"It Will Be Good for You," They Said: Ensuring Internships Actually Benefit the Intern and Why It Matters for FLSA and Title VII Claims

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ABSTRACT: Unpaid interns are a vulnerable group of people in the modern workforce that neither Congress nor the courts know quite how to deal with in relation to federal protection for workers. Specifically, modern courts have trouble with deciding when and whether unpaid interns are classified as employees. This Note discusses the various tests courts use to determine who is an employee deserving of minimum wage and discrimination protections under the Fair Labor Standards Act ("FLSA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). Both statutes define "employee" vaguely, yet each boast their own unique set of various and conflicting tests. With the increasing number of interns in the workforce, the federal statutes now have to incorporate an employment relationship that did not exist in the original conception of employment. Many of the tests lack the capacity to properly protect unpaid interns even when the interns, in effect, act like employees. In order to simplify the tests, comply with legislative intent, and balance the competing interests of employers and employees, this Note argues that the Supreme Court should adopt a modified version of the primary beneficiary test as articulated in the Second Circuit's decision in Glatt v. Fox Searchlight Pictures, Inc., *when evaluating whether interns are employees under the FLSA and Title VII.*

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I. INTRODUCTION

Wander through the halls of any institution of higher education and listen to students' conversations, look at the bulletin boards, and one will find the internship is a prevalent subject in the student's life. In the modern era, more students than ever are going to college,[1] and as a result, more students than ever participate in internships before they enter the workforce as full-time employees.[2] Internships can provide experience and training for students that help the students obtain full-time jobs upon graduation, give

1. Chad A. Pasternack, Note, *No Pay, No Gain? The Plus Side of Unpaid Internships*, 8 J. BUS. ENTREPRENEURSHIP & L. 193, 210 (2014).

2. "[C]olleges and universities, and employers themselves, have encouraged students to seek internships while in college, graduate school, during the summer, or even after graduation. . . . Today, nearly three-quarters of all college students complete an internship before they graduate, compared with 1 in 36 who interned in 1980." Craig J. Ortner, Note, *Adapting Title VII to Modern Employment Realities: The Case for the Unpaid Intern*, 66 FORDHAM L. REV. 2613, 2617–18 (1998) (footnote omitted).

students "real world" experience, and provide important networking opportunities.[3]

But internships, especially unpaid internships, have a darker side. Many employers use the pool of unpaid interns to get around government labor regulations and receive cheap labor.[4] In many cases, the employer receives completely free labor through unpaid internships.[5] It is easier for employers to get around the rules because the federal statutes Congress enacted to protect workers were not written with the modern reality of unpaid internships in mind, so it becomes difficult to apply the term "employee," as it was originally understood, to interns.[6] This oversight leaves unpaid interns in limbo because interns are one of the fastest emerging groups of workers yet "enjoy no workplace protections and no standing in courts of law."[7] Interns increasingly rely on internships for career advancement,[8] and having an unpaid, lowly position puts interns at the mercy of not-so-scrupulous employers.[9] While the interns may be acting as employees,[10] they receive none of the same protections that employees receive.[11]

The Fair Labor Standards Act of 1938 ("FLSA")[12] and Title VII of the Civil Rights Act of 1964 ("Title VII")[13] are two separate federal statutes that govern employment relationships.[14] The FLSA governs how employers pay their workers, and Title VII prohibits discrimination and harassment of

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3. Beth Braccio Hering, *Why Are Internships So Important?*, CNN (Apr. 14, 2010, 11:09 AM), http://www.cnn.com/2010/LIVING/worklife/04/14/cb.why.internships.important.

4. ROSS PERLIN, INTERN NATION: HOW TO EARN NOTHING AND LEARN LITTLE IN THE BRAVE NEW ECONOMY, at xii–xiv (2011); *see also* Hering, *supra* note 3 (quoting Melissa Benca, director of career services at Marymount Manhattan College in New York City, as stating "[i]n this economic downturn, employers are relying increasingly on interns to shore up areas where full-time hiring has been cut").

5. Gregory S. Bergman, Note, *Unpaid Internships: A Tale of Legal Dissonance*, 11 RUTGERS J.L. & PUB. POL'Y 551, 554–55 (2014) ("As of 2012, one-third to one-half of the 1.5 million internships were unpaid.").

6. *Id.* at 579 ("[S]ince unpaid interns are not considered employees, they will not receive statutory protections that apply to employees, such as Title VII.").

7. PERLIN, *supra* note 4, at xiv.

8. *See* Hering, *supra* note 3 (as stated by Melissa Benca, "Graduating students with paid or unpaid internships on their résumé have a much better chance at landing a full-time position upon graduation. Students are doing internships as undergraduates, and it is now not unusual for recent grads to take an unpaid internship with hopes of turning it into a permanent position or at least making some contacts and building their résumé.").

9. PERLIN, *supra* note 4, at 29–30.

10. *Id.* at 61–62.

11. Interns, typically young and inexperienced, may be subject to the most unethical employment practices and "have no legal recourse" against their "employers, internship programs, or colleges." *Id.* at 64.

12. 29 U.S.C. § 206 (2012).

13. 42 U.S.C. § 2000e–2 (2012).

14. 29 U.S.C. § 206; 42 U.S.C. § 2000e–2.

employees in the workplace.[15] Both of these statutes only protect "employees." When interns bring suits against their employers for failing to pay minimum wage or overtime, or they bring claims for sexual harassment or discrimination, the first question courts must ask is whether the intern is an employee.[16]

If the law requires an employer to pay an employee under the FLSA, then the employee will be protected under Title VII as well. A key problem is that both statutes have vague, circular definitions of "employee" that do nothing to help the court interpret exactly who is and who is not an employee. Due to this ambiguity, different circuits have created a multitude of tests to determine whether a worker is an "employee" and have applied those imperfect tests to cases concerning unpaid interns. However, the conflicting tests create confusion and leave interns without statutory protection, which is contrary to the legislative intent of providing broad workplace protections for workers.[17]

In light of these issues, this Note first examines the history of internships and the problems that result from them. Next, this Note discusses the text and purpose of the FLSA and Title VII, then examines the most common tests courts use for determining whether the plaintiff is an "employee" under Title VII and the FLSA. Finally, this Note proposes that the Supreme Court adopt a modified version of the "primary beneficiary test" articulated in *Glatt v. Fox Searchlight Pictures, Inc.*, to determine when an intern is an "employee" under both the FLSA and Title VII and establish a single, uniform test for both statutes.

II. THE HISTORY OF INTERNSHIPS

This Part summarizes the evolution of the modern-day internship and how the structure of internships has changed over the years. Part II.A explains the problems current interns face in the workplace and the vulnerabilities they experience. Part II.B then discusses the general purpose of the FLSA and Title VII and explains the common tests courts have implemented when analyzing who exactly is an "employee" under the two statutes.

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15. 29 U.S.C. § 206; 42 U.S.C. § 2000e–2.

16. Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 533–38 (2d Cir. 2016) (discussing how an unpaid intern must qualify as an "employee" under the FLSA to receive compensation for his work); Marie v. Am. Red Cross, 771 F.3d 344, 351–52 (6th Cir. 2014) (stating that if the plaintiffs were not employees they could not maintain a claim under Title VII).

17. *See* Ortner, *supra* note 2, at 2625 ("'Congress intended to cover the full range of workers who may be subject to the harms the statute was designed to prevent.' Thus, the word 'employee' might arguably be interpreted as broadly as is reasonably possible in order to satisfy Title VII's legislative intent." (footnote omitted) (quoting Armbruster v. Quinn, 711 F.2d 1332, 1339 (6th Cir. 1983)).

A. THE RISE OF UNPAID INTERNSHIPS

"Internship" is a difficult word to define.[18] Many students have wildly different experiences based on industry custom and individual company programs.[19] Merriam–Webster's dictionary provides a broad definition, stating that an intern is "a student or recent graduate who works for a period of time at a job in order to get experience."[20] While some people assume internships are unpaid, others assume the exact opposite.[21] Proponents of internships, especially of unpaid internships, highlight the flexibility and educational aspect of internships.[22] Critics of internships focus on the potential for employers to assign menial work in place of experiential benefit.[23]

An intern can be a high school, college, or graduate student, or even a recent graduate still looking for full-time paid employment.[24] Internships generally provide training for people attempting to enter the job market in their chosen field.[25] For the purposes of this Note, an intern is any student or graduate who performs work for an employer for a specified amount of time in the hopes of using the experience to learn about and advance in a career.[26]

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18. PERLIN, *supra* note 4, at 23–25 (finding "[t]he very significance of the word *intern* lies in its ambiguity").

19. Hannah Nicholes, Note, *Making the Case for Interns: How the Federal Courts' Refusal to Protect Interns Means the Failure of Title VII*, 15 WAKE FOREST J. BUS. & INTELL. PROP. L. 80, 93–94 (2014).

20. *Intern*, MERRIAM–WEBSTER, http://www.merriam-webster.com/dictionary/intern (last visited Feb. 27, 2017).

21. PERLIN, *supra* note 4, at 24.

22. *Id.* at 23–25.

23. *Id.* at 25 (discussing how "an internship is understood more in terms of its cultural and professional function than in terms of actual responsibilities").

24. *See id.* at 27 (describing how a "conservative estimate of 1 to 2 million internships annually in the United States . . . does not begin to account for internships taken by community college students, graduate students, recent graduates, and others" while "a major representative study of 9,000 young people[] found that approximately 4 percent of *high school* students take an internship").

25. The National Association of Colleges and Employers ("NACE") recommends defining an internship as:

> [A] form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting. Internships give students the opportunity to gain valuable applied experience and make connections in professional fields they are considering for career paths; and give employers the opportunity to guide and evaluate talent.

Position Statement: U.S. Internships: A Definition and Criteria to Assess Opportunities and Determine the Implications for Compensation, NACE (July 2011), http://www.naceweb.org/advocacy/position-statements/united-states-internships.aspx [hereinafter *Position Statement*, NACE]. However, NACE also points out that there are no guidelines for employers, teachers, and students to concretely define "internship" because all the parties have different objectives and all internships are structured differently. *Id.*; *see also* PERLIN, *supra* note 4, at 24–26 (discussing all the different kinds and definitions of internships).

26. PERLIN, *supra* note 4, at 23–25.

The number of internships in the modern employment world has exploded because of "[the] employers' desire to hold down costs and students' eagerness to gain experience for their résumés,"[27] but internships as they exist today are a relatively new phenomenon. They first started to appear in the medical field during the 1900s, but otherwise remained fairly uncommon.[28] In the 1970s and 1980s, educational institutions began awarding school credit for internships, thereby encouraging more student participation in the programs.[29] The late 1980s and early 1990s saw a sharp expansion in standard, formal internships at many firms in various industries.[30] In 2008, the number of unpaid internships increased following the economic recession.[31] Because the definition of internships is ambiguous, the exact number of current interns and internships throughout the country is difficult to determine. Around 20% of large, for-profit companies have unpaid internships.[32] Overall, "between 1 and 2 million people participate in internships each year in the [United States]."[33] In 2015, 65% of students that graduated with bachelor's degrees participated in an internship and/or co-op during their education.[34] Around 39.2% of those internships were unpaid.[35]

One of the reasons that internships became so popular is the rise in employers' demand for work experience in prospective employees.[36]

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

28. *See, e.g.*, PERLIN, *supra* note 4, at 30 (finding how "the term 'internship' was associated exclusively with hospitals" before World War II); Meaghan Haire & Kristi Oloffson, *Brief History: Interns*, TIME (July 30, 2009), http://content.time.com/time/nation/article/0,8599,1913474,00.html (describing the development of internships from World War I to the late 2000s).

29. RACHAEL MINER, THE HISTORY AND CONTEXT OF UNPAID INTERNSHIPS 3, http://unpaidinternshipsproject.weebly.com/uploads/2/0/7/3/20735642/history_and_context_of_unpaid_internships_.pdf (last visited Feb. 27, 2017).

30. PERLIN, *supra* note 4, at 34–35.

31. MINER, *supra* note 29, at 3.

32. PERLIN, *supra* note 4, at 27.

33. *Id.* at xiv.

34. *Percentage of Students with Internship Experience Climbs*, NACE (Oct. 7, 2015), http://www.naceweb.org/s10072015/internship-co-op-student-survey.aspx.

35. *Id.*

36. Brian Burnsed, *Degrees are Great, but Internships Make a Difference*, U.S. NEWS & WORLD REP. (Apr. 15, 2010, 12:00 AM), http://www.usnews.com/education/articles/2010/04/15/when-a-degree-isnt-enough. Whether or not unpaid internships actually help students get jobs after they complete their education or when they finish their internships is a debated topic. *Compare* Pasternack, *supra* note 1, at 213 ("The market is highly competitive, and an experienced candidate with professional contacts is more likely to find employment than an inexperienced outsider."), *with Unpaid Internships: A Clarification of NACE Research*, NACE (Oct. 16, 2013), http://www.naceweb.org/s10162013/paid-internship-full-time-employment.aspx ("Students coming off of an unpaid internship and seeking a job prior to graduation had no greater probability of receiving a full-

Typically, recent graduates obtain this experience by participating in internships. According to the National Association of Colleges and Employers ("NACE"), "relevant work experience is preferred by almost 75 percent of employers, and 60 percent of employers say they prefer work experience gained through an internship or co-op experience."[37]

B. THE UNPAID INTERNSHIP PROBLEM

Unpaid interns are a particularly vulnerable group of workers because they fall through "the cracks of legal protections for workers and . . . students."[38] "[T]he landmark civil rights legislation prohibiting age-, gender-, and race-based discrimination simply passes over unpaid interns."[39] While employees have protection against these social evils, interns, who are just as exposed to them, do not have the same protection.[40] Unpaid interns may be even more affected because they are more likely to not report any abuses.[41]

Denying one the ability to participate meaningfully in an internship—where one could receive invaluable training—through discrimination or harassment "can represent a great loss and lead to irreversible harm" to the intern.[42] One of the purposes of Title VII is to protect the livelihood of employees.[43] Internships can significantly affect the livelihood of unpaid interns because they rely heavily on their internships to promote their

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time job offer than students with no internship experience in their background."). For the purposes of this Note, it is most important to mention that many people see the greater advantage from having an internship as an actual benefit.

37. *Percentage of Students with Internship Experience Climbs, supra* note 34 ("The *Class of 2015 Student Survey*, was administered to 39,950 students at the associate's, bachelor's, master's, and doctoral degree levels through NACE's college members from February 11, 2015, to April 30, 2015. The focus of the survey report is the 9,184 bachelor's degree students who indicated that they would be graduating—or already had graduated—during the 2014–2015 academic school year (July 1 to June 30), and were thus members of the Class of 2015.").

38. PERLIN, *supra* note 4, at 78.

39. *Id.* at 78–79.

40. Sean Hughes & Jerry Lagomarsine, Note, *The Misfortune of the Unpaid Intern*, 32 HOFSTRA LAB. & EMP. L.J. 409, 421 (2015) ("Interns lack not only the benefits and protection of the labor laws, but also do not have standing to file complaints in general."); Bryce Morgan, Note, *Compensation Isn't Everything: The Threshold-Remuneration Test for Employment Discrimination Under Title VII*, 40 J. CORP. L. 779, 791–92 (2015) (discussing the risks for interns working without protection under Title VII); *see also* Lauren Fredericksen, Comment, *Falling Through the Cracks of Title VII: The Plight of the Unpaid Intern*, 21 GEO. MASON L. REV. 245, 247 (2013) ("Uncertain of their position and seeking either a positive recommendation or future full-time employment, interns are less likely to speak up about discrimination in the workplace.").

41. *See* Craig Durrant, Comment, *To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169, 186 (2013) (explaining the incentive for interns to not report abuses and thus keep their job).

42. Ortner, *supra* note 2, at 2621.

43. Morgan, *supra* note 40, at 785–86.

career ambitions.[44] In many cases, students are required to get an internship for school credit or to get a foot into the industry they want to work in.[45] It is common for employers to offer full-time positions to present or past interns.[46] Businesses and institutions of higher education indicate that internship experience is one of the most important hiring criterions.[47] More graduates take on internships because they cannot find full-time employment and unpaid internships are the only option available.[48] Unpaid interns only receive statutory protection if they qualify as employees.[49] Employers who refuse to pay an intern—possibly in violation of the FLSA requirements—protect themselves from liability for harassment and discrimination claims because Title VII protections seem tied to economic compensation.[50]

The way courts define "employee" under both the FLSA and Title VII is a problem because none of the tests adequately protect interns. First, too many tests result in inconsistent results. Each test is similar to the others in some aspects, but they quickly diverge and confuse employers and interns alike.[51] For example, the elements of the common law agency test appear in both the hybrid test[52] and sometimes unofficially in the primary purpose

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44. *Id.* at 786. Internships can be likened to volunteer positions, and "[i]n situations where there is a sufficiently probable and clear path to employment . . . the volunteer is economically dependent on the employer" and so should be able to satisfy the economic requirement of employment under Title VII. *See* Marie v. Am. Red Cross, 771 F.3d 344, 355 (6th Cir. 2014).

45. *See, e.g.*, Cynthia Grant Bowman & MaryBeth Lipp, *Legal Limbo of the Student Intern: The Responsibility of Colleges and Universities to Protect Student Interns Against Sexual Harassment*, 23 HARV. WOMEN'S L.J. 95, 107 (2000) ("Because students need prior experience to get jobs in the industry, they view these hands-on experiences as their chance to obtain both practical experience and contacts for future employment."); Ortner, *supra* note 2, at 2616–17 ("Many employers require that candidates for skilled-labor positions, even entry-level positions, include work experience in the field among their qualifications."); Burnsed, *supra* note 36 ("University officials and employers almost universally maintain that partaking in an internship—or several, which sets a student apart from his or her peers even more—before graduation is integral to finding meaningful employment in today's seemingly impenetrable job market.").

46. Morgan, *supra* note 40, at 786–87 ("According to one recent survey by an online internship portal, 69% of companies with 100 or more employees offered full-time jobs to their interns upon the completion of the internship.").

47. PERLIN, *supra* note 4, at 28; *see also* Jaclyn Gessner, Note, *How Railroad Brakemen Derailed Unpaid Interns: The Need for a Revised Framework to Determine FLSA Coverage for Unpaid Interns*, 48 IND. L. REV. 1053, 1067 (2015) ("One study reported that some employers 'will not consider a candidate for employment who has not completed an internship.' Another reported as many as '[seventy-five] percent of employers prefer candidates with relevant work experience.'" (alteration in original) (footnote omitted)). These findings show how "some employers value students' internships and job experiences more highly than grade point average." Gessner, *supra*, at 1067.

48. PERLIN, *supra* note 4, at xvii.

49. *See supra* notes 15–17 and accompanying text.

50. PERLIN, *supra* note 4, at 79.

51. *See infra* Part III.

52. *See infra* Part III.A.5.

test,[53] but do not appear in other tests.[54] Rather than clarify who qualifies as employees in the internship context, the multitude of tests only confuses the issue and leaves the question of who exactly is protected by the federal statutes open for employers and prospective interns.

Second, none of the Title VII tests and hardly any of the FLSA tests properly protect unpaid interns in accordance with the broad vision of the Acts.[55] Withholding statutory discrimination protection from vulnerable workers like unpaid interns can cause serious harm.[56] The inability to incorporate unpaid interns into an old statute because the statute was not equipped to deal with a new type of worker exacerbates the struggles of interns in the workforce.[57]

C. TITLE VII: WHAT DOES IT SAY AND WHAT IS ITS PURPOSE?

The Civil Rights Act of 1964 included Title VII, which makes employer discrimination on the basis of race, sex, religion, or national origin unlawful.[58] The purpose of Title VII is to protect workers and deter employers' discriminatory behavior.[59] Title VII is meant to protect workers by "ensur[ing] equal employment opportunities for all qualified applicants."[60] Two general purposes of Title VII are to eradicate "group-based status inequalities" and to end the unfair treatment of individuals.[61]

Under Title VII, an "employee" is "an individual employed by an employer."[62] Keeping to the tradition of circular definitions, "employer" is defined as "a person engaged in an industry affecting commerce who has fifteen or more employees."[63] Unlike the FLSA, there is no bedrock Supreme Court case for trainees or interns under Title VII. Courts instead have created tests for other employment relationships, such as independent contractors, and analogized them to apply to interns.[64]

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53. *See infra* Part III.A.4.

54. *See infra* Part III.A.3, III.B.

55. Bergman, *supra* note 5, at 579 ("[S]ince unpaid interns are not considered employees, they will not receive statutory protections that apply to employees, such as Title VII.").

56. Stephanie A. Pisko, Comment, *Great Expectations, Grim Reality: Unpaid Interns and the Dubious Benefits of the DOL* Pro Bono *Exception*, 45 SETON HALL L. REV. 613, 629–31 (2015).

57. Morgan, *supra* note 40, at 785–86.

58. 42 U.S.C. § 2000e–2 (2012).

59. Nicholes, *supra* note 19, at 84, 86.

60. *Id.* at 83.

61. Damon Ritenhouse, *A Primer on Title VII: Part One*, 2 A.B.A. GPSOLO EREPORT 9, 10 (2013), http://www.americanbar.org/content/dam/aba/publications/GPSolo_eReport/2013/jan/january_2013.authcheckdam.pdf.

62. 42 U.S.C. § 2000e(f).

63. 42 U.S.C. § 2000e(b).

64. *See infra* Part III.A.

D. THE FLSA: WHAT DOES IT SAY AND WHAT IS ITS PURPOSE?

Before the advent of the modern unpaid internship, Congress enacted the FLSA in response to the poor treatment of employees during the Great Depression.[65] The FLSA lays out the general rights and duties of employers and employees.[66] One of the duties of the employer is to pay its employees a minimum wage at the rate set out in the FLSA.[67] The stated purpose of the FLSA is to correct the "conditions [that are] detrimental to the maintenance of the minimum standard of living necessary for [the] health, efficiency, and general well-being of workers."[68]

Another purpose of the FLSA "[is] to insure that every person whose employment contemplated compensation should not" have to receive less than the minimum wage as their compensation.[69] Essentially, the FLSA was enacted to protect workers who could not afford the "bare necessities of life" and "to protect the free flow of interstate commerce and fair competition."[70] The FLSA's ultimate goal is important, but its wording creates problems in applying its parameters to interns. It unhelpfully defines employee as "any individual employed by an employer."[71] To employ someone is "to suffer or permit [them] to work."[72] These amorphous definitions have opened the door to inconsistent tests for determining who qualifies as an employee under the FLSA.[73]

The Department of Labor ("DOL") assumes that the FLSA covers a broad range of employees, unless a "clear case" shows that a particular individual falls within one of the FLSA's stated exemptions.[74] The FLSA's definition of "employee" can expand to cover "some parties who might not qualify as such under a strict application of traditional agency law

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65. Ashley G. Chrysler, Comment, *All Work, No Pay: The Crucial Need for the Supreme Court to Review Unpaid Internship Classifications Under the Fair Labor Standards Act*, 2014 MICH. ST. L. REV. 1561, 1569 (2014).

66. 29 U.S.C. § 206 (2012). The FLSA's provisions establishing employers' and employees' rights and duties are supposed to improve working conditions and protect the average worker. Chrysler, *supra* note 65, at 1569–70.

67. 29 U.S.C. § 206(a); *see also* WILLIAM G. WHITTAKER, THE FAIR LABOR STANDARDS ACT 8 tbl.1 (2003) (listing federal minimum wage rates from 1938 to 2001). The FLSA has been amended multiple times since 1938. WHITTAKER, *supra*, at 7–8.

68. 29 U.S.C. § 202(a); *see also* Bergman, *supra* note 5, at 584 ("One of the motivating factors for the FLSA was that employers that chose not to pay workers had a negative impact on the national economy.").

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

70. George A. Hanson, *A Brief History of the Fair Labor Standards Act*, *in* THE FAIR LABOR STANDARDS ACT 1-3, 1-18 (Ellen C. Kearns et al. eds., 3d ed. 2015).

71. 29 U.S.C. § 203(e)(1).

72. 29 U.S.C. § 203(g).

73. *See infra* Part III.B.

74. WHITTAKER, *supra* note 67, at 7.

principles."[75] Though the Supreme Court has recognized this expansive definition, and generally followed the DOL's lead in its own interpretations of the FLSA, the Court has also somewhat limited the definition of "employee" with respect to trainees in *Walling v. Portland Terminal*.[76]

The Court decided *Walling* in 1947, and the case has become the foundation for unpaid internship analyses, even though the Supreme Court has not directly addressed how the FLSA specifically relates to unpaid interns.[77] In *Walling*, railroad brakemen took a training course from the Portland Terminal railroad.[78] Portland Terminal refused to pay the trainees, and the trainees brought suit.[79]

The Supreme Court held that employers must pay minimum wage to trainees, apprentices, and similar workers if the employer agreed to give them compensation at the outset.[80] However, the Court also said that, under certain circumstances, not all trainees had to receive minimum wages.[81] The Court in *Walling* decided that trainees did not qualify as "employees" under the FLSA because the trainees worked for their own benefit rather than the employer's.[82] The railroad received no immediate benefit from the trainees' work, but the trainees received official training and recognition from the company of certification, which would lead to future jobs from the company.[83] The Court ultimately denied the trainees payment because the Court decided they were not "employees."[84] Since *Walling*, some circuit courts have used the case as a basis for analyzing unpaid internships.[85]

III. THE ESTABLISHED FLSA AND TITLE VII EMPLOYEE TESTS

As the number of unpaid internships grows,[86] it is important for employers to ensure their internship programs comply with federal-worker

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75. Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 326 (1992).

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

77. "The Supreme Court has yet to address the difference between unpaid interns and paid employees under the FLSA." Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 534 (2d Cir. 2016).

78. *Walling*, 330 U.S. at 149.

79. *Id.* at 150.

80. *Id.* at 151.

81. *Id.* at 152.

82. *Id.* at 152–53.

83. Walling v. Portland Terminal Co., 330 U.S. 148, 149–50 (1947). The Court accepted "the *unchallenged* findings . . . that the railroad receive[d] no 'immediate advantage from any work done by the trainees.'" *Id.* at 153 (emphasis added).

84. *Id.* at 153.

85. *See infra* Part III.B.

86. PERLIN, *supra* note 4, at 61 ("An Intern Bridge survey . . . found that 18 percent of the respondents had received neither pay nor academic credit for their internships. . . ."); *see also* Durrant, *supra* note 41, at 184–86 (discussing that unpaid internships persist because of the recession, unequal bargaining power, the idea that employers prefer experience, and there is little oversight due to lack of reporting because interns feel the need to keep their internship and reputation at all costs).

protection laws in order to protect themselves from liability. To best protect themselves, employers must know whether their interns qualify as "employees" for federal statutory purposes.[87] The question is much easier asked than answered. An intern's duties vary from industry-to-industry and from business-to-business, which makes achieving any sort of consistent standard difficult. Furthermore, the federal definitions of "employee" are vague, making the law confusing and unclear to judges, litigants, employers, and potential employees.[88] Different tests for "employee" abound and still fail to fulfill the legislative purpose of both Title VII and the FLSA. Interns and employers alike have difficulty knowing exactly when the interns fall under the federal statutes.[89]

Both the FLSA's and Title VII's definitions of "employee" are too vague to be helpful to the courts in determining whether and when an unpaid intern is actually an employee. This difficulty has led courts to develop a multitude of different tests for each statute. The common tests for employee status under Title VII are: (1) the common law agency; (2) the benefits analysis; (3) the primary purpose; (4) the economic realities; (5) and the hybrid test.[90] The common FLSA tests are the DOL six-factor test, totality of the circumstances, economic realities/immediate advantage, and the primary beneficiary test.[91]

A. *TITLE VII TESTS FOR EMPLOYEE STATUS*

Courts have struggled to come up with a universal test for who qualifies as an employee under Title VII.[92] The most used tests are: "(1) a benefits analysis test; (2) a common law agency test; (3) a primary purpose test; (4) an economic realities test; and (5) a hybrid test."[93] Many of these tests were constructed around the idea that compensation is a key part of the employer-employee relationship.[94] As such, unpaid interns rarely, if ever,

87. *See, e.g.*, Chloe Della Costa, *Why Your Unpaid Internship May Be Illegal*, MONEY & CAREER CHEAT SHEET (July 3, 2015), http://www.cheatsheet.com/personal-finance/why-your-unpaid-internship-may-be-illegal.html; Greenhouse, *supra* note 27; Dylan Matthews, *Are Unpaid Internships Illegal?*, WASH. POST (June 13, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/06/13/are-unpaid-internships-illegal; Emily Yeh, *Are Unpaid Internships Legal?*, COLUM. UNDERGRADUATE L. REV. (Sept. 5, 2015), http://blogs.cuit.columbia.edu/culr/2015/09/05/are-unpaid-internships-legal.

88. *See supra* Part II.C–D.

89. Bergman, *supra* note 5, at 588 ("As a result of the circuit split, both unpaid interns and employers are left to ponder the proper standard by which each must order their actions. Employers are uncertain about whether or not to host unpaid interns because doing so might violate the FLSA.").

90. *See infra* Part III.A.

91. *See infra* Part III.B.

92. *See* Fredericksen, *supra* note 40, at 255.

93. *Id.*

94. *See, e.g.*, Pietras v. Bd. of Fire Comm'rs, 180 F.3d 468, 473 (2d Cir. 1999) ("[T]he question of whether someone is or is not an employee under Title VII usually turns on whether

receive protection under Title VII.[95] Courts consider benefits other than wages such as sick leave and social security, but the tests still leave out swaths of students and other unpaid interns who should be protected.

1. The Common Law Agency Test

Because Congress's definition of "employee" is open to interpretation, courts initially applied the traditional common law agency test for determining whether an employer–employee relationship existed.[96] The common law agency test "focuses on the employer's right to control the worker."[97] The control part of the common law agency test comes from the Restatement (Second) of Agency ("Restatement"), which lists various factors to consider.[98] But courts tend to focus on how much of the physical conduct an employer has the authority to control as the determinant factor.[99]

In *Cobb v. Sun Papers, Inc.*, the Eleventh Circuit had to determine whether the plaintiff was an employee or an independent contractor.[100] The

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he or she has received 'direct or indirect remuneration' from the alleged employer."); Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 221–22 (4th Cir. 1993) (suggesting remuneration can come from both monetary compensation and indirect benefits); Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990) ("Compensation . . . is an essential condition to the existence of an employer-employee relationship."); Wang v. Phx. Satellite Television US, Inc., 976 F. Supp. 2d 527, 532 (S.D.N.Y. 2013) (stating that compensation is a threshold requirement for employment under Title VII).

95. *See* James J. LaRocca, Note, Lowery v. Klemm*: A Failed Attempt at Providing Unpaid Interns and Volunteers with Adequate Employment Protections*, 16 B.U. PUB. INT. L.J. 131, 134 (2006) ("Courts have rejected unpaid interns' and volunteers' Title VII claims" because they were not compensated, even if the work the interns and volunteers performed was equal to that of a paid employee or failing to protect the interns would have a detrimental effect on any future employment opportunities.); *see also* Durrant, *supra* note 41, at 184 ("[U]npaid interns are not considered 'employees' under Title VII of the Civil Rights Act of 1968 due to their unpaid status. This lack of protection leaves interns particularly vulnerable to harassment, because they are 'generally on the lowest rung of a workplace hierarchy.'" (footnote omitted) (quoting Kathryn Anne Edwards & Alexander Hertel-Fernandez, *Not-So-Equal Protection: Reforming the Regulation of Student Internships*, ECON. POL'Y INST. 3 (Apr. 9, 2010), http://www.epi.org/files/page/-/pdf/epi_pm_160.pdf)).

96. *See* Nancy E. Dowd, *The Test of Employee Status: Economic Realities and Title VII*, 26 WM. & MARY L. REV. 75, 78–79 (1984) (citing Cobb v. Sun Papers, Inc., 673 F.2d 337, 340–41 (11th Cir. 1982)).

97. Dowd, *supra* note 96, at 80.

98. *Id.* at 80–83.

99. *Id.* at 81–82 (considering factors like "whether equipment used in performing work is provided by the employer or the worker, and whether the worker must perform the work personally or may hire others who are not selected or supervised by the employer to complete the work" (footnote omitted)).

100. Cobb v. Sun Papers, Inc., 673 F.2d at 338. The factors the trial court considered and appellate court adopted include:

> (1) There was some direction given by the defendant as to certain details of the work to be done; (2) the basic materials and tools used in the work were paid for and furnished by the defendant; (3) there was no written contract with provisions typically found in contracts involving independent contractors; (4) the firm that replaced plaintiff, Associated Cleaning, had a contract in writing that clearly delineated an independent contractor relationship with Sun Papers; and

court held the term "employee" in Title VII was to be interpreted "in light of general common law concepts."[101] Any economic factors between the employee and employer were viewed through the common law agency and control principles.[102] In *Marie v. American Red Cross*, the Sixth Circuit decided whether volunteer nuns qualified as employees under Title VII so as to be protected from religious discrimination.[103] The court stated that "the first sign of the incongruity between the common law agency test and the" relationship at issue was that the American Red Cross did not pay the plaintiff nuns.[104] Even though economic remuneration is a factor in common law agency test, it is not dispositive and must be considered with the rest of the traditional common law factors.[105]

Many courts have rejected the common law test because it is too rigid and it "exclude[s] the greatest number of persons from Title VII coverage."[106] Excluding such a large number of workers from Title VII coverage goes against Congress's intent to protect as many workers as possible.[107]

2. The Benefits Analysis Test: From a Stand-Alone and Threshold Perspective

The benefits analysis test can be used as a stand-alone test for determining whether someone is an employee or it can be a threshold factor before the court proceeds to another test to determine employee status.[108] But courts are split on how exactly to apply the test and how much weight monetary compensation should have in a benefits analysis.[109]

The Sixth and Ninth Circuits have adopted the benefits analysis test as a stand-alone test.[110] In the stand-alone test, courts look at "the sufficiency of the benefits."[111] Under this test, monetary remuneration is important but not dispositive.[112] If a plaintiff does not receive monetary compensation but

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(5) plaintiff did not report his payments from Sun Papers as business income on his 1977 tax returns.

Id. at 341.

101. *Id.* at 340–41.

102. *Id.* at 341.

103. Marie v. Am. Red Cross, 771 F.3d 344, 351 (6th Cir. 2014).

104. *Id.* at 354.

105. *Id.*

106. Ortner, *supra* note 2, at 2628.

107. *Id.* at 2623.

108. Fredericksen, *supra* note 40, at 256.

109. Morgan, *supra* note 40, at 781–82.

110. *Id.* at 782.

111. Fredericksen, *supra* note 40, at 256.

112. Morgan, *supra* note 40, at 782; *see also* Bryson v. Middlefield Volunteer Fire Dep't, Inc., 656 F.3d 348, 354 (6th Cir. 2011) (noting how the Sixth Circuit, "when evaluating a

still receives "numerous job-related benefits," she may still qualify as an employee.[113] However, student interns rarely qualify as employees if they do not receive monetary compensation.[114]

The Second, Fourth, and Eighth Circuits have adopted the threshold test, which makes the economic benefits factor much more important to the employee determination than it was in the common law agency test.[115] Courts focus on the financial benefits aspect as a necessary requirement for an employee relationship.[116] Under this test courts conduct a two-step inquiry: (1) whether the plaintiff received direct or indirect compensation; and, if so, (2) what the employment relationship is like.[117] If a person has received compensation or significant benefits from the position, only then will the court examine the rest of the employment relationship under other established employment tests.[118] Monetary compensation is determinative in the threshold test "because monetary compensation is an essential condition to [the] employment relationship."[119] The court can use other tests such as the common law agency test or the economic realities test for the second step of the inquiry.[120]

The Second Circuit applied the benefits threshold test in *O'Connor v. Davis* to determine whether an unpaid student intern was an employee.[121] The intern, O'Connor, was required to participate in an internship in order to graduate.[122] O'Connor filed a sexual harassment complaint against her boss for making inappropriate comments and calling her inappropriate

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particular relationship, [must assess and weigh] 'all of the incidents of the relationship'" (quoting Nationwide Mut. Ins. v. Darden, 503 U.S. 318, 324 (1992))).

113. Fredericksen, *supra* note 40, at 256 (quoting Pietras v. Bd. of Fire Comm'rs of the Farmingville Fire Dist., 180 F.3d 468, 473 (2d Cir. 1999)).

114. *Id.*

115. Morgan, *supra* note 40, at 782–84; *see also Pietras*, 180 F.3d at 473 (discussing how "it is clear that an employment relationship within the scope of Title VII can exist even when the putative employee receives no salary so long as he or she gets numerous job-related benefits"); O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir. 1997) (finding that "the preliminary question of remuneration is dispositive in this case"); Haavistola v. Cmty. Fire Co. of Rising Sun, Inc., 6 F.3d 211, 220 (4th Cir. 1993) (noting how "employees are those who as a matter of economic reality are dependent upon the business to which they render service" (quoting Bartels v. Birmingham, 332 U.S. 126, 130 (1947)); Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990) ("Compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, but it is an essential condition to the existence of an employer-employee relationship.").

116. Fredericksen, *supra* note 40, at 256.

117. Elizabeth R. Langton, Note, *Workplace Discrimination as a Public Health Issue: The Necessity of Title VII Protections for Volunteers*, 83 FORDHAM L. REV. 1455, 1468–69 (2014). Indirect compensation comes from benefits like pensions or life insurance. *Id.* at 1469.

118. *See, e.g.*, Fredericksen, *supra* note 40, at 256; Morgan, *supra* note 40, at 781.

119. Fredericksen, *supra* note 40, at 256.

120. Morgan, *supra* note 40, at 781.

121. O'Connor v. Davis, 126 F.3d 112, 115–16 (2d Cir. 1997).

122. *Id.* at 113.

names at the workplace.[123] Supervisors did nothing to address the issue, despite her numerous reports.[124] She soon left the internship and her school arranged for her to finish her requirement somewhere else.[125] After she left, O'Connor filed suit in federal court.[126]

The court first analyzed whether O'Connor received payments or benefits.[127] The court stated that before engaging in a common law agency analysis, it must first decide whether the plaintiff had been "hired," which essentially meant whether the plaintiff had received compensation for her work.[128] The Second Circuit stated that "a financial benefit . . . 'is an essential condition to the existence of an employer–employee relationship.'"[129] The court likened O'Connor's situation to a volunteer who did not receive any benefits.[130] The court subsequently held that the lack of remuneration was dispositive and dismissed her Title VII claim without analyzing the rest of the employment relationship.[131]

3. The Primary Purpose Test

The primary purpose test looks at the entire relationship between employer and plaintiff to determine what the primary purpose of the relationship is in order to decide whether the plaintiff qualifies as an employee.[132] In *Williams v. Meese*, the Tenth Circuit held that working inmates had no cause of action under Title VII because, while some aspects of the relationship were "commonly present in an employment relationship, . . . '[t]he primary purpose of [the] association [is] incarceration, not employment.'"[133] Such a broad test necessarily considers "incentives and benefits on both sides of the table."[134] The Supreme Court has indicated that courts can examine "underlying economic facts" when

123. *Id.* at 113–14.

124. *Id.* at 114.

125. *Id.*

126. *Id.*

127. O'Connor v. Davis, 126 F.3d 112, 115–16 (2d Cir. 1997) (stating that only if a "hire" had taken place would it undertake a common law agency analysis to determine whether an employment relationship existed).

128. *Id.* at 115–16.

129. *Id.* at 116 (quoting Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 73 (8th Cir. 1990)).

130. *Id.*

131. *Id.*

132. Fredericksen, *supra* note 40, at 259. In contrast, others have defined the primary purpose test as looking to the primary purpose of the *statute*, not the relationship between the two parties. Jackson Taylor Kirklin, Note, *Title VII Protections for Inmates: A Model Approach for Safeguarding Civil Rights in America's Prisons*, 111 COLUM. L. REV. 1048, 1064 (2011).

133. Williams v. Meese, 926 F.2d 994, 997 (10th Cir. 1991) (fourth alteration in original) (quoting EEOC Decision No. 86-7, 40 Fair Empl. Prac. Cas. (BNA) 2–3 (1986)).

134. Fredericksen, *supra* note 40, at 259.

applying the primary purpose test.[135] While the test is supposedly all-encompassing, lower courts have consistently shifted the scope to focus mainly on the "underlying economic facts."[136]

4. The Economic Realities Test

Courts that use the economic realities test do so because the common law and primary purpose tests are too technical and inhibiting.[137] For example, the Sixth Circuit in *Armbruster v. Quinn* stated that the primary purpose test does not result in the broad coverage Congress intended Title VII to achieve.[138] The court then held that the proper test was "the economic realities of the relationship."[139] Essentially, the economic realities test looks at the worker's economic dependence on her job, the work she performs, and the power balance between employer and worker.[140] The Eleventh Circuit also adopted the economic realities test for Title VII claims.[141] In *Cuddeback v. Florida Board of Education*, the court held that a graduate research assistant was an employee under the economic realities test.[142] The court looked at the student's stipends and benefits, allowed sick leave, a bargaining agreement, salary, and the student's permitted use of equipment.[143] The court in *Cuddeback* also mentioned that in cases where the "academic requirements [are] truly central to the relationship," an employment relationship does not exist.[144] Most of the cases the court cited

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135. N.L.R.B. v. Hearst Publ'ns, Inc., 322 U.S. 111, 129 (1944), *overruled in part by* Nationwide Mut. Ins. v. Darden, 503 U.S. 318 (1992).

136. *Id.*

137. Fredericksen, *supra* note 40, at 260.

138. Armbruster v. Quinn, 711 F.2d 1332, 1341 (6th Cir. 1983), *abrogated by* Arbaugh v. Y & H Corp., 546 U.S. 500 (2006).

139. *Id.* at 1341–42.

140. Fredericksen, *supra* note 40, at 260; *see also* Doe v. Lee, 943 F. Supp. 2d 870, 875–76 (N.D. Ill. 2013) (discussing factors to determine whether an employee relationship exists). A triable issue of fact on whether the plaintiff was an employee existed in *Doe v. Lee* when the intern "received reduced parking ticket fines, signed an agreement for 'temporary employment,' received training for sting procedures, and used money supplied by the village for sting operations. Moreover, she had workers' compensation coverage, and her schedule as controlled by a tactical detective." 1-4 LEX K. LARSON, LARSON ON EMPLOYMENT DISCRIMINATION § 4.05 n.19.7 (2d ed. 2016) (citing *Doe*, 943 F. Supp. 2d at 877–79).

141. Cuddeback v. Fla. Bd. of Educ., 381 F.3d 1230, 1234 (11th Cir. 2004).

142. *Id.* at 1235. However, the court did include common law agency principles while taking into account the economic realities. *Id.* at 1234–35.

143. *Id.* at 1234–35.

144. *Id.* at 1235. Specifically, the Eleventh Circuit cited *Pollack v. Rice University*, 28 Fair Empl. Prac. Cas. (BNA) 1273, 1982 WL 296 (S.D. Tex. 1982), stating that *Pollack* found "that paid research or instruction by the plaintiff was 'attendant to his capacity as a graduate student' because it was a central part of the graduate program and, therefore, the plaintiff's status was that of 'student' rather than 'employee.'" *Id.* (quoting *Pollack*, 1982 WL 296, at *1).

focused on monetary compensation as the primary, if not dispositive, factor of an employment relationship.[145]

5. The Hybrid Test

The hybrid test combines the economic realities test with the common law agency test by examining common law agency factors based on the working relationship of the parties.[146] The Tenth Circuit in *Zinn v. McKune* accomplished this by applying the "common-law agency principles to the facts and circumstances surrounding the working relationship of the parties."[147] The court in *Zinn* used the common law agency test's focus on the employer's "right to control the 'means and manner' of the worker's performance."[148] Then the court considered other factors from the economic reality of the relationship, such as payment, leave, benefits, taxes, whether a supervisor is typically present, the level of skill required for the job, and who owns the work equipment.[149] Based on the combination of these factors and the employer's low level of control, the court eventually found that the plaintiff's nursing services were not enough to form an employment relationship.[150] Her employers had no control over her activities except for the general conditions they implemented for safety and security.[151] The lack of control combined with the expectations of the parties led to the conclusion that the plaintiff was not an employee.[152]

B. THE FLSA TESTS FOR EMPLOYEE STATUS

The FLSA's vague definitions of "employee" and "employer" leave both terms open to a variety of interpretations. The ambiguity makes it more difficult for courts to definitively fit a new class of workers into a legal framework that was not constructed to deal with the uniqueness of internships. Courts are split on how to incorporate interns into the existing legal framework. As a result, circuits use a variety of established tests to

145. *Cuddeback*, 381 F.3d at 1235 (citing Ivan v. Kent State Univ., 863 F. Supp. 581, 585–86 (N.D. Ohio 1994) (determining that "a graduate student researcher was an employee where she was under an employment contract, was paid biweekly, and had retirement benefits withheld"); Jacob-Mua v. Veneman, 289 F.3d 517, 520–21 (8th Cir. 2002) (holding "that a volunteer graduate student researcher was not an employee because she was not financially compensated for her work"), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

146. Fredericksen, *supra* note 40, at 261–62.

147. Zinn v. McKune, 143 F.3d 1353, 1357 (10th Cir. 1998).

148. *Id.* at 1357 (citing Lambertsen v. Utah Dep't of Corr., 79 F.3d 1024, 1028 (10th Cir. 1996)).

149. *Id.*

150. *Id.* at 1358–59.

151. *Id.*

152. *Id.* at 1359.

attempt to analyze interns under the FLSA framework.[153] Courts are particularly divided on how to decide whether unpaid interns are employees under the FLSA.[154]

Initially, the DOL created an "all-or-nothing" six-factor test to answer this question.[155] A trainee is an employee—and entitled to compensation—unless the employer can meet all six factors.[156] The Tenth Circuit has taken the DOL's six-factor test and adopted it into a "totality of the circumstances" test, where no one factor is dispositive.[157] The Eleventh Circuit created an "economic realities" test to try and fit unpaid interns into the modern job industries.[158] The Fourth and Second Circuits have gone their own way and created a "primary beneficiary" test to be flexible and better balance the competing interests of employers and interns.[159]

1. The DOL Six-Factor Test

In 1975, the Wage and Hour Division of the DOL published a six-factor test based on the *Walling* opinion to aid courts in deciding whether a trainee was an employee.[160] In 2008, when the number of unpaid internships increased dramatically, the DOL test and the *Walling* exception received renewed attention.[161] In response to the growing number of unpaid internships, the DOL produced a Fact Sheet in 2010 adjusting the six-factor test to apply specifically to interns.[162] The Fact Sheet states:

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153. Cody Elyse Brookhouser, Note, *Whaling on* Walling*: A Uniform Approach to Determining Whether Interns Are "Employees" Under the Fair Labor Standards Act*, 100 IOWA L. REV. 751, 756 (2015).

154. Madiha M. Malik, Note, *The Legal Void of Unpaid Internships: Navigating the Legality of Internships in the Face of Conflicting Tests Interpreting the FLSA*, 47 CONN. L. REV. 1183, 1190 (2015).

155. *See* Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 524–25 (6th Cir. 2011) (discussing the DOL's six-factor test).

156. *Id.*

157. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993) (en banc) ("The prefatory language to the Secretary's test itself makes clear that the six factors are meant as an assessment of the totality of the circumstances.").

158. Kaplan v. Code Blue Billing & Coding, Inc., Nos. 12-12011, 12-12376, 12-12679, 2013 WL 238120, at *2 (11th Cir. Jan. 22, 2013).

159. McLaughlin v. Ensley, 877 F.2d 1207, 1209 (4th Cir. 1989) (discussing *Walling*'s focus on the employer's "immediate advantage" and whether the instruction will "greatly benefit" the trainee); *see also* Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536 (2d Cir. 2016) (finding "the proper question is whether the intern or the employer is the primary beneficiary of the relationship").

160. *McLaughlin*, 877 F.2d at 1208 n.1.

161. Malik, *supra* note 154, at 1192 & n.48; Natalie Bacon, Note, *Unpaid Internships: The History, Policy, and Future Implications of "Fact Sheet #71,"* 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 67, 74 (2011); *see also* Chrysler, *supra* note 65, at 1564 ("In recent years, internships—particularly unpaid internships—have become increasingly prevalent in the United States. . . . [U]ndergraduate students obtain over one million internships each year . . . .").

162. U.S. DEP'T OF LABOR WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT 1 (2010), https://www.dol.gov/whd/regs/compliance/whdfs71.pdf

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.[163]

The intern is an employee, and entitled to wages, *unless* the employer can show that the internship satisfies all six factors.[164] The test is "necessarily quite narrow" in order to give full effect to the broad scope of the FLSA's intended coverage.[165]

Despite its inclusiveness, the DOL Fact Sheet is flawed for several reasons. First, it is inconsistent with itself. The Fact Sheet states that all six factors must be met, but it also explains that determining who qualifies as an employee requires an "all of the facts and circumstances" analysis.[166] Second, because the Fact Sheet is only an opinion letter from the DOL, it is not binding.[167] The Fact Sheet is a guideline without the force of a regulation,

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[hereinafter FACT SHEET #71]; Anthony J. Tucci, Note, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1369 n.30 (2012) ("The DOL practically adopted the trainee standard verbatim—only changing 'training' to 'internship' and 'trainee' to 'intern.'").

163. FACT SHEET #71, *supra* note 162, at 1. The Wage and Hour Division of the DOL highlighted the purpose of Congress's broad definition of "employ"—it "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." *Id.* (emphasis added). The sheet specifically states that interns who are working for their educational benefit may not be covered by the FLSA. *Id.* However, even if an intern receives educational credit, the employer is typically also benefiting from the intern's work. PERLIN, *supra* note 4, at 83–85. Rarely do interns work to only serve their own interests.

164. FACT SHEET #71, *supra* note 162, at 1. Even though Fact Sheet #71 states that whether an internship program is exempted from the FLSA requirements depends "upon all of the facts and circumstances of each such program," the DOL's requirement that all six factors must be met is more rigid than a facts and circumstances test. *Id.*

165. *Id.*

166. *Id.*

167. Opinion letters receive *Skidmore* deference, "but only to the extent that those interpretations have the 'power to persuade.'" *See* Christensen v. Harris Cty., 529 U.S. 576, 587 (2000) (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)). A full explanation of *Skidmore* deference is beyond the scope of this Note, but a general summary is as follows. Even

meant only to provide reference for courts in deciding the particular issues it addresses.[168] Courts are therefore free to follow or adjust the six-factor test as they wish. For example, the Fifth Circuit has strictly followed the DOL's six-factor test[169] while other courts have only given the test some deference because they see it as too "rigid and inconsistent."[170]

2. The Totality of the Circumstances Test

The Tenth Circuit created the "totality of circumstances test" in *Reich v. Parker Fire Protection District* as a way to remedy the flaws in the DOL's six-factor test in both trainee and internship circumstances.[171] In *Reich*, the Secretary of Labor brought suit against the fire protection district seeking to recover minimum wages for four trainee firefighters.[172] The court did not apply a "high level of deference" to the six-factor test, but applied *Skidmore* deference.[173] Under *Skidmore* deference, the DOL's test is not binding but the court "may properly resort" to the DOL for guidance because of the experience and informed judgment the DOL used in forming its test.[174]

The court viewed the six-factor test as too strict and unreasonable.[175] The court described the DOL factors as "relevant but not conclusive."[176] The court decided to follow the Fact Sheet's prefatory language that called for a totality of the circumstances analysis but considered all six factors without requiring the trainees to meet a certain number.[177] The court found that

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though opinion letters are more informal than regulations, *Skidmore* indicates that courts can resort to such opinions for guidance because "it did constitute a body of experience." *See* Elizabeth C. Lawrence, *Operations and Functions of the Department of Labor, in* THE FAIR LABOR STANDARDS ACT 2-3, 2-10 (Ellen C. Kearns et al. eds., 3d ed. 2015). The weight of an opinion letter depends on "[1] the thoroughness evident in its consideration, [2] the validity of its reasoning, [3] its consistency with earlier and later pronouncements, and [4] all those factors which give it power to persuade, if lacking power to control." Lawrence, *supra*, at 2-10. It is not certain if the deference is different between opinion letters and fact sheets but many courts have given the fact sheets deference. Lawrence, *supra*, at 2-38 to 2-39.

168. *Skidmore*, 323 U.S. at 140; Chrysler, *supra* note 65, at 1574 & n.84. Courts have also been inconsistent in how much deference to give the Fact Sheet, from very little to some under *Skidmore* and a whole lot under *Chevron*. *See* Chrysler, *supra* note 65, at 1574 n.84.

169. Donovan v. Am. Airlines, Inc., 686 F.2d 267, 273 (5th Cir. 1982) ("The trainees here are not employees by each of [the DOL's] criteria.").

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

171. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1027 (10th Cir. 1993). This case was the circuit's first case dealing with an employee/trainee distinction. *Id.* at 1027.

172. *Id.* at 1024–25. When the case was decided the only six-factor test came from DOL's six-factor Fact Sheet for trainees, but the Fact Sheet has the same requirements as the 2010 sheet for interns.

173. *Id.* at 1026.

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

175. *Reich*, 992 F.2d at 1027.

176. *Id.* The court felt comfortable making the factors merely relevant partially because it did not use an absolute factor test to decide employee status in other contexts. *Id.*

177. Reich v. Parker Fire Prot. Dist., 992 F.2d 1023, 1026–27 (10th Cir. 1993).

even though the internship met five of the six factors applied to the trainees, the trainees were not employees under the FLSA.[178]

While the Tenth Circuit's test is more flexible than the all-or-nothing DOL approach, it is not without its own shortcomings. First, the totality approach requires a much more extensive and fact-intensive analysis than the DOL approach.[179] The test takes up time and is quite subjective, which leads to inconsistent results and a problematic application.[180] Second, the DOL has a significant amount of expertise about the employment/internship issue. But the totality approach ignores the DOL's expert position that *all* factors must be met for a trainee not to qualify as an employee.[181] Under a totality of the circumstances test, it is unclear at what point interns become employees. The uncertainty can be a problem for employers because they do not know beforehand whether their interns are entitled to wages under the FLSA.[182]

3. The Economic Realities (or Immediate Advantage) Test

In 2013, the Eleventh Circuit created its own test to determine who qualifies as an employee by applying an "economic realities" test (or immediate advantage test) to student externs in *Kaplan v. Code Blue Billing & Coding, Inc.*[183] The primary consideration in this test is whether the interns "confer[] an economic benefit on the entity for whom they are working."[184] Under this test, if an intern works primarily for his or her own benefit and there is no immediate advantage to the employer, then the intern is not an employee.[185] In *Kaplan*, the court noted that the business' employees took time away from their own duties to train and supervise the interns, which caused the business to run less effectively, resulting in no *immediate advantage* to the employer.[186] The interns also engaged in hands-on work and received academic credit.[187] The experience from hands-on work and the academic credit shows the primary benefit went to the student interns.[188] The court also stated, without explaining, that the internship program satisfied all six

178. *See id.* at 1029 ("[A] single factor cannot carry the entire weight of an inquiry . . . .").

179. *See* Chrysler, *supra* note 65, at 1589.

180. *Id.*

181. *Id.* at 1588.

182. *Id.* at 1588–89.

183. Kaplan v. Code Blue Billing & Coding, Inc., Nos. 12-12011, 12-12376, 12-12679, 2013 WL 238120, at *2 (11th Cir. Jan 22, 2013) (finding the students "were eligible to earn their degrees" by completing their internships). The strict economic realities test is probably the least used in regards to the FLSA and unpaid internships, though elements of the test make their way into the other tests. *See* Chrysler, *supra* note 65, at 1586.

184. *Kaplan*, 2013 WL 238120, at *2.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

of the DOL's factors so the plaintiffs were not employees under the meaning of the FLSA.[189]

The problem with this test is that employers receive little guidance for what, exactly, constitutes an economic reality that shows an employee-employer relationship—particularly for unpaid interns—because no exchange of compensation is involved.[190] In *Kaplan*, the Eleventh Circuit merely stated that the internship satisfied all six of the DOL's factors without detailing how all six of the DOL factors were met.[191] Instead, the court held the plaintiffs were not employees because they caused the business to run less efficiently and gave no economic benefit to the defendant through their work.[192]

The economic realities test is too broad and ambiguous; there is no "question to answer [or] factors to balance."[193] Unlike the DOL Fact Sheet, there are no specific boundaries or guidelines for the analysis.[194] The economic realities test leads to even more uncertainty than the tests courts used before.[195]

4. The Primary Beneficiary Test

In the most recent case to address whether unpaid interns qualify as employees, the Second Circuit adopted a "primary beneficiary" test.[196] In the July 2015 case *Glatt v. Fox Searchlight Pictures, Inc.*, the three plaintiffs worked as unpaid interns on the set of *Black Swan*, a Fox movie production.[197] The district court classified the interns as employees and said the plaintiffs were entitled to compensation, using a balancing totality of the circumstances test based on the DOL's six factors.[198]

On appeal, the Second Circuit had the chance to choose between three different tests: (1) the DOL's six factors; (2) a version of the primary

189. Kaplan v. Code Blue Billing & Coding, Nos. 12–12011, 12–12376, 12–12679, 2013 WL 238120, at *3 (11th Cir. Jan. 22, 2013) ("The externship programs at Code Blue and EFEI satisfy all six of the Administrator's criteria.").

190. Chrysler, *supra* note 65, at 1593–94.

191. *Kaplan*, 2013 WL 238120 at *3.

192. *Id.* at 834.

193. Chrysler, *supra* note 65, at 1593 (quoting Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 523 (6th Cir. 2011)).

194. *Id.*

195. *Id.* at 1594.

196. *See generally* Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376 (2d Cir. 2015), *amended and superseded on other grounds by* 811 F.3d 528 (2d Cir. 2016). In September 2015, the Eleventh Circuit decided to adopt the Second Circuit's new primary beneficiary test as well in *Schumann v. Collier Anesthesia, P.A.*, 803 F.3d 1199 (11th Cir. 2015).

197. *Glatt*, 791 F.3d at 378.

198. *Id.* at 382.

beneficiary test; or (3) the economic realities/immediate advantage test.[199] The court said the DOL's factors were too rigid and decided to adopt a tailored primary beneficiary test, establishing a new test specifically for interns.[200] Under the new primary beneficiary test, an intern is an employee only when the employer benefits more from the relationship than the intern.[201]

While other circuits structured their tests around the DOL's factors, the Second Circuit created its own list of "non-exhaustive" factors wholesale, specifically for "the context of unpaid internships."[202] These factors include:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.

199. *Id.* at 383. The plaintiffs urged the court to adopt the immediate advantage test, basing their claim on *Walling*'s language that the railroad had not received any immediate advantage from the trainee's and so the trainees were not employees. *Id.*

200. *Id.* at 383–84.

201. Wang v. Hearst Corp., No. 13-4480-CV, 2015 WL 4033091, at *2 (2d Cir. July 2, 2015). This is different than the "immediate advantage" test and in fact is a better test for the employer because under the primary beneficiary standard the employer can still get something out of the intern's work without being worried that the intern must be paid. *Id.* This way the intern is guaranteed to get some benefit: either monetary if the employer is getting all the rewards or substantive and beneficial training.

202. *Glatt*, 791 F.3d at 384.

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.[203]

None of the seven factors are dispositive and multiple factors can weigh either for or against an intern's possible employee status.[204] The court made an effort to highlight the relationship between the unpaid internship and the intern's formal education.[205] Generally, when the internship incorporates the formal education into the workplace, the intern does not qualify as an employee.[206] The court claimed that this test is more flexible because it accounts for the true economic realities of internships and focuses on what the intern receives during the internship.[207] The primary beneficiary test can still fall prey to the weaknesses of the totality of the circumstances test, but the advantage in a primary beneficiary test is that the analysis is slightly more confined, because the focus is on the internship's relationship to education and economic benefits.

IV. PROPOSAL

Unpaid internships are here to stay.[208] Generally, internships provide valuable benefits to both the interns and employers.[209] However, interns can also experience harassment and discrimination without recourse because they fall through the gaps left by the traditional "employee" tests the courts employ. Because internships have become such an integral part of higher education—in both graduate and undergraduate institutions—courts must find a test that fits interns into the existing employer-employee framework, but they have so far been only partially successful.[210] To simplify and standardize the analysis, courts should apply a single test for both the FLSA and Title VII claims. This test should be a modified version of the Second Circuit's primary beneficiary analysis.

A. *COURTS SHOULD USE THE SAME TEST FOR "EMPLOYEE" UNDER BOTH THE FLSA AND TITLE VII*

Courts should use a single test for determining who is an employee under both the FLSA and Title VII to support the goals of both statutes.

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203. *Id.*

204. *Id.*

205. *Id.* at 385.

206. *See id.*

207. *Id.* at 383–84 (2nd Cir. 2015).

208. *See* Fredericksen, *supra* note 40, at 253 ("[T]he number of unpaid internships has skyrocketed. Experts predict that the prevalence of internships, mostly unpaid, will continue to expand as more and more employers demand an internship on student resumes as the entrance cost into such a competitive job market." (footnote omitted)).

209. *Position Statement*, NACE, *supra* note 25.

210. Bowman & Lipp, *supra* note 45, at 105–06.

First, precedent already exists for using one federal statute's definition of a word to help interpret the same word in another statute. For example, the Sixth Circuit stated that definitions of "employee" from federal statutes like the National Labor Relations Act and the Social Security Act can be persuasive in determining "employee" under the FLSA.[211] It is only a small step to use the same test for employee determinations under both statutes.[212]

Second, a single test for both the FLSA and Title VII employee determinations ties in the monetary component that is central to Title VII tests, while providing the broad coverage Congress intended for both statutes. Financial compensation is a key factor in deciding whether a plaintiff qualifies as an employee in Title VII claims.[213] This of course leaves out the entire sector of unpaid interns, who may be acting as "employees" in all other respects.[214] If interns *should* be getting paid but are potentially missing out on wages legally entitled to them under the FLSA then, by extension, they are missing out on protection they are legally entitled to under Title VII.

Consider the following scenario: An unpaid intern brings a Title VII claim for sexual harassment in the workplace and is denied relief because she did not receive financial compensation for her work. But, if the same unpaid intern had brought an FLSA claim and qualified as an employee under a different test, she should have received financial compensation from the outset under the FLSA. Since she did not receive the payment she was entitled to, she lost her Title VII claim.[215] It would be much simpler to combine the two steps and have a single test for the FLSA and Title VII to ensure more consistent results and possibly broaden Title VII coverage to some unpaid interns. All interns, paid or unpaid, should have the same basic protections in the workplace as other employees.[216] If monetary compensation becomes a less important factor for Title VII claims, the number of workers who will qualify as employees is closer to the legislative intent of broad workplace protections.[217] By making the test the same for both the FLSA and Title VII claims, unpaid interns are closer to being on the same footing as paid interns in regards to workplace protections. Both federal statutes are meant to address broad social issues. The definitions for "employer" and "employee" should be similarly as broad. Interns are

211. Dunlop v. Carriage Carpet Co., 548 F.2d 139, 143–44 (6th Cir. 1977).

212. *See supra* note 14 and accompanying text.

213. *See supra* Part II.B.

214. Morgan, *supra* note 40, at 785 (explaining that the circular definitions of employment relationships in Title VII "has made it difficult for courts to determine the statute's applicability to unconventional employment relationships").

215. *See supra* note 55 and accompanying text.

216. *Position Statement*, NACE, *supra* note 25.

217. *See supra* Part II.C.

becoming a more significant part of the work force and need to be brought under Title VII's protections.[218]

In *N.L.R.B. v. Hearst Publications*, the Supreme Court analyzed the definition of "employee" under the National Labor Relations Act.[219] The Court recognized that the definition "must be read in the light of the mischief to be corrected and the end to be attained."[220] The Sixth Circuit has taken the same position and said that terms like "employee" and "employer" do not hold their strict common law definitions in the context of federal social-welfare legislation.[221] Instead, the definitions must serve the purpose of the legislation.[222] The court said "that strict common law concepts will not be applied to determine the bounds of coverage of terms used in the [FLSA]."[223] Congress intended the statute to protect the extensive "range of workers who may be subject to the harms the statute was designed to prevent, unless such workers are excluded by a specific statutory exception."[224] Unpaid interns are not part of a specific statutory exception.[225]

While having a single test may expose employers to more liability by broadening the scope of covered employees, there are still workers—like volunteers—who fall outside the statute. The essence of what it means to be an employee remains.[226] Using the same test for both statutes clarifies and simplifies the analysis: if a student intern should be getting paid, then they are also protected from workplace discrimination and harassment.

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218. Morgan, *supra* note 40, at 790.

219. *See generally* N.L.R.B v. Hearst Publ'ns, Inc., 322 U.S. 111 (1944), *overruled in part by* Nationwide Mut. Ins. v. Darden, 503 U.S. 318 (1992).

220. *Id.* at 124 (quoting S. Chi. Coal & Dock Co. v. Bassett, 309 U.S. 251, 259 (1940)).

221. Dunlop v. Carriage Carpet Co., 548 F.2d 139, 145 (6th Cir. 1977) (looking at the Supreme Court's interpretation of the National Labor Relations Act, Social Security Act, and the FLSA, noting broad definitions of "employee" and "employer" in each situation). The *Dunlop* Court relied on the Fifth Circuit case of *Mednick v. Albert Enterprises, Inc.*, 508 F.2d 297, 299–300 (5th Cir. 1975), which reviewed *N.L.R.B. v. Hearst Publications, Inc.*, 322 U.S. 111 (1944) (discussing the NLRA), *United States v. Silk*, 331 U.S. 704 (1947) (discussing the Social Security Act), *Bartels v. Birmingham*, 332 U.S. 126 (1947) (discussing the Social Security Act), and *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947) (discussing the FLSA).

222. *Dunlop*, 548 F.2d at 145–46.

223. *Id.* at 145.

224. Armbruster v. Quinn, 711 F.2d 1332, 1339 (6th Cir. 1983), *abrogated by* Arbaugh v. Y & H Corp., 546 U.S. 500 (2006). "The primary purpose of the Civil Rights Act, and Title VII in particular, is remedial. Its aim is to eliminate employment discrimination by creating a federal cause of action to promote and effectuate its goals." *Armbruster*, 711 F.2d at 1336.

225. Volunteers are one class of workers who are considered exempt from the FLSA. But internships are closely linked to future job opportunities and careers and are considered gateway opportunities for full-time jobs, which makes the interns more like traditional employees than exempted classes such as volunteers.

226. *See* Morgan, *supra* note 40, at 791–92 (arguing that a partial FLSA test incorporating the DOL factors would prevent volunteers from becoming employees and would protect employers).

B. COURTS SHOULD ELIMINATE THE ACADEMIC CREDIT FACTOR FROM GLATT*'S PRIMARY BENEFICIARY TEST*

None of the tests courts use for Title VII claims are like the primary beneficiary analysis the Second Circuit constructed in *Glatt*.[227] Some of the primary purpose tests come close, but their focus is on the economic benefits of the relationship.[228] As stated above, the *Glatt* factors include: understanding, expectation, or promises of compensation, "clinical and other hands-on training [similar to that] provided by educational institutions"; participation in "coursework or [the] receipt of academic credit"; timing that "correspond[s] to the academic calendar"; a limited learning period; how much the work displaces or complements paid employees; "educational benefits"; and, finally, "entitlement to a paid job at the conclusion of the internship."[229] *Glatt*'s test looks at a multitude of factors besides monetary compensation that better represent the modern relationship between intern and employer.[230]

The best test to use to determine whether an intern qualifies as an employee is one that balances the intern's interests with the employer's.[231] The DOL Fact Sheet gives the most protection for interns, but its rigidity cannot account for many different types of internships that exist in the modern market.[232] Even in *Walling*, the case that led to the DOL Fact Sheet, the court attempted to answer the ultimate question of which party benefited and whose interests the relationship served.[233] The primary beneficiary test is the best test because it incorporates aspects from the other existing tests while maintaining necessary flexibility.[234] A primary beneficiary

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227. *See supra* Part III.

228. *See supra* Part III.A.3, III.B.3.

229. Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 384 (2d Cir. 2015), *amended and superseded on other grounds by* 811 F.3d 528 (2d Cir. 2016).

230. *See supra* Part III.B.4.

231. The best solution is one that acknowledges declining availability of internships and employer abuse. *See* Bergman, *supra* note 5, at 585.

232. *See supra* Part III.B.1.

233. Walling v. Portland Terminal Co., 330 U.S. 148, 152–53 (1947). Bergman, *supra* note 5, at 585 ("The Court did use the factors as a guide to its analysis but held that those factors informed the ultimate inquiry: which party was the primary beneficiary of the work done by the trainees?" (citing *Walling*, 330 U.S. at 152–53)).

234. The competing interests involved in unpaid interests are diametrically opposed:

> Either interns will not be paid when they should be or employers will be forced to pay, which could lead to a dropoff in the availability of unpaid internships. However, a solution that addresses both the worst examples of employer abuse of unpaid internships and the need for unpaid internships as necessary professional experience is possible.

Bergman, *supra* note 5, at 585. The primary beneficiary analysis is a version of the totality of circumstances approach Bergman advocates. *Id.*

analysis also comports with the Court's statement in *Walling* that some workers are not necessarily employees.[235]

A primary beneficiary test keeps the financial benefits factor in play while still giving courts some flexibility for broader coverage by considering other types of benefits.[236] *Glatt*'s test allows courts to consider any economic compensation the intern receives from her internship with other factors without making any of them dispositive.[237] The economic factor incorporates the focus from the Title VII benefits analysis test[238] and the FLSA economic realities test.[239] The first *Glatt* factor considers whether the intern was paid or promised payment,[240] but wages are not the only kind of benefit the Title VII tests consider.[241] For example, the District Court for the District of Columbia held that "a clear pathway to full-time, paid employment" from simply participating in the internship opportunity "might constitute significant benefits to constitute an employer-employee relationship" under Title VII.[242] The primary beneficiary analysis ensures such benefits are taken into account.[243] This test also includes variations of the six factors from the DOL's Fact Sheet while adhering to the DOL letter's statement that courts should consider all facts and circumstances when deciding whether an intern qualifies as an employee.[244] The test maintains a balance between totality of the circumstances and strict benefits, establishing a middle ground between consistency and broad coverage.

While *Glatt*'s primary beneficiary test is the best way to analyze unpaid internships, a modification is in order. Courts should eliminate the academic-credit factor. In many cases, schools require their students to participate in an internship to graduate.[245] Such an unavoidable situation

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235. *Id.* at 588. If interns are truly the primary beneficiaries of the relationship, then they are (mostly) working for their own benefit. The Court in *Walling* made sure to point out that as "broad as [the definition of employee is, it] cannot be interpreted so as to make a person whose work serves only his own interest an employee of another person who gives him aid and instruction." *Walling*, 330 U.S. at 152.

236. Diana Shaginian, Note, *Unpaid Internships in the Entertainment Industry: The Need for a Clear and Practical Intern Standard After the Black Swan Lawsuit*, 21 SW. J. INT'L L. 509, 530–31 (2015).

237. *See supra* notes 202–03 and accompanying text.

238. *See supra* Part III.A.2.

239. *See supra* Part III.B.3.

240. *See supra* note 203 and accompanying text.

241. *See supra* Part III.A.2.

242. Fredericksen, *supra* note 40, at 265 (citing Rafi v. Thompson, Civil Action No. 02-2356 (JR), 2006 WL 3091483, at *1 (D.D.C. Oct. 30, 2006)).

243. "[D]rawing an arbitrary line around wages . . . threatens to unfairly exclude unpaid interns in contravention of Title VII's intent . . . ." Ortner, *supra* note 2, at 2615.

244. *See supra* Part III.A.1 (describing the common law agency test). The factors are taken from the DOL's Fact Sheet, and "[t]he six factors address [the competing tensions in unpaid internships] very well." Pasternack, *supra* note 1, at 207.

245. PERLIN, *supra* note 4, at 89.

should not be held against the interns.[246] Taking academic credit out of the equation safeguards the internship's original purpose: real-world experience and proper training.[247] Most students, as well as educators and employers, espouse the benefits of internships as real-world experience and training that lead to substantive learning.[248] If courts can use academic credit as a reason to deny protection in the workplace, it becomes easier for employers to get away with "benefitting" the intern with academic credit without giving the student the proper training and experience that supposedly make the internship so desirable. Employers can create "shell" internships—where they claim the intern benefits by getting credit, but in reality the intern does not learn anything substantial. Employers have less incentive to create and structure a substantively good program if the academic-credit factor weighs in their favor, because so long as they meet a school's requirement for receiving academic credit, they need not go any further. Without the academic-credit factor, employers have to make sure the intern is truly benefiting from the experience in terms of hands-on training.[249]

An internship that provides practical and substantive experience, while perhaps costlier than a "shell" internship where students perform menial tasks, is a win-win situation. In both cases the intern is benefited—either the intern must be paid because the employer receives the most benefit from his or her work, or the intern benefits from significant training, experience, and networking.[250] Employers are able to get some of their investment back from the intern's work and, in the long run, employers have more confidence that

246. Ortner, *supra* note 2, at 2618.

247. Ortner observes:

> [U]npaid internships are becoming increasingly prevalent and are recognized as a source of invaluable on-the-job training. While students may earn academic credit for interning, and some are academically required to complete an internship program prior to graduation, internships need not be for credit, because for many interns the 'payoff' comes in the form of valuable experience gained by working in a professional environment.

Id. (footnotes omitted).

248. Hughes & Lagomarsine, *supra* note 40, 409–10 ("The internship is one of the most common methods that students use to gain real world experience and attempt to secure employment for post-graduation. . . . These internships are considered valuable because students are able to build their professional networks, and they are more likely to be hired by employers because they have field experience.").

249. *See* Ortner, *supra* note 2, at 2618 ("While students may earn academic credit for inteming, and some are academically required to complete an internship program prior to graduation, internships need not be for credit, because for many interns the 'payoff' comes in the form of valuable experience gained by working in a professional environment." (footnote omitted)).

250. Fredericksen, *supra* note 40, at 252–53.

their prospective employees who had previous internships received good training and hands-on experiences.[251]

It is true that the receipt of academic credit factor is not an immediate disqualifier from employee status.[252] But, keeping the factor in play increases the risk that an internship will not truly benefit the intern in experience and training. Minimizing the risk of "shell" internships is congruent with the broad conception of "employee" the legislature intended and the courts have tried to implement.[253]

It is possible that taking out the academic credit factor will result in employers spending more time and resources on internships to guarantee they benefit the interns enough to disqualify the interns from employee status. The risk of more expenses may lead to internships disappearing from the marketplace, which is a detriment to everyone involved.[254] But eliminating one factor will not eliminate internships completely. Employers can also get some of their expended resources and time back from the intern's work.[255] More quality internships can also lead to more qualified interns looking for full-time positions, benefiting the employer.

C. MECHANISM FOR IMPLEMENTING THE SOLUTION

The best way to implement the modified primary beneficiary test for both the FLSA and Title VII is a Supreme Court decision affirming *Glatt* with the proposed modification. In *Glatt*, the Second Circuit vacated and remanded the lower court's decision, but the uncertainty in the jurisprudence cannot last for long.[256] A consistent judicial test is better than

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251. *Id.* In many cases the employer also gets the chance to determine the possibility of full-time employment for the current intern. The determination is more useful when the intern received a valuable experience and produced meaningful work.

252. *See supra* notes 203–04 and accompanying text.

253. "Title VII's protections were intended to be comprehensive and not diluted by concerns for judicial economy, which might otherwise encourage a narrower reading." Ortner, *supra* note 2, at 2623. Even though the definition of "employee" indicates that a line has to be drawn between employees and non-employees at some point, "it is generally accepted that Congress intended Title VII to be understood in the broadest possible terms." *Id.* at 2625; *see also* Gessner, *supra* note 47, at 1058 ("Interpretations of the definitions of the FLSA and, in turn, the scope of its reach, have always been based on a very broad reading of the statute.").

254. *See* Hughes & Lagomarsine, *supra* note 40, at 426–27 ("Some employers were advised not to take interns on at all. CBS Moneywatch advised employers that if they did not have the resources to mentor an intern, did not have room for them, did not have substantive work for them, or the company was undergoing significant change, then they should not hire an intern at all.").

255. *See* Bergman, *supra* note 5, at 586. ("It strains logic to advocate that an employer who hosts an internship program must make sure that it does not benefit from the program. Employers would ultimately have no incentive to provide internships that have become a crucial stepping-stone for college students."). "[I]f employers cannot both receive benefit from and award benefit to the interns alike without monetary cost, these 'good' internships will likely disappear." Fredericksen, *supra* note 40, at 269.

256. Glatt v. Fox Searchlight Pictures, Inc., 791 F.3d 376, 388 (2d Cir. 2015), *amended and superseded on other grounds by* 811 F.3d 528 (2d Cir. 2016).

a statutory change to the definition because keeping the statutory definition of "employee" as broad as possible better serves the statutes' purposes, and a judicial interpretation provides the necessary flexibility for changing workplace relationships.[257] Stricter definitions would likely exclude groups of workers who act as employees but may not fit the technical definition. A broad and somewhat ambiguous understanding allows more people to fall under the statutes' protections; however, the inconsistency between circuits needs to be addressed to cut down on confusion and uncertainty. A Supreme Court decision applying a single test for defining "employee," particularly for interns, would cut down on inconsistencies while keeping the flexibility necessary to analyze wildly varying kinds of internships, thereby affording interns the protection they so desperately need.

V. CONCLUSION

The FLSA and Title VII are unable to keep up with the numerous and rapid changes to the work environment in the modern world. Unpaid internships are a fairly recent phenomenon. The inability of statutes to protect these new kinds of "employees" requires a consistent judicial interpretation of old-fashioned definitions that remain true to the spirit of protection the statutes were meant to implement. With the increased number of students attending college, the rise of employers who either prefer or require internship experience before hiring, and the large number of unpaid internships as the only available means for such experience, creating a consistent test that can best protect the interns while still considering the interests of employers is a pressing matter. Changing *Glatt*'s primary beneficiary test and using it for Title VII and the FLSA is a step towards alleviating the harm to one of the more vulnerable groups of workers in our nation today.

257. *See supra* Part II.C–D.