 302 (1985). The policy behind this is that such an exception would allow employers "to use [their] superior bargaining power to coerce employees to . . . waive their protections under the Act." *Id.*

133. *See Glatt*, 293 F.R.D. at 534.

134. *Id.* Although the internship satisfied the last two factors of the test, these factors were apparently given little weight since the court found that the other four factors established that the interns were "employees." *See id.* at 532–34.

135. *Id.* at 534 (emphasis added).

B. CONSEQUENCES OF GLATT

Before the *Glatt* plaintiffs filed their suit against Fox Searchlight and its parent company, there were few, if any, examples of unpaid interns suing their employers under the FLSA.¹³⁶ However, since the decision was rendered in June of 2013, many similar cases have been barraging the courts.¹³⁷ In fact, just two days after the issuance of the decision, the law firm that represented the *Glatt* plaintiffs filed another class action against Condé Nast Publications for employing unpaid interns.¹³⁸ Further, between the months of June and August of 2013, several other dominant corporations found themselves defending against unpaid internship lawsuits.¹³⁹ The list of corporations involved in post-*Glatt* litigation includes media giants such as Warner Music Group, Fox Entertainment Group, NBC Universal, Sony, and Viacom, among others.¹⁴⁰ Assuming that these class actions are certified and progress on the merits, these corporations, and presumably others, will be at the mercy of the courts to determine whether their unpaid interns were employees under the FLSA, and thus, whether they are entitled to back pay.¹⁴¹

As established in Parts II.B and III.A, there is no uniform test that courts use to make the employee versus trainee determination under the FLSA.¹⁴² As a result, depending on the jurisdiction of the lawsuits, employers may be subject to different legal standards.¹⁴³ Furthermore, and perhaps more

136. *The Current Landscape in FLSA Unpaid Intern Litigation—Law Firms Ready to Pounce*, PATTON BOGGS (June 19, 2013), <http://www.pattonboggs.com/viewpoint/the-current-landscape-in-flsa-unpaid-intern-litigation-law-firms-ready-to-pounce> (stating that the *Glatt* “decision is one of the first to [even] certify a class of unpaid interns” suing under the FLSA (emphasis added)).

137. See Newhouse, *supra* note 95; Perlin, *supra* note 6; see also Complaint, MacKown v. News Corp., No. 1:13-cv-04406-UA (S.D.N.Y. June 25, 2013); Complaint, Mayer v. 21C Media Grp., Inc., No. 1:13-cv-04369-JGK (S.D.N.Y. June 24, 2013); Complaint, Mark v. Gawker Media L.L.C., No. 1:13-cv-04347-AJN (S.D.N.Y. June 21, 2013); Complaint, Ballinger v. Advance Magazine Publishers, Inc., No. 13 Civ. 4036 (S.D.N.Y. June 13, 2013); Complaint, Iseri v. Junker, No. 30-2013-00665521-CU-OE-CJC (Cal. App. Dep’t Super. Ct. July 30, 2013); Complaint, Fields v. Sony Corp. of Am., No. 1:13-cv-06520-UA (N.Y. Sup. Ct. Sept. 16, 2013); Complaint, Henry v. Warner Music Grp. Corp., No. 155527/2013 (N.Y. Sup. Ct. June 17, 2013).

138. See Complaint, Ballinger v. Advance Magazine Publishers, Inc., *supra* note 137; *The Current Landscape in FLSA Unpaid Intern Litigation—Law Firms Ready to Pounce*, *supra* note 136.

139. See Newhouse, *supra* note 95; see also *supra* note 137 and accompanying text.

140. See Newhouse, *supra* note 95.

141. In other cases, companies may settle these lawsuits upon commencement in order to prevent the negative media attention that would most surely accompany the litigation. Charlie Rose, Inc., a television company, is one example. It recently contracted for a settlement agreement in the amount of up to \$250,000 for a class of 189 unpaid interns. *The Current Landscape in FLSA Unpaid Intern Litigation—Law Firms Ready to Pounce*, *supra* note 136; see also Order Granting Motion for Settlement, Bickerton v. Rose, No. 650780/2012 (N.Y. Sup. Ct. June 13, 2013).

142. The two main approaches are the primary beneficiary test and the totality of the circumstances test. See *supra* Parts II.B–III.A.

143. See *supra* Parts II.B–III.A. This may prove to be particularly problematic for companies operating in multiple jurisdictions. For example, a company may have one business location in a

importantly, employers that are not yet defendants in lawsuits have no way of knowing whether or not their unpaid internship programs are legal.

Without a uniform approach by which employers can recognize when unpaid interns qualify as employees, employers will be hesitant to continue offering internship opportunities for fear of potential liability. Even in the immediate wake of *Glatt* and subsequent similar lawsuits, some companies are doing away with their internship programs.¹⁴⁴ For example, Condé Nast Publications—the industry giant responsible for magazines including *Vogue*, *Vanity Fair*, and *The New Yorker*—abruptly eliminated its program after two former unpaid interns sued the company during the summer of 2013.¹⁴⁵ The company's decision to end its internship program will presumably harm students' ability to gain employment with the company in the future. As one former intern lamented: "I'm disappointed on behalf of all future interns . . . [they are] no longer going to have that foot in the door."¹⁴⁶

Condé Nast could mark the beginning of a trend of employers discontinuing their unpaid internship programs for fear of potential liability.¹⁴⁷ Some companies may be unable to afford paid internship positions and may be forced to cut their programs altogether, while other companies may be unwilling to offer paid positions simply from a cost-saving perspective. Regardless of its financial situation, no employer wishes to sit idly by, "employing" unpaid interns and exposing itself to potential liability.

If the Condé Nast trend takes hold, college students may become hard-pressed to gain the invaluable work experience that today's job market requires.¹⁴⁸ In today's workplace, college students are hardly job candidates at all without the previous work experience that internships provide.¹⁴⁹ Even those with good grades and extracurricular activities, but without on-the-job experience, have difficulty securing employment.¹⁵⁰ One survey found that nearly 40% of unpaid interns were subsequently offered full-time, paid

jurisdiction where it is subject to primary beneficiary analysis, and another where it is subject to the totality test. Therefore, this same company may have different risks of liability throughout different jurisdictions. In order to remedy this, the company may have to devise different internship programs in order to satisfy the relevant test, which could prove to be unduly costly.

144. See Tisha Lewis, *The End of Unpaid Internships?: Several Companies Eliminate Programs*, MY FOX CHICAGO (Oct. 23, 2014, 8:24 PM), <http://www.myfoxchicago.com/story/23784943/the-end-of-unpaid-internships-several-companies-eliminate-programs>. But see *id.* (reporting that at least one expert does not perceive Condé Nast as starting a trend in internship closures).

145. See Lewis, *supra* note 144.

146. Cara Buckley, *Sued Over Pay, Condé Nast Ends Internship Program*, N.Y. TIMES (Oct. 23, 2013), <http://www.nytimes.com/2013/10/24/business/media/sued-over-pay-conde-nast-ends-internship-program.html> (quoting Rosana Lai, a student at Medill School of Journalism at Northwestern University) (internal quotation marks omitted).

147. See Newhouse, *supra* note 95.

148. See Green, *supra* note 7.

149. See *id.*

150. See *id.*

positions with their employers.¹⁵¹ Without the availability of unpaid internships, those students may have been unable to obtain that employment in their industry of choice.¹⁵² These unpaid internships are vital to students entering the workforce, but as long as employers are fearful of litigation or are unable to predict how the courts will view their internship programs, students may see a marked decrease in the availability of these opportunities.¹⁵³

IV. THE TOTALITY OF THE CIRCUMSTANCES TEST AS THE UNIFORM APPROACH FOR DETERMINING WHETHER INTERNS ARE “EMPLOYEES”

In order to prevent the Condé Nast trend from taking hold and damaging college students’ prospects of gainful employment, the Supreme Court should clarify the test that courts should use to determine whether unpaid interns are employees under the FLSA. Because of the plaintiff-favorable outcome in *Glatt*, the increase in unpaid internship litigation will likely continue.¹⁵⁴ As it does, employers and interns alike are entitled to clarity. This calls for uniformity in the approach for determining employee status.

A. TOTALITY OF THE CIRCUMSTANCES’ CONSISTENCY WITH WALLING

Because *Walling* established the employee versus trainee distinction,¹⁵⁵ the uniform test should comport with that decision as closely as possible. Out of the various approaches currently employed by the circuits, the totality of the circumstances test¹⁵⁶ is the most consistent with *Walling*. While some circuits have adopted the primary beneficiary test,¹⁵⁷ that approach does not fully account for all of the *Walling* factors to the extent of the totality of the circumstances approach.

For example, in applying the primary beneficiary test, the Fourth Circuit does not articulate or apply the employee displacement, supervision, or work impediment factors.¹⁵⁸ Instead, the court focuses solely on weighing the perceived relative benefits to each party.¹⁵⁹ This approach implies that as long as the worker receives *more* of a benefit than the employer, the primary beneficiary test is satisfied, and the worker is not an employee under the

151. See Newhouse, *supra* note 95 (referring to a 2012 National Association of Colleges and Employers survey).

152. See *id.*; Green, *supra* note 7.

153. See Newhouse, *supra* note 95.

154. See *id.*

155. See Bacon, *supra* note 92, at 72–73.

156. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993); see *supra* Part II.B.2.

157. *McLaughlin v. Ensley*, 877 F.2d 1207, 1209 (4th Cir. 1989); see *supra* Part II.B.1.

158. See *McLaughlin*, 877 F.2d at 1209–10.

159. *Id.*

FLSA.¹⁶⁰ In a hypothetical internship scenario that takes this approach to its furthest reach, an intern could spend the morning observing and learning from regular employees, then spend the afternoon performing free labor, with no supervision, that displaces other employees.¹⁶¹ Such a situation is inconsistent with *Walling*, where the Court expressed disapproval of employers gleaning *any* benefit from unpaid workers.¹⁶² However, under the primary beneficiary test, any free labor performed during an internship would be perfectly legal as long as the intern learned *more* from the experience than the employer benefitted from it.¹⁶³ Such an allowance would be contrary to the express language in *Walling*, where the employer gained “*no* immediate advantage from any work done by the trainees.”¹⁶⁴

While the primary beneficiary test takes only select parts of *Walling* into account,¹⁶⁵ the totality of the circumstances test, on the other hand, purports to apply all of its factors.¹⁶⁶ As seen in the Tenth Circuit’s analysis, as well as the Southern District of New York’s *Glatt* analysis, the approach allows courts to consider all of *Walling*’s factors, while applying the DOL’s *Fact Sheet #71*.¹⁶⁷ The use of the DOL factors is completely consistent with *Walling* since they are derived directly from the opinion.¹⁶⁸ Furthermore, there are no major considerations in *Walling* that are not explicitly represented in the DOL’s factors.¹⁶⁹

160. *Id.* at 1210 (“[I]t becomes plain that [the employer] received more advantage than the workers.”).

161. *See Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 528 (6th Cir. 2011). In its primary beneficiary analysis, the Sixth Circuit implied that, even where the employer obtains an immediate advantage from the work performed, if the program was sufficiently educational to the worker, the primary beneficiary test might be satisfied. *See id.* at 527–28 (“Had the training program been found to be educationally sound[,] the court might nevertheless have concluded that the bulk of the benefit inured to the trainees, but because the trainees were shortchanged educationally[,] the court finds that the [employer] was the primary benefactor.” (quoting *Marshall v. Baptist Hosp., Inc.*, 473 F. Supp. 465, 476 (M.D. Tenn. 1979), *rev’d*, 668 F.2d 234 (6th Cir. 1981))).

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

163. *See McLaughlin*, 877 F.2d at 1210.

164. *Walling*, 330 U.S. at 153 (emphasis added) (internal quotation marks omitted). Pointing out the subjectivity involved in the primary beneficiary analysis, the *Glatt* court noted, “an employer could never know in advance whether it would be required to pay its interns.” *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013).

165. *See supra* notes 158–60 and accompanying text.

166. *See Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1026–27 (10th Cir. 1993) (articulating and applying all six factors); *Glatt*, 293 F.R.D. at 532.

167. *Reich*, 992 F.2d at 1025–29; *Glatt*, 293 F.R.D. at 531–34.

168. *See Reich*, 992 F.2d at 1025–26 (explaining that the six criteria in the DOL test were derived directly from *Walling*).

169. All of the factors articulated in *Walling* are captured in the DOL’s test. FACT SHEET #71, *supra* note 63; *see also supra* Parts II.A, II.B.2.

In addition to deriving from the *Walling* opinion, the DOL factors also merit deference by the courts.¹⁷⁰ The Supreme Court has held that some deference should be given to an “agency’s policy statements, . . . [which] interpret not only the regulations but also the statute itself.”¹⁷¹ The degree of deference that courts should afford “depend[s] upon the thoroughness evident in [the agency’s] 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.”¹⁷² As the DOL factors themselves comprise “a reasonable application of [the FLSA]” and find support in *Walling*, courts have largely shown them deference and have considered them appropriate for assessing the totality of the circumstances.¹⁷³

In the totality of the circumstances approach, no one factor is dispositive, nor must all of the factors be present in order for the test to be satisfied.¹⁷⁴ This is contrary to the DOL’s advocated all-or-nothing approach,¹⁷⁵ but importantly, still consistent with *Walling*. In *Walling*, the Court merely surveyed a list of pertinent factors and then applied them to ascertain whether the trainee’s work immediately advantaged the employer.¹⁷⁶ There is nothing in the Court’s opinion that requires an all-or-nothing application of the factors it identified.¹⁷⁷

Under the totality of the circumstances test, the hypothetical internship scenario, where an intern trains in the morning and provides free labor in the afternoon,¹⁷⁸ would *not* trigger the trainee exception.¹⁷⁹ Where a theoretical intern performs free labor without supervision, while displacing regular employees, it is doubtful that the intern could be deemed anything other than

170. See *Reich*, 992 F.2d at 1026–27; *Glatt*, 293 F.R.D. at 532.

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

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

173. *Glatt*, 293 F.R.D. at 532; see also *Reich*, 992 F.2d at 1026–27; *Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1005–09 (N.D. Cal. 2010). Although the factors *themselves* should be given deference by the courts, the DOL Secretary’s “all or nothing” approach should not. *Reich*, 992 F.2d at 1026–27; see also *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 525 (6th Cir. 2011). The all-or-nothing approach is merely a test the Secretary advocated in front of various courts, none of which have adopted it. See *Solis*, 642 F.3d at 525; *Reich*, 992 F.2d at 1026–27. Instead, these courts have held that the factors embodied in *Fact Sheet #71* should be afforded deference, while the all-or-nothing approach should not, as it is “inconsistent with prior [agency] interpretations,” *Solis*, 642 F.3d at 525, and is “unreasonable.” *Reich*, 992 F.2d at 1026–27.

174. See *supra* note 74 and accompanying text.

175. See *Solis*, 642 F.3d at 525 (rejecting the Secretary of Labor’s all-or-nothing argument).

176. See *Walling v. Portland Terminal Co.*, 330 U.S. 148, 151–53 (1947).

177. See *Reich*, 992 F.2d at 1026–27 (finding no support in *Walling* for the all-or-nothing approach); *Glatt*, 293 F.R.D. at 532 (noting the *Glatt* court’s statement that the DOL factors, on the other hand, are supported by *Walling*).

178. See *supra* note 161 and accompanying text.

179. See *Glatt*, 293 F.R.D. at 534 (intimating that an internship should be “designed to be uniquely educational to the interns and of little utility to the employer”).

an employee under the FLSA and the totality of the circumstances test.¹⁸⁰ Because it conforms with the entirety of the *Walling* opinion and is better equipped to recognize patently inappropriate unpaid internships than the primary beneficiary test, the totality of the circumstances test should be the uniform test by which courts analyze unpaid internships.

B. BENEFITS OF A UNIFORM TOTALITY OF THE CIRCUMSTANCES TEST

Given the vast possibilities of internship fact patterns that the courts can expect, the totality of the circumstances test is most beneficial to employers and interns alike. While a uniform, totality approach is not a cure-all, with uniformity comes clarity. Although the totality of the circumstances approach is still a balancing test rather than a bright-line rule, it is more appropriate and provides greater clarity than either the “subjective and unpredictable” primary beneficiary test,¹⁸¹ or the “overly rigid” all-or-nothing approach.¹⁸² With this uniform test in place, employers will be better able to tailor their internship programs to meet the legal standard.¹⁸³

In doing so, employers would be wise to look to the current case law to devise internship programs that conform to the totality standard. For example, in tailoring their programs, employers should focus on satisfying the first four factors of the test,¹⁸⁴ as they received the greatest weight in *Glatt*.¹⁸⁵ While all of the factors are relevant to the inquiry, courts seem less concerned with the last two factors.¹⁸⁶ As an illustration of the kinds of tweaks employers can make to conform with the totality of the circumstances test, the employer in the hypothetical internship scenario noted above,¹⁸⁷ could tweak its program to allow the intern to spend the morning observing and learning, but should ensure that the intern does not confer an advantage to the employer by displacing its regular employees in the afternoon.¹⁸⁸ In order to

180. *Glatt* implicitly rejects *Solis*’s primary beneficiary argument that an intern, who learns a lot via the educational aspects of the training, may fall under the trainee exception even where the employer immediately benefits as well. See *supra* notes 112–14 and accompanying text.

181. *Glatt*, 293 F.R.D. at 532.

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

183. This may be particularly helpful to large companies that do business in multiple jurisdictions. Rather than having to tailor their internships to satisfy multiple legal standards, these companies would be able to devise one unpaid internship program that conforms with the law. See *supra* Parts II.B–III.A.

184. See *supra* note 65 and accompanying text.

185. For example, in *Glatt*, even though the internship satisfied the last two factors of the DOL’s *Fact Sheet* #71, it failed the first four factors, making the circumstances such that the interns were “employees” under the FLSA. See *supra* notes 129–35 and accompanying text; see also *FACT SHEET* #71, *supra* note 63.

186. *Glatt*, 293 F.R.D. at 534 (acknowledging that the sixth factor, whether the intern expects compensation, is of little value since a person’s rights under the FLSA cannot be waived).

187. See *supra* text accompanying note 161.

188. See *FACT SHEET* #71, *supra* note 63. The internship’s morning activities would probably satisfy the first two factors, so the remaining factors would need to be accounted for.

avoid the intern's "employee" classification, the employer could require the intern's supervisor to thoroughly review and check all of her work and provide her with feedback. An internship fitting this scenario would most likely satisfy the four most heavily weighted factors, and as such, the intern would not be entitled to minimum wage under the FLSA.¹⁸⁹ This is probably true regardless of whether the intern was entitled to a job after the internship, or whether she expected and received some sub-minimum wage compensation.¹⁹⁰ This example demonstrates the ways that employers can tailor their unpaid internships in order to avoid liability, simply by gearing their programs towards the four most heavily weighted factors of the totality approach.

Employers, who abide by the totality of the circumstances standard in crafting their programs, will face less uncertainty regarding the potential liability that accompanies unpaid internships. With this decreased uncertainty and fear, employers will likely have fewer reservations about keeping their unpaid internship positions. With these internships remaining in place, and with the potential creation of new ones, today's college students will be able to continue benefiting from these "valuable steppingstones that help [them] land future jobs."¹⁹¹ Therefore, a uniform totality of the circumstances approach will benefit employers by allowing them to offer internship programs that comply with the law and to continue providing students with the experience necessary to enter the workforce.¹⁹²

189. This theoretical internship would seem to satisfy the first four factors of the DOL's *Fact Sheet #71*: (1) the internship would be of educational value considering the observation and learning portion during each day, in addition to the feedback provided to the intern; (2) the internship would benefit the intern via the educational component as well as the supervised, hands-on-learning component; (3) the intern would not displace regular employees since the supervisor would be required to thoroughly check and review all work, which would seemingly require the supervisor to perform the work himself; and (4) the employer would derive no immediate advantage from the intern since the supervisor would have to re-perform her work and provide feedback, which may actually impede the employer's efficiency. *See supra* note 65 and accompanying text.

190. *See supra* notes 184–85 and accompanying text.

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

192. While this experience should be the main goal of these programs, opponents of unpaid internships argue that they disadvantage less affluent students that cannot afford to work without pay over the summer. *Id.*; *see also* Edward L. Glaeser, *High Value in Unpaid Internships*, BOSTON GLOBE (Oct. 31, 2013), <http://www.bostonglobe.com/opinion/2013/10/30/unpaid-internships-unpopular-solution-real-problem/KqHbPLxfgdjuhcvNoxL6XJ/story.html> ("Critics are right to worry that unpaid internships provide access only to students from wealthy families."). Expert Edward Glaeser, a Harvard economist, has proposed a solution to this perceived problem. *See id.* He argues that federal loan programs should expand to encompass students' expenses when they accept unpaid internships. *Id.* He recognizes the importance of these internships in that they "provide a pathway towards employment[,] [and therefore,] should be encouraged—not penalized." *Id.*

V. CONCLUSION

The influx of unpaid internship litigation making its way into the courts warrants clarification of the employee versus trainee distinction under the FLSA. The totality of the circumstances test is most consistent with the Supreme Court's decision in *Walling v. Portland Terminal Co.*, and therefore should be the uniform approach by which that distinction is made. While this solution will not determine whether all unpaid internships are legal or illegal under the FLSA, it provides a uniform approach for answering that question, and it allows employers to tailor their internship programs so as to avoid liability and to continue to provide much needed internship opportunities to students.