

HOW RAILROAD BRAKEMEN DERAILED UNPAID INTERNS: THE NEED FOR A REVISED FRAMEWORK TO DETERMINE FLSA COVERAGE FOR UNPAID INTERNS

JACLYN GESSNER*

INTRODUCTION

You are an undergraduate student, and you need summer work. Which of the following two internships would you prefer?

Internship A: You land a coveted, three-month internship with a major technology company.¹ You are assigned to a supervisor who explains what the company has planned for you and provides you with assignments, giving you the option to decline any projects that do not interest you.² The assignments allow you to practice your developing computer engineering skills, while working in a laid back office environment where interns are encouraged to support each other's work.³ You are never asked to fetch coffee, and the company allows you to share in employee benefits, such as free food, a free gym membership, and laundry services.⁴ The founders of the company meet weekly to respond to employee questions and concerns and share the company's latest product developments.⁵ During the experience, your supervisor mentors you on career options and teaches you about the industry.⁶ For your three months of work, you are paid \$20,000.⁷

Internship B: You land a highly sought-after, three-month internship with a premiere fashion magazine.⁸ You are expected to work at least forty hours per week, but you must regularly stay late to finish projects, sometimes working as many as fifty-five hours per week.⁹ Your responsibilities include coordinating pickups and deliveries of fashion samples, ensuring accurate contents of fashion sample trunks and fashion closets, assisting at photo shoots, managing expense reports, and processing reimbursement requests.¹⁰ You also must manage and

* J.D. Candidate, 2015, Indiana University Robert H. McKinney School of Law; Bachelor of Arts in Sociology and Spanish, 2009, Purdue University, West Lafayette, Indiana. I would like to express my gratitude to Stephen Gessner for his unending support. I would also like to thank Professor Mike Pitts for his valuable feedback.

1. See generally Caroline Moss, *Former Google Interns Confess: This Is What It Was Really Like*, BUSINESS INSIDER (Dec. 26, 2013), <http://www.businessinsider.com/how-to-be-a-google-intern-2013-12>, archived at <http://perma.cc/3ACJ-V7GP>.

2. See generally *id.*

3. See generally *id.*

4. See generally *id.*

5. See generally *id.*

6. See generally *id.*

7. See generally *id.*

8. See generally Wang v. Hearst Corp., 293 F.R.D. 489, 491-92 (S.D.N.Y. 2013).

9. See generally *id.*

10. See generally *id.*

oversee the work of several other interns.¹¹ You do not have an assigned supervisor, and assignments are handed down to you from various managers and editors.¹² For your three months of work, you are paid \$0.¹³

The preferred internship choice is obvious, and the hypothetical raises another obvious point: how can the employer offering “Internship B” legally avoid paying its intern? The intern in “Internship B” is doing the work of an administrative assistant, a manager, and an accountant. The employer would certainly have to pay regular employees working in these positions.

The labor protections guaranteed by the Fair Labor Standards Act (“FLSA”), specifically the payment of at least the minimum wage, apply only to “employees,” as they are defined by the statute.¹⁴ Until recently, federal courts had no precedent for claims of FLSA violations raised by former interns.¹⁵ Often, though, courts have had to interpret the meaning of the definition in the context of employer training programs.¹⁶ In a typical trainee case, a former trainee alleges an FLSA violation for the employer’s failure to pay minimum wage and overtime for the time spent training.¹⁷ Unpaid trainees in a variety of employment settings, including railroad yard brakemen, airline flight attendants, and firemen have alleged FLSA violations.¹⁸

Recently, the Department of Labor (“DOL”) has begun to investigate for-profit companies that are not paying their interns.¹⁹ Unpaid and underpaid (below minimum wage) interns have also begun to file FLSA claims against their former employers to recover wages owed pursuant to the FLSA’s guarantees of minimum wage and overtime pay.²⁰ Notable defendants have included the following employers: Fox Searchlight Pictures, a division of Twentieth Century Fox Film Corporation (claims pursued by “Black Swan” production and accounting interns); Hearst Corporation, one of the world’s largest publishers of monthly magazines (claims brought by interns in a variety of departments at *Harper’s Bazaar*, *Cosmopolitan*, *Marie Claire*, *Esquire*, *Redbook*, and *Seventeen*

11. See generally *id.*

12. See generally *id.*

13. See generally *id.*

14. 29 U.S.C. §§ 203, 206 (2014).

15. David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 230 (2002).

16. See *Walling v. Portland Terminal*, 330 U.S. 148 (1947); *Solis v. Laurelbrook Sanitarium and Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993); *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267 (5th Cir. 1982); *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp. 504 (S.D.N.Y. 1998).

17. See *McLaughlin*, 877 F.2d at 1208.

18. See *Walling*, 330 U.S. at 149; *Reich*, 992 F.2d at 1024; *Donovan*, 686 F.2d at 268.

19. Steven Greenhouse, *The Unpaid Intern, Legal or Not*, N.Y. TIMES (Apr. 3, 2010), http://www.nytimes.com/2010/04/03/business/03intern.html?pagewanted=all&_r=0, archived at <http://perma.cc/7JJP-TYPH>.

20. See, e.g., *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013).

magazines); NBCUniversal (claims brought by MSNBC and Saturday Night Live interns); fashion designers such as Kenneth Cole Productions Inc., Calvin Klein Inc., Marc Jacobs International LLC, Oscar de la Renta LLC, Gucci America Inc., and Coach Inc.; and Warner Music Group Corporation and Atlantic Recording Corporation.²¹

Internships are incredibly valuable to interns in terms of gaining experience, securing job references, and expanding their professional network.²² Thus, it is not surprising to learn that intern lawsuits, such as those mentioned above, are only recent developments in the legal realm.²³ Interns have been reluctant, for good reason, to risk labeling themselves as a whistleblower within their desired job industry.²⁴ It may benefit an intern to “suck it up” and hope for a better opportunity to come along.²⁵ Their fears might be justifiable, as some interns from the mentioned cases have been criticized for filing lawsuits.²⁶

The internship experience can sometimes be far less than ideal, and some interns want to recover lost wages and improve conditions for their successors.²⁷

21. Henry v. Warner Music Group Corp., No. 13CV05031, 2014 WL 1224575 (S.D.N.Y. July 19, 2013); Glatt v. Fox Searchlight Pictures, Inc., 293 F.R.D. 516 (S.D.N.Y. 2013); Wang, 293 F.R.D. at 492-93; Keenan Mayo, *Why Interns Are Suing ‘Saturday Night Live,’ Hollywood, and Other Dream Employers*, BLOOMBERG BUSINESSWEEK (July 12, 2013), <http://www.businessweek.com/articles/2013-07-12/why-interns-are-suing-saturday-night-live-hollywood-and-other-dream-employers>, archived at <http://perma.cc/2LL6-92KT>; Kurt Orzeck, *Kenneth Cole Hit With Latest NY Unpaid Intern Class Action*, LAW360 (Dec. 4, 2014), http://www.law360.com/employment/articles/601574?utm_source=shared-articles&utm_medium=email&utm_campaign=shared-articles.

22. David Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL’Y 227, 241 (1998); Maurice S. Pianko, *Dealing with the Problem of Unpaid Interns and Nonprofit/Profit-Neutral Newsmagazines: A Legal Argument that Balances the Rights of America’s Hardworking Interns with the Needs of America’s Hardworking News Gatherers*, 41 RUTGERS L. REV. 1, 7 (2014).

23. Yamada, *supra* note 15, at 230.

24. Randy Holbrook, *Let the Intern Do It*, THE LRC LEGAL PAD (August 13, 2013), <http://legalpad.legalresearch.com/let-the-intern-do-it/>, archived at <http://perma.cc/FCE7-9G88>.

25. Greenhouse, *supra* note 19.

26. See Kayleen Schaefer, *The Norma Rae of Fashion Interns*, N.Y. MAG. (Sep. 11, 2012), <http://nymag.com/thecut/2012/09/norma-rae-of-fashion-interns.html>, archived at <http://perma.cc/6CSA-NYJG> (discussing those who criticized one intern-plaintiff for “failing to respect ‘the process’ and pay [her] dues”).

27. Josh Sanburn, *The Beginning of the End of the Unpaid Internship*, TIME (May 2, 2012), <http://business.time.com/2012/05/02/the-beginning-of-the-end-of-the-unpaid-internship-as-we-know-it/>, archived at <http://perma.cc/8U92-KV4H> (quoting intern-plaintiff, Xuedan Wang, describing her motivation to bring a claim, saying, “Thinking of the spring interns who would come in with high hopes just like my fellow interns and I had—I decided that someone had to put a stop to this practice”); Third Amended Class Action Complaint at 7, Wang v. Hearst Corp., 293 F.R.D. 489 (S.D.N.Y. 2013) (Plaintiffs sought “injunctive relief to ensure that the unlawful policies and practices do not continue.”).

Interns who have sued their former employers often had expectations of engaging and interesting assignments.²⁸ Instead, they were assigned to perform a variety of menial jobs and office tasks, including: answering telephones, making photocopies and coffee, performing deliveries, picking up lunch for paid employees, delivering employee paychecks, filing paperwork, purchasing office supplies, taking out the trash, and cleaning the office.²⁹ Such activities do not provide unpaid interns with the benefits they expect and deserve for agreeing to forgo wages. One of the biggest fears among interns is that “they will be relegated to a ‘glorified gopher.’”³⁰

Considering the continued expansion and prevalence of the private sector’s use of interns, a specifically tailored framework is needed to accurately interpret the FLSA’s definition of “employee” in the context of internships. For example, intern hiring has increased by 2.9, 6.8, 8.5, and 2.7% each year since 2010.³¹ Observers generally agree on a conservative estimate of the total number of United States interns: one to two million.³² A new legal framework, in contrast from that currently advanced by the DOL, must not be so stringent that it effectively prohibits the use of unpaid interns.³³ Internships are immensely

28. Third Amended Class Action Complaint at 4, *Wang*, 293 F.R.D. at 489. In fact, one study found that interns’ primary recommendation to employers on how to improve internships was to “insure interesting and challenging work assignment[s] for all interns,” and it reported that “college students consistently list interesting and challenging work as the most important characteristic they seek in a job.” PHIL GARDNER ET AL., READY FOR PRIME TIME 7 (2008) [hereinafter GARDNER ET AL., PRIME TIME].

29. *Henry v. Warner Music Group Corp.*, No. 13CV05031, 2014 WL 1224575 at *7, (S.D.N.Y. July 19, 2013); *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 533 (S.D.N.Y. 2013).

30. GARDNER ET AL., PRIME TIME, *supra* note 28, at 11.

31. NAT’L ASS’N OF COLLEGES AND EMPLOYERS, RESEARCH BRIEF: 2010 INTERNSHIP & CO-OP SURVEY, 2 (2010), available at http://web.trinity.edu/Documents/student_affairs_docs/Career_Services_docs/Data/2010_NACE_Intern_Coop_Survey.pdf, archived at <http://perma.cc/YA7J-QFRM> [hereinafter 2010 INTERNSHIP SURVEY] (One exception to the continued increases in internship hiring rates exists for 2009, immediately following the 2008 Recession. In 2009, “the intern hiring rate dropped by more than 20 percent.”); NAT’L ASS’N OF COLLEGES AND EMPLOYERS, RESEARCH BRIEF: 2011 INTERNSHIP & CO-OP SURVEY 2 (2011), available at <http://www.naceweb.org/uploadedFiles/NACEWeb/Research/Intern/2011%20Internship%20and%20Co-op%20Survey%20Research%20Brief.pdf>, archived at <http://perma.cc/SX46-68GY>; NAT’L ASS’N OF COLLEGES AND EMPLOYERS, RESEARCH BRIEF: 2012 INTERNSHIP & CO-OP SURVEY 3 (2012), available at <http://indianaintern.net/documents/articles/46.pdf>, archived at <http://perma.cc/DDA6-CRL9>; NAT’L ASS’N OF COLLEGES AND EMPLOYERS, SURVEY REPORT: 2013 INTERNSHIP & CO-OP SURVEY, EXECUTIVE SUMMARY, 3 (2013), available at <https://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2013-internship-co-op-survey-executive-summary.pdf>, archived at <http://perma.cc/2583-M8RU> [hereinafter 2013 INTERNSHIP SURVEY].

32. ROSS PERLIN, INTERN NATION 27, VERSO (2011).

33. Greenhouse, *supra* note 19 (quoting the acting director of the Department of Labor, Wage

valuable to both interns and employers,³⁴ and the rules should seek to punish bad actors who misuse interns, not to eliminate all unpaid internships entirely.

The current and prevailing test uses an ill-suited framework developed for “trainees” to evaluate whether an intern qualifies as an employee under the federal law.³⁵ Considering the DOL uses the same test to determine whether an intern qualifies for FLSA coverage as it does for a trainee, the test includes factors that do not apply to interns and fails to address other, highly relevant factors.³⁶ The DOL must adopt new rules, crafted specifically for interns, to determine whether an intern is an employee under the FLSA and, thus, entitled to minimum wages and overtime pay.

This Note proposes a new federal regulation, applied fairly to both interns and employers, which establishes different factors to be considered when determining whether an intern is an employee under the FLSA. Part I discusses the purpose of the FLSA, the prevailing agency and judicial interpretations of the test used to determine “employee” status, and the advantages of internships in the current economy. Part II critiques the prevailing test used to distinguish employees from legal unpaid interns, highlighting its major inadequacies. Finally, Part III proposes a new legal framework in the form of a federal regulation issued by the DOL.

I. THE FAIR LABOR STANDARDS ACT AND MODERN INTERNSHIPS

The FLSA provides broad worker protections to all those who qualify as “employees.”³⁷ Although the statute includes several exemptions,³⁸ it does not explicitly exempt interns from its coverage, and the federal courts have had little opportunity to analyze the statute as applied to interns.³⁹ Legal analysis in this context relies primarily on a framework developed from a 1947 United States Supreme Court case that considered whether trainees were covered by the FLSA.⁴⁰ However, the DOL has offered insufficient justification for using the trainee framework instead of an individualized test developed specifically for interns. In addition, courts disagree as to the proper authority of the DOL framework. Considering the many advantages of internships, the overly strict DOL test should be abandoned for a more flexible, fair approach.

and Hour Division, stating, “If you’re a for-profit employer or you want to pursue an internship with a for-profit employer, there aren’t going to be many circumstances where you can have an internship and not be paid and still be in compliance with the law.”)

34. Jenna Lebel, *Internships: A Win-Win for Employers and Students*, SYMPPLICITY, https://www.experience.com/alumnus/article?channel_id=internships&source_page=home&article_id=article_1208895873387 (last visited Jan. 23, 2015), archived at <http://perma.cc/A56K-4ZF3>.

35. PERLIN, *supra* note 32, at 65-66.

36. 29 U.S.C. § 201 (2014).

37. *Id.* §§ 203, 206-07.

38. *See id.* § 213.

39. Yamada, *supra* note 15, at 230.

40. Walling v. Portland Terminal, 330 U.S. 148, 150 (1947).

A. Purpose, Scope, and Definitions

The FLSA is “a comprehensive legislative scheme” set up in part to prevent the production of goods under labor conditions that are “detrimental to the maintenance of the minimum standards of living necessary for health and general well-being.”⁴¹ It was “intended to protect workers from substandard conditions and the ‘fair-minded’ employer from unfair competition.”⁴² Specifically, in terms of wages, the FLSA is purported “to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.”⁴³ Among other major provisions, the FLSA requires employers to pay employees at least the federal minimum wage and one and a half times the regular rate of pay for time worked above forty hours in a week.⁴⁴

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. The FLSA defines “employ” as “to suffer or permit to work” and defines “employee” as “any individual employed by an employer.”⁴⁵ According to the United States Supreme Court, the FLSA definitions are “comprehensive enough to require its application to many persons and working relationships”⁴⁶ The language of the definitions “leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.”⁴⁷ While the FLSA specifically exempts various employment relationships and positions from its protection, it does not do so for interns.⁴⁸

41. *United States v. Darby*, 312 U.S. 100, 109 (1941).

42. *Velez v. Sanchez*, 693 F.3d 308, 325 (2d Cir. 2012) (citing S. Rep. No. 93-690, at 4 (1974)).

43. *Walling*, 330 U.S. at 152.

44. Federal minimum wage is \$7.25 per hour beginning July 24, 2009. *General Information on the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LABOR, <http://www.dol.gov/whdregs/compliance/mwposter.htm> (last visited Aug. 5, 2014), *archived at* <http://perma.cc/MGJ2-VZXJ>; U.S. DEP’T OF LABOR, WAGE & HOUR DIV., BASIC INFORMATION, *available at* http://www.dol.gov/whdregs/compliance/whd_fs.pdf (last updated June 2012), *archived at* <http://perma.cc/7Q54-A38Z>.

45. 29 U.S.C. § 203 (2014).

46. *Walling*, 330 U.S. at 150.

47. *United States v. Rosenwasser*, 323 U.S. 360, 362-63 (1945) (explaining the intended use of the words “each” and “any” in the sections of the Act requiring payment of minimum wage to “each” employee, restricting employers from requiring “any” employee to work longer than specified hours in a workweek without paying overtime, and defining an employee as “any” individual employed by an employer).

48. 29 U.S.C. § 213 (2014); Anthony J. Tucci, *Worthy Exemption? Examining How the DOL Should Apply the FLSA to Unpaid Interns at Nonprofits and Public Agencies*, 97 IOWA L. REV. 1363, 1367 (2012). The FLSA does, however, “in order to prevent curtailment of opportunities for employment,” permit employers to employ certain “learners,” “apprentices,” and “students” under

B. Department of Labor Interpretation of Walling v. Portland Terminal

The United States Supreme Court first interpreted the FLSA's definition of an "employee" in 1947 in *Walling v. Portland Terminal*.⁴⁹ There, rail yard trainees alleged that a railroad company violated the FLSA by failing to pay minimum wages for training time.⁵⁰ Once a trainee was accepted to the training program, the training period typically lasted about a week.⁵¹ Trainees were not paid during this time nor did they expect to receive compensation.⁵² The Court noted that the trainees did not displace regular, paid employees, but they did work under the close supervision of regular employees, which sometimes actually impeded the company's business.⁵³ If a trainee successfully completed training, he would be considered certified and placed in a pool of eligible employees from which the railroad would likely hire.⁵⁴

In its rather short opinion, the Court concluded that the trainees were not employees.⁵⁵ The Court's analysis focused on a comparison of the training program to a vocational school, reasoning that the railroad was offering free instruction similar to that which trainees could have received in railroading courses.⁵⁶ The Court determined that the training was ultimately for the benefit of the trainee.⁵⁷ In explanation, the Court said, "[the Act's definition of 'employee'] 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."⁵⁸ The Court concluded that the trainees were not employees under the FLSA.⁵⁹

1. DOL Interpretation and Application of Portland Terminal.—The Court's analysis in *Portland Terminal* has since been overextended to apply to interns, rather than just trainees, as it was originally intended.⁶⁰ The DOL relied extensively on the *Portland Terminal* opinion to develop a test to determine whether the FLSA applies to certain persons and whether they qualify as employees.⁶¹ In the Wage & Hour Division ("WHD") Field Operations Handbook, the DOL lists six criteria ("Trainee Guidelines") used to determine

special certificates at wages lower than minimum wage. 29 U.S.C. § 214 (2014).

49. *Walling*, 330 U.S. at 148.

50. *Id.* at 149.

51. *Id.*

52. *Id.* at 150.

53. *Id.* at 149-50.

54. *Id.*

55. *Id.* at 153.

56. *Id.* at 152-53.

57. *Id.* at 153.

58. *Id.* at 152.

59. *Id.* at 153.

60. See generally *id.* at 149.

61. Yamada, *supra* note 15, at 227-28.

whether *trainees* or *student-trainees* qualify as employees.⁶² As the Tenth Circuit has previously explained, “[t]he six criteria in the Secretary's test were derived almost directly from *Portland Terminal* and have appeared in Wage and Hour Administrator opinions since at least 1967.”⁶³ The Trainee Guidelines provide that trainees or students are not employees under the FLSA if all six criteria apply.⁶⁴ The criteria are:

- (1) the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- (2) the training is for the benefit of the trainees or students;
- (3) the trainees or students do not displace regular employees, but work under their close observation;
- (4) the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded;
- (5) the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and
- (6) the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.⁶⁵

The *Portland Terminal* analysis and the subsequent Trainee Guidelines also form the basis for the WHD's set of guidelines, Fact Sheet #71,⁶⁶ for determining whether an intern is an employee under the FLSA.⁶⁷ Observers discussing unpaid internships cite to *Portland Terminal* and Fact Sheet #71 for the applicable rules.⁶⁸ Yet, Fact Sheet #71 is merely a slight rephrasing of the Trainee

62. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FIELD OPERATIONS HANDBOOK, CH. 10: FLSA COVERAGE—EMPLOYMENT RELATIONSHIP, STATUTORY EXCLUSIONS, GEOGRAPHICAL LIMITS, § 10b11 (1993), available at http://www.dol.gov/whd/FOH/FOH_Ch10.pdf, archived at <http://perma.cc/5D7B-M2GR> [hereinafter HANDBOOK]; U.S. DEP'T OF LABOR, WAGE & HOUR DIV., OP. LETTER NO. FLSA2004-5NA (2004), available at http://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm, archived at <http://perma.cc/97GX-DZZ6> [hereinafter 2004 OPINION LETTER].

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

64. 2004 OPINION LETTER, *supra* note 62; HANDBOOK, *supra* note 62, at § 10b11 n.45.

65. HANDBOOK, *supra* note 62, at § 10b11(b).

66. U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FACT SHEET #71: INTERNSHIP PROGRAMS UNDER THE FAIR LABOR STANDARDS ACT (2010), available at <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf>, archived at <http://perma.cc/D2Z3-TPC6> [hereinafter FACT SHEET #71].

67. KATHRYN ANNE EDWARDS & ALEXANDER HERTEL-FERNANDEZ, ECON. POLICY INST., POLICY MEMO. #160, NOT-SO-EQUAL PROTECTION—REFORMING THE REGULATION OF STUDENT INTERNSHIPS 1, 1 (2010), available at <http://www.epi.org/publication/pm160/>, archived at <http://perma.cc/NR4U-T6FQ>.

68. Natalie Bacon, Note, *Unpaid Internships: The History, Policy, And Future Implications of “Fact Sheet # 71,”* 6 OHIO STATE ENTREPEN. BUS. L.J. 67, 73-77 (2011).

Guidelines to apply them to interns.⁶⁹ The United States Secretary of Labor, arguing on behalf of the DOL in *Solis v. Laurelbrook Sanitarium & School, Inc.*, has stated that the Trainee Guidelines, as *restated* in Fact Sheet #71, are employed in a variety of scenarios and offer the “best means” of determining whether interns are employees under the FLSA.⁷⁰ Fact Sheet #71 provides that an employment relationship does not exist (i.e., the intern is not an employee covered by the FLSA) when all of the following apply:

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.⁷¹

2. *Authority and Application of the DOL Interpretation.*—The DOL has not provided adequate support for the use of the Trainee Guidelines in the context of interns, nor has it explained why an individualized test should not exist for interns.

The DOL has summarily provided that the Trainee Guidelines apply to interns and that one test should be used for both groups, but it has not offered a clear explanation for this position. In *Laurelbrook*, the Secretary of the DOL, arguing for a rehearing en banc, failed to provide adequate support for the DOL’s position that the Trainee Guidelines should be applied consistently to trainees, students, and interns.⁷² The Secretary’s petition stated, “The determination whether a trainee or student-learner is an employee under the FLSA arises under many different factual scenarios, such as individuals participating in an employer-sponsored job training program, students enrolled at a vocational school with on-

69. See FACT SHEET #71, *supra* note 66.

70. Secretary of Labor’s Petition for Rehearing *En Banc* at 3-5, *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011) (No. 09-6128), *reh’g and reh’g en banc denied* (6th Cir. 2011).

71. FACT SHEET #71, *supra* note 66.

72. Although the Secretary’s position is presented in a legal brief, to which some courts may not afford a high level of deference, the petition still offers the agency’s opinion on the matter and explains its reasoning for applying Fact Sheet #71 to interns. See *Auer v. Robbins*, 519 U.S. 452, 462 (1997); but cf. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (holding that “interpretations contained in policy statements, agency manuals, and enforcement guidelines . . . lack the force of law [and] do not warrant *Chevron*-style deference . . .”).

site job training, and interns.”⁷³ The Secretary discussed the examples and explanations in Fact Sheet #71 to justify the application of the factors of the Trainee Guidelines.⁷⁴ For example, the Secretary provided several relevant considerations to include in an analysis of factors one and two, such as: “whether the intern is performing the routine work of the business on a regular basis; whether the business is dependent on the work of the intern; and whether the interns are performing productive work.”⁷⁵ Such highly relevant considerations are not explicitly part of the six-factor test in the Trainee Guidelines.⁷⁶ Thus, the DOL maintains that it supports the use of a single, consistent test for trainees, students, and interns, yet in reality it recognizes that additional factors apply to interns. If courts should assess these additional considerations beyond the six factors, then the six factors are not the sole, appropriate criteria for evaluating interns.

The DOL also has failed to properly identify legal support for its adherence to the Trainee Guidelines. The Secretary argued that the criteria closely track the United States Supreme Court’s decision in *Portland Terminal* and constitute a “faithful application” of it.⁷⁷ The petition cites *Harris v. Vector Marketing Corp.* in support of this assertion.⁷⁸ However, the court in *Harris* does not even support the use of the Trainee Guidelines in the context of trainees, let alone interns.⁷⁹ The *Harris* court determined that *Portland Terminal* “effectively prescribes an economic realities test in the specific context of job training.”⁸⁰ Thus, not only did the court interpret *Portland Terminal* to support an entirely different test, but it also concluded that the analysis applies only to job training programs.⁸¹ In other words, *Harris* does not support the DOL’s position that the Trainee Guidelines should be extended to apply to internships.

An individualized test for interns would not be without precedent, considering particularized tests exist for different employment relationships. The WHD, in reference to the *Portland Terminal* analysis, said that “[t]here is no single rule or test for determining whether an individual is an employee under the Act.”⁸² The Sixth Circuit, expounding on this notion, said, “The issue of the

73. Secretary of Labor’s Petition for Rehearing *En Banc* at 3-4, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011) (No. 09-6128), *reh’g and reh’g en banc denied* (6th Cir. 2011).

74. *Id.* at 6.

75. *Id.*

76. *Id.*

77. *Id.* at 4 (citing Archie v. Grand Cent. P’ship, Inc., 997 F. Supp. 504, 532-33 (S.D.N.Y. 1998)).

78. *Id.* at 4-5 (citing Harris v. Vector Mktg. Corp., 716 F. Supp. 2d 835, 840-43 (N.D. Cal. 2010)).

79. *Harris*, 716 F. Supp. 2d at 842-43.

80. *Id.* at 840 (emphasis added).

81. *See generally id.* at 835.

82. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., OP. LETTER NO. WH-229, 1973 WL 36835 (1973).

employment relationship does not lend itself to a precise test, but is to be determined on a case-by-case basis upon the circumstances of the whole business activity.”⁸³ For example, in *Reich v. Parker Fire Protection District*, the Tenth Circuit mentioned the proper analysis to determine whether an independent contractor is an employee under the Act.⁸⁴ The court recognized that the relevant “factors distinguishing employees from *independent contractors* are different from the factors distinguishing employees from *trainees*.⁸⁵ Thus, factors different from those included in the Trainee Guidelines may (and do)⁸⁶ exist which should be applied when distinguishing between an employee and an intern.

The DOL has not properly justified the use of the Trainee Guidelines in the context of internships, and it has not explained why there should not be an individualized test to analyze the FLSA in the context of unpaid interns.

C. Circuit Split

Little consensus exists among the courts regarding the proper authority of the Trainee Guidelines when evaluating employee status under the FLSA. Courts have reached a variety of different outcomes when deciding when and how to apply the Trainee Guidelines. While additional interpretations and analyses exist, this Note will provide an overview of two common variations. In the first variation, several courts apply the factors laid out in the two tests, weighing them on a totality of the circumstances basis.⁸⁷ For the second, at least three Circuit Courts have rejected the tests entirely and apply a primary benefit test.⁸⁸

1. *Totality of the Circumstances Test*.—The Tenth Circuit and the United States District Court for the Southern District of New York apply the six criteria of the Trainee Guidelines and Fact Sheet #71 as a totality of the circumstances test.⁸⁹ The Tenth Circuit has taken a definite stance and has explicitly held in *Reich v. Parker Fire Protection District* that the Trainee Guidelines should be evaluated on a totality of the circumstances basis.⁹⁰ The court said, “[T]here is nothing in *Portland Terminal* to support an ‘all or nothing’ approach.”⁹¹ The court held that employers do not have to satisfy every factor to establish that a

83. *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).

84. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1027 (10th Cir. 1993).

85. *Id.* (emphasis added).

86. See Secretary of Labor’s Petition for Rehearing *En Banc* at 6, *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011) (No. 09-6128), *reh’g and reh’g en banc denied* (6th Cir. 2011).

87. See *Reich*, 992 F.2d at 1027; *Archie v. Grand Cent. P’ship, Inc.*, 997 F. Supp. 504, 532-33 (S.D.N.Y. 1998).

88. See, e.g., *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518 (6th Cir. 2011); *McLaughlin v. Ensley*, 877 F.2d 1207 (4th Cir. 1989).

89. *Reich*, 992 F.2d at 1027; *Archie*, 997 F. Supp. at 532-33.

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

91. *Id.* at 1026.

trainee is not an employee under the FLSA.⁹²

2. *Primary Benefit Test*.—The primary benefit test has been applied by the Fourth, Fifth, and Sixth Federal Circuit Courts.⁹³ The Fourth Circuit's decision in *McLaughlin v. Ensley* exemplifies the primary benefit test.⁹⁴ The case concerned the employment status of snack food distributor employees who were required to undergo a weeklong orientation period.⁹⁵ The court "concluded that the general test used to determine if an employee is entitled to [FLSA protections] is whether the employee or the employer is the *primary beneficiary* of the trainees' labor."⁹⁶ Finding that the training primarily benefitted the employer, the court noted that the orientation provided little instruction to the employees and provided the employer with employees able to start working at a higher skill level.⁹⁷ Additionally, the trainees provided assistance to existing workers.⁹⁸ Notably, the court said that the brevity of the training period and the lack of training in transferable skills revealed that the workers did not receive quality training.⁹⁹ The Sixth Circuit, supportive of the primary benefit test for its flexibility, has said that a universal "precise test" cannot be crafted due to the changing nature of the employment relationship.¹⁰⁰

Courts have reached varying conclusions as to the level of deference to give the Trainee Guidelines, from which Fact Sheet #71 derives. In applying the Guidelines under a totality of the circumstances test, courts have recognized the possibility that certain factors may weigh more heavily than others, depending on the case.¹⁰¹ Other courts have used a primary benefit test to determine employee status, recognizing the need for more flexibility when deciding employee status.¹⁰² The DOL cannot provide a convincing reason why Fact Sheet #71 should be the test for interns, and courts have been open to considering alternative approaches.

D. Modern Internships

Internships are mutually beneficial to both interns and employers, and an overly strict test to determine the legality of unpaid internships fails to account

92. *Id.* at 1026-27.

93. *Solis*, 642 F.3d at 532; *McLaughlin*, 877 F.2d at 1209.

94. *McLaughlin*, 877 F.2d at 1207.

95. *Id.* at 1208.

96. *Id.* at 1209 (emphasis added).

97. *Id.* at 1210.

98. *Id.*

99. *Id.*

100. *Solis v. Laurelbrook Sanitarium & Sch., Inc.*, 642 F.3d 518, 532 (6th Cir. 2011); *Donovan v. Brandel*, 736 F.2d 1114, 1116 (6th Cir. 1984) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729-30 (1947)).

101. See, e.g., *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023 (10th Cir. 1993); *Archie v. Grand Cent. P'ship, Inc.*, 997 F. Supp. 504 (S.D.N.Y. 1998).

102. See, e.g., *Solis*, 642 F.3d at 518; *McLaughlin*, 877 F.2d at 1207.

for the benefits provided to both parties when employers do *not* exploit interns as unpaid labor. The current legal test makes it nearly impossible for an employer to offer a legal, unpaid internship, because it fails to recognize the many benefits the internship offers. A more flexible test that recognizes the benefits offered by internships is needed to resolve this problem. A new test will also better protect interns from bad actors while still allowing interns to receive the benefits that internships provide.

Crafting an all-encompassing definition for “internship” can be slightly complicated.¹⁰³ As one commentator puts it, an internship is seemingly “understood [by interns] more in terms of its cultural and professional function than in terms of [its] actual responsibilities . . .”¹⁰⁴ In its most recent publication offering a position statement on United States internships, the National Association of Colleges and Employers (“NACE”) offered the following definition of an internship:

An internship is 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.¹⁰⁵

This lengthy description, although thorough, actually highlights the difficulty in developing a proper definition: the definition will “depend largely on who’s doing the defining.”¹⁰⁶ For example, the foregoing definition was created by an organization representing colleges, so its definition focuses on interns who are also students.

The second sentence of the definition does, however, reveal a key aspect of internships: they are mutually beneficial for employers and interns.¹⁰⁷ Internships offer career benefits to interns and hiring benefits to employers.¹⁰⁸ The large number of employers offering internships and of students participating in them is proof of such benefits.¹⁰⁹ These high participation rates, by both sides, seem to indicate that the parties are receiving some benefit.¹¹⁰ The Society for

103. PERLIN, *supra* note 32, at 23-25.

104. *Id.* at 25.

105. Nat’l Ass’n of Colleges & Employers, *Position Statement: U.S. Internships*, <https://www.naceweb.org/advocacy/position-statements/united-states-internships.aspx> (last visited Jan. 24, 2015), *archived at* <http://perma.cc/EY84-2R9C> [hereinafter NACE Position Statement].

106. PERLIN, *supra* note 32, at 26.

107. Greenhouse, *supra* note 19 (quoting a Chicago attorney, Camille Olson, who represents employers, saying, “[M]any employers agreed to hire interns because there is a very strong mutual advantage to both the worker and the employer.”).

108. *Id.*

109. *Id.* (explaining the number of unpaid internship opportunities is “mushrooming” and has grown more than three times in the past two years).

110. *Id.* (describing internships as “valuable steppingstones” for interns).

Human Resource Management's ("SHRM") 2013 Internship Survey ("SHRM Survey") reported that seventy-one percent of employer respondents hired or planned to hire interns in 2013, and "[forty-four percent of organizations have increased the number of interns hired since the start of the Recession."¹¹¹ Further, nearly eighty percent of human resource managers reported that the return on investment for internships (including cost to market them on college campuses, attend job fairs, and manage the internship programs) was "good to excellent."¹¹²

Interns now represent a sizeable labor population that requires an individual legal test to determine FLSA eligibility.¹¹³ Statistics on the number of undergraduate students who have participated in internships suggest that roughly sixty to seventy-five percent will accept an internship prior to graduation.¹¹⁴ Specifically, of seniors graduating college in 2013, 63.2% participated in an internship or cooperative education assignment, the highest rate since NACE started tracking it.¹¹⁵ In terms of real numbers, of the 10,200,000 students enrolled full time in a four-year college, somewhere between one and two million students participate in internships annually.¹¹⁶ This number is likely a conservative estimate of the overall total, since it does not account for interns who are not enrolled in a four-year college, including those enrolled at a two-year college, graduate students, high school students, and interns who are not college students.¹¹⁷ Additionally, about fifty percent of United States internships are

111. Soc'y for Human Res. Mgmt., *Survey Findings: Internships* (Nov. 6, 2013) <https://www.shrm.org/Research/SurveyFindings/Articles/Pages/SHRM-2013-Internships.aspx>, *archived at* <http://perma.cc/2P8C-DW9U> [hereinafter *SHRM Survey Findings*] (see slides six and eight).

112. GARDNER ET AL., PRIME TIME, *supra* note 28, at 4.

113. Tucci, *supra* note 48, at 1365.

114. PERLIN, *supra* note 32, at preface xiv; NAT'L ASS'N OF COLLEGES & EMPLOYERS, 2013 STUDENT SURVEY, EXECUTIVE SUMMARY 6 (2013), *available at* <http://www.naceweb.org/uploadedFiles/Content/static-assets/downloads/executive-summary/2013-student-survey-executive-summary.pdf>, *archived at* <http://perma.cc/S2GH-AT3A> [hereinafter STUDENT SURVEY].

115. STUDENT SURVEY, *supra* note 114, at 6; Kevin Dobbs, *Good Jobs for College Grads? Better Have Internships*, INVESTOR'S BUS. DAILY (Aug. 30, 2013), <http://news.investors.com/business/083013-669502-how-to-get-good-paying-job-after-college-by-interning.htm>, *archived at* <http://perma.cc/3U6A-DR9Z>; PHIL GARDNER, INTERN BRIDGE, INC., THE DEBATE OVER UNPAID COLLEGE INTERNSHIPS 4 (2010) [hereinafter GARDNER, INTERN BRIDGE] (citing a 2008 National Association of Colleges & Employers survey which reported "50 percent of graduating students had held some kind of internship during their college career, up from the 17 percent shown in a 1992 study by Northwestern University.").

116. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, DATA ON SCHOOL ENROLLMENT, OCTOBER 2012 (2012), *available at* <http://www.census.gov/hhes/school/data/cps/2012/tables.html>, *archived at* <http://perma.cc/CH8K-Z5LM> (follow "Table 5" hyperlink) (As of 2012, just over ten million students were enrolled in a four-year college.); PERLIN, *supra* note 32, at 226 n.4 (Dividing the population number by four results in the estimated number of interns on average per year.).

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

unpaid.¹¹⁸

Internships mutually benefit employers and interns in large part due to the conferment of work experience to the intern. Employers find value in new hires with work experience, and internships provide a realistic way for an individual with limited professional work experience to jumpstart his or her career.¹¹⁹ One study reported that some employers “will not consider a candidate for employment who has not completed an internship.”¹²⁰ Another reported as many as “[seventy-five] percent of employers prefer candidates with relevant work experience.”¹²¹ In terms of intern-hiring among college students, some employers value students’ internships and job experiences more highly than grade point average.¹²² Thus, an experienced intern might have a greater chance of getting a full-time job offer if he or she completes an internship.

Not only does an internship have the potential to help the intern secure a future full-time position, but it also might contribute to the intern’s ability to secure a higher-paying position. “[N]ew college graduates with ‘experiential education’ were paid an average of [nine] percent more than other new hires.”¹²³ Viewed from the intern’s perspective, this is a very real advantage offered by internships. Some survey findings support the notion that the advantage is not just hypothetical, since interns are, in fact, realizing such benefits.¹²⁴ A 2013 NACE survey found that “employers made full-time offers to 56.5 percent of their interns.”¹²⁵ In summary, internships provide employers with greater access to experienced job applicants, and interns with the experience they need to secure full-time, gainful employment.

Considering such valuable benefits, it makes little sense to have an overly strict legal test apply to interns that effectively eliminates unpaid internships entirely. While arguments exist for the complete elimination of unpaid

118. *Id.* at 28; STUDENT SURVEY, *supra* note 114, at 6; Victoria Stilwell, *Youth for Hire Find Internships Prove Preferred Process*, BLOOMBERG NEWS (Sep. 25, 2013), <http://www.businessweek.com/news/2013-09-25/youth-for-hire-finding-internship-proves-preferred-process-jobs#p2>, archived at <http://perma.cc/3AH9-4M3W> (reporting that about forty-eight percent of the internships held by graduating seniors in 2013 were unpaid).

119. GARDNER ET AL., PRIME TIME, *supra* note 28, at 11; Yamada, *supra* note 15, at 217.

120. GARDNER ET AL., PRIME TIME, *supra* note 28, at 4.

121. See Joseph E. Aoun, *Protect Unpaid Internships*, INSIDE HIGHER ED (July 13, 2010), <http://www.insidehighered.com/views/2010/07/13/aoun>, archived at <http://perma.cc/BY6N-B3LX>; Craig Durrant, *To Benefit or Not to Benefit: Mutually Induced Consideration as a Test for the Legality of Unpaid Internships*, 162 U. PA. L. REV. 169, 185 (2013).

122. Lisa Takeuchi Cullen, *The New World of Internships*, TIME (Sept. 21, 2006), <http://content.time.com/time/nation/article/0,8599,1537534,00.html>, archived at <http://perma.cc/VYN9-8RYB>.

123. Yamada, *supra* note 15, at 217 (quoting Glenn C. Altschuler, *A Tryout for the Real World: Interning Is Good for the Resume. Better Yet, It May Get You Hired*, N.Y. TIMES, Apr. 14, 2002, at 20).

124. See, e.g., 2013 INTERNSHIP SURVEY, *supra* note 31, at 4.

125. *Id.*

internships, doing so would also take away such advantages from interns without a decent alternative. One critic of unpaid internships suggests that they are harmful to interns due to lost opportunity costs; the intern could have been working a paid, non-professional job in lieu of the unpaid internship.¹²⁶ However, the potential wages that an intern could earn working as a waiter, or some other comparable position, will not likely offer the aforementioned career advantages. While wages offer instantaneous economic relief, the long-term gains from a quality job experience offer more valuable benefits.

Many critics also espouse a socioeconomic argument against unpaid internships, alleging that they might cause a class divide between interns from low- and high-income families.¹²⁷ The argument suggests that, due to the lack of pay, an unpaid intern from a low-income background may be forced to work one or more part-time, wage-earning jobs during the unpaid internship or forego the internship entirely.¹²⁸ On the other hand, an unpaid intern from a high-income background could rely on the financial support of his or her family, and may be more likely, or able, to accept an unpaid internship.¹²⁹ A recent, widely conducted survey of college students offers some statistics that indicate that this argument may not be accurate.¹³⁰ The survey of over 27,000 college students reports that, of students with family incomes below \$80,000, forty-six percent participated in unpaid internships.¹³¹ A comparable number (forty percent) of students with family incomes above \$80,000 participated in unpaid internships.¹³²

In fact, Fact Sheet #71's overly strict factors further the socioeconomic problem. If the requirements make it nearly impossible to offer a legal unpaid internship, employers would be forced to eliminate such positions entirely.¹³³ With fewer opportunities to gain valuable work experience, the low-income earner loses this important opportunity to access higher-paying jobs. An unfortunate result might be that he or she must continue working hourly positions for a longer period of time. In addition, the socioeconomic argument actually

126. Durrant, *supra* note 121, at 180.

127. See, e.g., Andrew Mark Bennett, *Unpaid Internships & the Department of Labor: The Impact of Underenforcement of the Fair Labor Standards Act on Equal Opportunity*, 11 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 293, 296-297 (2011); Yamada, *supra* note 15, at 218; Daniel Akst, *Unpaid Internships? File Under 'Hypocrisy,'* L.A. TIMES (June 15, 2010), <http://articles.latimes.com/2010/jun/15/opinion/la-oe-akst-internships-20100615>, archived at <http://perma.cc/5BWU-KMS3>; Takeuchi Cullen, *supra* note 122; Jennifer Lee, *Crucial Unpaid Internships Increasingly Separate the Haves From the Have-Not*s, N.Y. TIMES (Aug. 10, 2004), <http://www.nytimes.com/2004/08/10/politics/10interns.html>, archived at <http://perma.cc/5WV4-JMKF>.

128. Yamada, *supra* note 15, at 218.

129. *Id.*

130. GARDNER, INTERN BRIDGE, *supra* note 115.

131. *Id.* at 6.

132. *Id.*

133. See e.g., Lauren Weber, *Condé Nast Ends Internship Program*, THE WALL STREET JOURNAL (Oct. 23, 2013), <http://www.wsj.com/articles/SB10001424052702304682504579153961333903066>.

supports the position that unpaid internships offer career advantages, and they should not be entirely eradicated. One author described the problem, saying that “[t]he growth in unpaid internships favors students from wealthier families and speeds their climb up the career ladder, while less affluent students often cannot afford to accept an unpaid internship.”¹³⁴ Thus, if the argument suggests (correctly) that unpaid internships should not be limited to only a specific class, it necessarily implies that they do in fact offer employment benefits. A test assessing the legality of such programs should be more flexible to allow the well-meaning employers to continue offering unpaid internships that provide such career benefits to interns from all socioeconomic classes.

Overly burdensome legal requirements for unpaid internships would also damage the ability of smaller organizations and those with fewer resources to offer rewarding internships. One survey reports that, among for-profit companies, smaller firms are more likely to offer unpaid internships than larger companies.¹³⁵ Since employers who offer paid internships on average pay very good wages, small firms might not have the ability to offer competitive wages. For example, of the SHRM Survey respondents who offered paid internships, a large majority reported paying interns above the applicable minimum wage.¹³⁶ NACE has found similar statistics, reporting an average hourly wage of \$16.26 for undergraduate interns.¹³⁷ If all unpaid internships are seemingly illegal under Fact Sheet #71, the employer would either have to pay its interns or eliminate the internship altogether, provided the employer does not have the resources to pay interns at least minimum wage.

Another suggested alternative might allow the employer to continue offering the unpaid internship if the employer collaborates with a college or university to provide a school-sponsored internship.¹³⁸ The intern would not be paid, but he or she could earn academic credit.¹³⁹ However, such programs merely impose an even greater cost on the student intern who must pay tuition fees for the credit hours. Additionally, this alternative fails to address unpaid internships offered to non-students.

Internships typically offer valuable benefits to both interns and employers. As one internship researcher explained, “[a] good [internship] can reduce anxiety and uncertainty of the job search and lead to an early acceptance of [a full-time job] offer.”¹⁴⁰ Those opposing the practice of unpaid internships do not deny that some beneficial aspects exist. In fact, without unpaid internships, many

134. Bennett, *supra* note 127, at 297 (citing Greenhouse, *supra* note 19).

135. GARDNER, INTERN BRIDGE, *supra* note 115, at 2.

136. *SHRM Survey Findings*, *supra* note 111, at slides 22-3 (reporting that the average hourly wage offered to undergraduate student interns is \$12.74 per hour, well above the federal minimum wage).

137. 2013 INTERNSHIP SURVEY, *supra* note 31, at 4 (reported wages apply to undergraduate interns seeking bachelor’s degrees. Even higher wages were reported for graduate student interns).

138. Yamada, *supra* note 15, at 235-36.

139. *Id.*

140. GARDNER ET AL., PRIME TIME, *supra* note 28, at 8.

employers may be precluded from offering internships entirely. The ultimate losers would be the growing number of people seeking internships, because there would be fewer available opportunities. The best means of analyzing unpaid internship positions under the FLSA is not with a strict legal test that effectively forbids the use of unpaid internships entirely. Instead, there must be a balanced, flexible test that considers the real advantages that internships offer to both interns and employers and that accounts for the relevant factors that apply to internships.

II. INAPPLICABILITY OF TRAINEE GUIDELINES TO INTERNS

The six criteria of the Trainee Guidelines and Fact Sheet #71 do not address issues common to internships.¹⁴¹ Due to the use of the Trainee Guidelines in varied employment situations, the DOL has argued for “[a] comprehensive test that fully takes into account all relevant indicia of an employment relationship.”¹⁴² However, this statement fails to answer what the appropriate criteria should be for interns. A single test used to evaluate a variety of employment relationships would surely be easier for the agency to conduct its evaluations of alleged FLSA violations, but each particular employment position has individualized issues that must be considered.

The majority of the Fact Sheet #71 factors which were written with *trainees* in mind are ill-suited for application to *internships*. First, factor three, the requirement that the intern work under close supervision of existing staff, fails to address the reality that most interns are not closely supervised and still have a positive experience nonetheless.¹⁴³ Factor four, which stipulates that the employer receive no immediate advantage from the intern, suffers from several problems of interpretation and application, especially considering the significant, potential advantages afforded to employers.¹⁴⁴ Factor five, the requirement that the intern is not entitled to a job at the completion of the internship, is unsupported by typical employer practices and intern expectations.¹⁴⁵ Finally, factor two, requiring that the internship benefit the intern, fails to account for the real benefits afforded to the employer and the potential, unique benefits provided to the intern.¹⁴⁶

A. Factor Three—Supervision

Factor three of Fact Sheet #71, the supervision requirement, is a good example of the inapplicability of the six criteria to interns. The DOL states that

141. FACT SHEET #71, *supra* note 66.

142. Secretary of Labor’s Petition for Rehearing *En Banc* at 4, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011) (No. 09-6128), *reh’g and reh’g en banc denied* (6th Cir. 2011).

143. See FACT SHEET #71, *supra* note 66.

144. See *id.*

145. See *id.*

146. See *id.*

this factor applies to interns, requiring that interns work “under close supervision of existing staff.”¹⁴⁷ Fact Sheet #71 explains the factor, saying that “a program that gives interns the same level of supervision as the rest of the workforce suggests an employment relationship rather than an education or training environment.”¹⁴⁸ For example, the *Portland Terminal* trainees who were ruled not employees were required to learn first by observation, then by practice while an employee closely supervised them.¹⁴⁹

A requirement for close supervision beyond that of the rest of the workforce is overly strict and should be more flexible, considering the different expectations of interns and trainees. In practice, interns often work many hours under little to no supervision.¹⁵⁰ This may be a necessary part of an internship, as an employer may wish to evaluate a potential worker’s ability to work independently. Employers also might find it necessary for interns to work without constant supervision just as regular employees must complete their own daily tasks. Further, employers might not be able to pay a full-time employee to supervise interns.

Although supervisory support is important to interns, they also expect internships to provide them with a sufficient level of responsibility.¹⁵¹ In other words, interns desire interesting projects for which they are responsible so they can contribute to the company.¹⁵² Interns expect supervision which is similar to that provided by a mentor,¹⁵³ as opposed to an overseer watching the interns’ every move. The supervision provided to the *Portland Terminal* trainees was unlike mentoring, as the supervisors were merely regular employees who observed the trainees perform tasks.¹⁵⁴ The regular employees were simply “responsible for seeing that the [trainees’] work [was] properly done.”¹⁵⁵

Additionally, regarding supervisory support, an intern might be more likely to accept an offer for full-time employment if an intern supervisor is responsive to questions, provides feedback on performance, and helps guide the intern, especially by discussing career opportunities.¹⁵⁶ Such activities are those commonly employed by mentors and not by overseers who merely supervise. Lastly, one study asked students to report the top reasons to decline an offer for

147. *Id.*

148. Secretary of Labor’s Petition for Rehearing *En Banc* at 6, Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518 (6th Cir. 2011) (No. 09-6128), *reh’g and reh’g en banc denied* (6th Cir. 2011).

149. Walling v. Portland Terminal, 330 U.S. 148, 149-50 (1947).

150. PERLIN, *supra* note 32, at 44.

151. GARDNER ET AL., PRIME TIME, *supra* note 28, at 5, 8.

152. *Id.* at 11.

153. *Id.* at 12 (reporting one experienced intern’s suggestions for improving internships, including, “[p]rovide mentoring to [the] intern, not simply supervision.”).

154. Walling v. Portland Terminal, 330 U.S. 148, 149-50 (1947).

155. Brief for the Petitioner at 6, Walling v. Portland Terminal, 330 U.S. 148 (1947) (Nos. 335, 336).

156. GARDNER ET AL., PRIME TIME, *supra* note 28, at 8.

full-time employment following an internship, and “poor supervision” was chosen less frequently than all other options,¹⁵⁷ indicating its lack of importance to interns.

Fact Sheet #71 discusses the difference between internships that “provide job shadowing opportunities” and those which give the intern “the same level of supervision as the employer’s regular workforce.”¹⁵⁸ Presumably, the type of high-level supervision given to a shadowing intern would seem to indicate a *legal* internship. Applying this factor, the WHD issued an opinion letter in response to an inquiry regarding a university’s externship program.¹⁵⁹ The program was essentially a one-week unpaid shadowing assignment that required employers to assign the student extern to a shadowed employee.¹⁶⁰ The only stated benefit to the sponsor employer was the potential opportunity to screen for future interns or employees.¹⁶¹ The WHD opined that the student externs were not employees under the FLSA, in part because of the almost constant amount of supervision.¹⁶²

While it is true that the shadowing program is not comparable to an actual employment relationship, most internship programs are not comprised exclusively of shadowing. The SHRM Survey reports that sixty percent of survey respondents did not even have an internship coordinator.¹⁶³ For example, in describing her positive experience as a summer intern at a newspaper, a college student wrote, “[T]he editor that I worked under took time out of her day to teach me, but at the same time, I produced many articles for her to publish in her newspaper at no fiscal cost.”¹⁶⁴ Thus, the real value to the intern was not only the time she spent shadowing, but also the marketable skills she developed by writing articles.¹⁶⁵ Joseph Aoun, the president of Northeastern University, further explained the problem when he said, “Under [Fact Sheet #71], internships . . . would deteriorate into job shadowing, a pale imitation of true experiential learning.”¹⁶⁶ In other words, job shadowing internships do not allow the intern to develop desirable skills and traits, such as confidence, the ability to work

157. *Id.* at 10.

158. FACT SHEET #71, *supra* note 66.

159. U.S. DEP’T OF LABOR, WAGE & HOUR DIV., OP. LETTER NO. FLSA2006-12 (April 6, 2006), available at http://www.dol.gov/whd/opinion/FLSA/2006/2006_04_06_12_FLSA.htm, archived at <http://perma.cc/BF9M-QZ83> [hereinafter 2006 OPINION LETTER].

160. *Id.*

161. *Id.*

162. *Id.*

163. *SHRM Survey Findings*, *supra* note 111, at slide 14.

164. Karen Podorefsky, *Are Unpaid Internships Justifiable?*, MASS. DAILY COLLEGIAN (Sep. 24, 2013), <http://dailycollegian.com/2013/09/24/are-unpaid-internships-justifiable/>, archived at <http://perma.cc/49UH-K32C>.

165. *Id.* (describing the benefit of her internship, the student wrote, “Maybe in the future, I could get a job at a newspaper because a potential employer will know what I am capable of and know that I learned from someone who knows what they are doing.”).

166. Aoun, *supra* note 121.

collaboratively, and other leadership traits.¹⁶⁷

A requirement that employers must continually supervise unpaid interns is unjustifiable. Employers have valid reasons for allowing interns to work with at least some independence, and interns in fact desire such independence and responsibility in their internships. Interns value internship supervisors who take on more of a mentoring role as opposed to merely supervising, because mentors are more likely to provide career advice and job feedback. Lastly, the “close supervision” requirement would essentially allow only internships that amount to nothing more than shadowing programs, which do not allow interns to develop important skills.

B. Factor Four—Immediate Advantage

Factor four of Fact Sheet #71 is practically inapplicable to internships. Factor four requires that “[t]he employer that provides the training [derive] no immediate advantage from the activities of the intern.”¹⁶⁸ When considering the aforementioned college shadowing program, the WHD determined that the interns were not employees, despite the assertion that employers benefitted from screening for future employees.¹⁶⁹ The WHD Administrator stated that factor four was satisfied for the following reasons: students participated in the program for only one week, the program required students to do virtually no actual work, and the employer had to assign a shadowed employee.¹⁷⁰ While this is just one example, the Department failed to provide further explanation of factor four; therefore, the WHD opinion provides a starting point for evaluating factor four.

First, one-week programs were common in earlier trainee cases,¹⁷¹ but a weeklong internship is not commonplace today. One survey indicated that sixty-four percent of internships offered to undergraduate students lasted from one to three months.¹⁷² The plaintiffs in *Xuedan Wang v. Hearst Corp.* worked for two to five months at one of six different magazines owned by Hearst Corporation.¹⁷³ The two plaintiffs in *Glatt v. Fox Searchlight Pictures, Inc.* worked eight and four months, respectively.¹⁷⁴ Thus, it is possible that an employer receives “no immediate advantage” from a weeklong internship, due merely to the fact that the intern is only present for a very short period of time, but such an arrangement likely represents a small fraction of all unpaid internships. When an intern spends

167. *Id.*

168. FACT SHEET #71, *supra* note 66 (emphasis added).

169. 2006 OPINION LETTER, *supra* note 159.

170. *Id.*

171. See, e.g., *Walling v. Portland Terminal*, 330 U.S. 148, 149 (1947); *McLaughlin v. Ensley*, 877 F.2d 1207, 1208 (4th Cir. 1989).

172. *SHRM Survey Findings*, *supra* note 111, at slide 12.

173. *Xuedan Wang v. Hearst Corp.*, No. 12CV793(HB), 2013 WL 1903787, at *1-2 (S.D.N.Y. May 8, 2013).

174. Class Action Complaint at 12, 14, *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516 (S.D.N.Y. 2013) (No. 11CV06784, 2013), WL 2495140.

months working for an employer, it is much less likely that the employer will not receive an immediate advantage from that intern's work.

Additionally, evidence demonstrates that the employer realizes a cost benefit from any intern that it subsequently hires on a permanent basis. According to a study conducted by the authors of the Princeton Review's *Internship Bible*, "The cost of hiring, as a permanent employee, a former intern is roughly one-third the cost of recruiting and training a new employee with no prior experience with the particular employer."¹⁷⁵ Employers often realize such cost-savings, given that employers convert interns into full-time employees over fifty percent of the time.¹⁷⁶ Cost-savings of this nature will often be immediate, considering the fact that job offers are made to the existing interns upon completion of their internships.¹⁷⁷ In fact, many employers desire to make full-time employment offers to interns early.¹⁷⁸

Internships "allow employers to identify and develop talent early" and are described as "a phenomenal investment in the organization."¹⁷⁹ "For employers, internships provide a pool of raw but talented labor from which they can cherry-pick the best and brightest."¹⁸⁰ For example, in describing the competition amongst companies to secure talented interns, the Vice President of Talent Acquisition for Enterprise Rent-A-Car, Marie Artim, said, "We need to make sure [we are investing in interns] so we don't miss out on great talent."¹⁸¹ The Director of Strategic and Foundation Research at NACE, Edwin Koc, described the rush to convert interns into full-time employees, saying that companies want to "lock in" talent before interns have the chance to go elsewhere.¹⁸² In such situations, the savings from decreased hiring costs are realized immediately or shortly after the completion of the internship.

Not only does intern hiring cost less than non-intern hiring, but some of the initial cost-savings can result in further benefits to the employer. "Studies show that [former interns have a higher retention rate than] employees who had not interned, so internship programs pay off as long-term talent acquisition and

175. Gregory, *supra* note 22, at 241.

176. 2013 INTERNSHIP SURVEY, *supra* note 31, at 4 (reporting a 48.4% conversion rate for turning interns into full-time hires, down from 58.6% in 2012); 2013 STUDENT SURVEY, *supra* note 114, at 6 (reporting that "67% of paid interns at for-profit organizations were offered full-time jobs").

177. *10 Benefits of Starting and Intern Program*, Internships.com, <http://www.internships.com/employer/resources/setup/benefits> (last visited Jan. 24, 2015), archived at <http://perma.cc/GA63-EQQX> (describing the benefits of interns to employers).

178. *Id.* (explaining that "67.7% of 2007-08 interns were offered fulltime position" and "35.3% of employers' fulltime, entry-level college hires came from their internship program").

179. Dobbs, *supra* note 115 (quoting National Association of Colleges and Employers Executive Director, Marilyn Mackes).

180. Takeuchi Cullen, *supra* note 122.

181. Dobbs, *supra* note 115.

182. *Id.*

retention investments.”¹⁸³ This advantage is certainly less “immediate” than the cost-savings described above, but both constitute benefits to the employer nonetheless. Furthermore, if the initial savings in hiring costs precede the future return on investment in an intern, they should be considered jointly. The immediacy of the later advantage would be immaterial in terms of factor four, because the employer would have already received the first immediate advantage of reduced hiring costs.

Further, if the employer ultimately does receive some advantage, it would be a tenuous argument to determine whether it was immediate. In a practical sense, every internship program could arguably provide employers with some form of the advantage originally sought by the Portland Terminal railroad company: creating a “pool” of potential future employees.¹⁸⁴ Although the railroad received the benefit of having a list of potential new hires as soon as the trainees completed training, the Court in *Portland Terminal* said the employer received no “immediate advantage” from the trainees.¹⁸⁵ Similarly, in *Reich*, the court held that the employer “derived an *ultimate* advantage by creating a pool of prospective employees trained in its operations,” rather than an immediate advantage, and concluded that “this is the intended result of any employer sponsored training program.”¹⁸⁶ While it is clear that most employers will receive such an advantage, courts should not be forced to draw a line between benefits which seem to be afforded *immediately* and those which are afforded *ultimately*. Requiring such a distinction would result in arbitrary line-drawing, without focusing on the actual advantages to employers.

Factor four also ignores the basic fact that the intern’s work can be of such importance that the employer is necessarily advantaged by it. For this reason, factor four is disfavored by both career services representatives and employers.¹⁸⁷ A 2010 survey conducted by NACE revealed that both groups disagreed with its use.¹⁸⁸ In fact, NACE explained this position by explicitly stating that the employer benefits from the intern’s work.¹⁸⁹ Indeed, this seems to be true. According to one NACE survey, “Interns . . . spend the lion’s share of their time engaged in core business functions. On average, less than 3 percent of their time is spent on nonessential functions.”¹⁹⁰ Such figures suggest that interns are performing work that is immediately advantageous to employers.

183. Jacquelyn Smith, *Internship Wish List: The 12 Things Students Value Most*, FORBES (Jan. 8, 2014), www.forbes.com/sites/jacquelynsmith/2014/01/08/internship-wish-list-the-12-things-students-value-most/, archived at <http://perma.cc/3LY5-JVLR> (quoting Vicki Lynn, senior vice president of client talent strategy and employer branding at Universum, a global research and advisory firm).

184. *Walling v. Portland Terminal*, 330 U.S. 148, 150 (1947).

185. *Id.* at 153.

186. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1028 (10th Cir. 1993) (emphasis added).

187. *NACE Position Statement*, *supra* note 105.

188. *Id.*

189. *Id.*

190. 2010 INTERNSHIP SURVEY, *supra* note 31, at 1.

Lastly, factor four is incompatible with factor five. Factor five provides that “[t]he intern is not necessarily entitled to a job” at the end of the program.¹⁹¹ Fact Sheet #71 sends mixed messages when it explains factor five, saying, “[U]npaid internships generally should not be used by the employer as a trial period for individuals seeking employment at the conclusion of the internship period.”¹⁹² Factor four, however, provides that an employer is not necessarily prohibited from using the internship program to screen for potential future employees, as the benefits of doing so are not necessarily “immediate advantages.”¹⁹³ Factor five arguably discourages this motivation, though, regardless of whether it could be considered an immediate advantage. While the explanation does not directly prohibit the employer from using internships as trial periods, as it uses “should not” instead of “shall not,” the conflicting interpretations of the two factors further support the need for their revision.

Factor four provides an overly harsh rule that fails to consider several realities of internships. While it is true that internships often provide employers with advantages in the form of cost savings, which can be realized soon after the completion of an internship, they can also provide long-term benefits to employers. Therefore, the legality of an internship should not rest on whether the advantage was delayed or not quite immediate. Factor four also fails to recognize the valuable work of interns that necessarily benefits employers. Lastly, factor four conflicts with factor five.

C. Factor Five—Job Entitlement

Factor five is not supported by modern employer practices. Factor five provides that “[t]he intern is not necessarily entitled to a job at the conclusion of the internship.”¹⁹⁴ Fact Sheet #71 expounds upon this requirement, explaining, “If an intern is placed with the employer for a trial period with the expectation that he or she will then be hired on a permanent basis, that individual generally would be considered an employee under the FLSA.”¹⁹⁵ Seemingly, in order for the employer to comply with this factor, it must not promise its interns future employment (notwithstanding the foregoing discussion regarding screening for future employees).

However, this is disingenuous in light of the primary reason an individual chooses to accept an unpaid internship: future job prospects.¹⁹⁶ For interns, the opportunity to obtain full-time employment is an important quality in any

191. FACT SHEET #71, *supra* note 66.

192. *Id.* (emphasis added).

193. *Id.*

194. *Id.* (emphasis added).

195. *Id.*

196. Smith, *supra* note 183 (Of over 65,000 undergraduates surveyed, fifty-one percent identified an “opportunity for full-time employment” as something they would like their internship employer to offer.).

internship.¹⁹⁷ According to one survey, “[Fifty-one percent of interns] said an opportunity for full-time employment is most important to them.”¹⁹⁸ Similarly, internships are increasingly viewed by employers as a means to assess new talent and identify potential full-time employees.¹⁹⁹ “Accounting giant PricewaterhouseCoopers, for instance, draws more than 70 percent of its new hires from its internship program,”²⁰⁰ and more than ninety-five percent of Ernst & Young interns receive a job offer.²⁰¹ Factor five is unrealistic and disingenuous, considering interns are likely seeking to gain a full-time employment position, and employers may be trying to fill, full-time employment positions.

D. Factor Two—Benefit for the Intern

Factor two demands that “[t]he internship experience is for the benefit of the intern.”²⁰² Crafted with trainees in mind, factor two uses broad language that does not explain which benefits the courts should evaluate in the analysis. The types of benefits provided by training programs are more tangible than those common to internships, and the question becomes less clear when it is applied to interns. Factor two does not explain which internship benefits should be considered, and it ignores the fact that employers also benefit from internships.

The *McLaughlin* case, explained in Part I, Section C, and the *Portland Terminal* case provide good examples for comparison. The trainees in *McLaughlin* were not paid during the required week of orientation, which preceded an official offer of permanent employment.²⁰³ The employment position in question was a “route job,” which involved driving a delivery truck, delivering snack foods, stocking vending machines, and selling the snack food products to vendors.²⁰⁴ Also, the rail yard brakemen trainees of *Portland Terminal* were expected to perform the following functions: “throw switches, couple and uncouple cars, give signals, help classify trains, set hand brakes, and cut and connect air hose[s].”²⁰⁵ A potential benefit from the training, and probably the most important benefit for the trainees, was the development of transferable skills through instruction and, most importantly, a permanent job offer from the

197. *Id.*

198. *Id.*

199. Dobbs, *supra* note 115.

200. Brian Burns, *Degrees Are Great, but Internships Make a Difference*, U.S. NEWS & WORLD REPORT (Apr. 15, 2010), <http://www.usnews.com/education/articles/2010/04/15/when-a-degree-isnt-enough, archived at http://perma.cc/35YS-SJVZ>.

201. Dobbs, *supra* note 115.

202. FACT SHEET #71, *supra* note 66 at 1.

203. *McLaughlin v. Ensley*, 877 F.2d 1207, 1208 (4th Cir. 1989).

204. *Id.*

205. Brief for the Petitioner at 5, *Walling v. Portland Terminal*, 330 U.S. 148 (1947) (Nos. 335, 336).

employer upon completion of the training.²⁰⁶

The trainee positions do not afford the same benefits as does an internship. In addition to skills training and job offers, interns also desire good employer references.²⁰⁷ Employers respond to such interests, considering that the SHRM Survey reports that seventy-three percent of employers provide letters of recommendation to interns and seventy-six percent provide references.²⁰⁸ For those interns who do not obtain such desired references, the consequences can be severe. Xuedan Wang, a fashion intern who sued her former employer, Harper's Bazaar/Hearst Corporation, is a principal example.²⁰⁹ Her supervisor ultimately denied her a recommendation, telling her that she was not ready for a "paid" job, and, as a result, Wang was unable to secure a position elsewhere.²¹⁰ The *McLaughlin* and *Portland Terminal* trainees would not seek training programs to get good references, considering the trainees likely understood that they would be hired following the training program.²¹¹ In other words, they participated in the training programs specifically to secure the benefit of full-time job offers.

Two problems arise under factor two, and both have the potential to cause different determinations of legality under Fact Sheet #71 for similarly situated internships. First, if the test requires a determination as to whether the internship benefitted the intern based on a subjective standard, there will be conflicting results for similar interns based on different opinions. While every trainee would consider himself benefitted by a training program that results in a job offer, interns will likely have different views of internship programs. In its explanation of the factor, Fact Sheet #71 describes the factor with the title "Primary Beneficiary of the Activity."²¹² The United States District Court for the Southern District of New York in *Glatt*, arguing against the use of a primary benefit test, explained that the "test is subjective and unpredictable."²¹³ In other words, two interns in the same internship program could disagree as to whether or not it was beneficial. Second, the factor itself does not limit the scope of the types of

206. *See id.*

207. Smith, *supra* note 183 (Of over 65,000 undergraduates surveyed, twenty-nine percent identified a "good employer reference" as something they would like their internship employer to offer.).

208. *SHRM Survey Findings*, *supra* note 111, at slide 31.

209. Wang v. Hearst Corp., No. 12CV793(HB), 2013 WL 1903787 (S.D.N.Y. May 8, 2013).

210. Schaefer, *supra* note 26; Abby Rogers, *Intern Who Accused Hearst of Unfair Labor Practices Says She's Turned Her Back On Fashion*, BUSINESS INSIDER (Sep. 11, 2012), <http://www.businessinsider.com/diana-wang-speaks-out-about-hearst-corporation-2012-9>, archived at <http://perma.cc/B78N-6SK2>.

211. *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (1989); Brief for the Petitioner at 4-5, *Walling v. Portland Terminal*, 330 U.S. 148 (1947) (Nos. 335, 336) (explaining that the training only occurred if the railroad expected it would need to hire the trainees full-time and that the trainees filled out formal applications for employment).

212. FACT SHEET #71, *supra* note 66 at 2.

213. *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11CV06784, 2013 WL 2495140 at *11 (S.D.N.Y. 2013).

benefits which the court may consider. The explanation, not the rule itself, suggests that the internship benefits the intern when he or she is taught transferable skills, and it does not benefit the intern when he or she is performing productive or menial work.²¹⁴ However, this commentary does not require the consideration of such traits, nor does it limit the reviewer's inquiry to only certain, acceptable benefits. Both of the two stated problems could result in different findings of employment relationships for similar internship programs.

Additionally, while the benefits suggested in factor two's explanation are highly relevant and important, they do not address all the benefits actually sought by interns. One survey indicates that the top three benefits sought by interns are full-time employment, job training, and good employer references, in that order.²¹⁵ The "intern benefit" rule however seems to limit the analysis to only the consideration of whether the intern benefitted by receiving job training in transferable skills.²¹⁶ If the DOL had intended for the legal analysis to consider transferable skills and productive work, it should have used factors that mention them directly and described how they should be evaluated. Otherwise, courts can interpret factor two in an overly narrow or overly broad manner, and interns may perceive the same internship differently in terms of the benefits offered.

Finally, factor two implies that the internship cannot benefit the employer, if it must necessarily benefit the intern. It is highly unlikely that an internship program would be of no benefit to the employer. The Fifth Circuit, describing the American Airlines training program, explained this, saying, "[If the training program] was solely for the trainee's benefit, the company would not conduct the [program] except as a matter of altruism or public pro bono."²¹⁷ This is one area in which training and internship programs would relate, considering employers would be motivated to offer both types of programs for their potential benefits. Additionally, courts have interpreted *Portland Terminal* to stand for the proposition that the creation of a labor pool does not *alone* inure the primary benefit to the employer.²¹⁸ This implies that such "employee screening" practices, or the use of former interns as a prospective labor pool, are in fact a benefit to employers. Yet, screening for future employees, arguably a benefit to the employer, is permissible under factor four, provided that it does not constitute an immediate advantage.

Indeed, employers are relying heavily on internship programs to secure the benefit of future new hires. According to one survey conducted by NACE, "More than one-third of [responding employers] expected new college hires will come from that organization's internship and co-op programs."²¹⁹ Additionally, "employers made full-time offers to 56.5 percent of their interns," with an

214. FACT SHEET #71, *supra* note 66.

215. Smith, *supra* note 183, at 2.

216. FACT SHEET #71, *supra* note 66 at 2.

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

218. *Donovan v. Am. Airlines, Inc.*, 514 F. Supp. 526, 534 (N.D. Tex. 1981), *aff'd*, 686 F.2d 267 (5th Cir. 1982).

219. 2013 INTERNSHIP SURVEY, *supra* note 31, at 3.

acceptance rate of over eighty percent.²²⁰ NACE even directly states on its website, “Internships provide a benefit to both employers and interns.”²²¹ In short, employers are gaining the benefit of using internships to identify (and hire) potential full-time employees.

Factor two provides that the internship must be for the benefit of the intern without setting clear guidelines as to what types of benefits to consider. Due to factor two’s subjectivity and the lack of explanation as to its scope, it can cause different determinations of FLSA coverage for similar internship programs. Factor two also fails to mention the very real problem of how to analyze an internship where the employer also receives some benefit from the intern. By suggesting that the internship must benefit the intern, factor two implies that the internship should not benefit the employer, which is an unrealistic rule.

III. REVISED REGULATIONS

The test for determining whether a trainee is considered an “employee” under the Fair Labor Standards Act (“FLSA”) is not an appropriate test to be used when analyzing the same question for interns. A revised test is needed in the form of regulations issued by the Department of Labor (“DOL”). The test must rationally and fairly apply to modern internship programs.

While this Note will not discuss the proper level of deference that courts should apply to the revised regulations, a few points should be made about the DOL’s authority to pass regulations on this subject. Ideally, (although in this author’s opinion, probably unlikely) Congress would amend the FLSA to explicitly provide that the Secretary of Labor has the authority to issue such a regulation. The amended language would be most appropriate in 29 U.S.C. § 213, which lists all of the various employment situations and relationships exempt from FLSA requirements. In a new subsection 213(k), “Interns,” the amendment would read:

The provisions of sections 206 and 207 of this title shall not apply with respect to an employee engaged in an internship, externship, or its equivalent (as such terms are defined and delimited from time to time by regulations of the Secretary), provided that the internship, externship, or its equivalent satisfies any and all requirements that the Secretary may issue by regulation under the authority of this section.

While statutory language would give courts little doubt that the regulation would deserve the highest level of deference,²²² congressional action is unlikely

220. *Id.* at 4.

221. Nat’l Ass’n of Colleges & Employers, *Internships Legal Issues*, NACEWEB.ORG, <http://www.naceweb.org/knowledge/legal/internships.aspx> (last visited Jan. 20, 2014), *archived at* <http://perma.cc/STK5-HNQ6>.

222. See generally *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”).

due to general inactivity on Capitol Hill.²²³ Thus, without enabling authority, the DOL, through the Administrator of the Wage & Hour Division, could issue the revised rules within a “Guidelines” publication or other policy statement.²²⁴ However, courts disagree as to the proper level of deference to give rulings and interpretations of the Administrator.²²⁵ While a court could ultimately disregard such a policy statement without explicit or implicit congressional intent to delegate rule-making authority, this Note will not make a contrary, administrative law argument. The above statutory amendment would be the ideal mechanism for the DOL to issue the revised regulation.

The following are proposed, revised factors to be considered when determining whether an unpaid or underpaid intern for a private, for-profit employer is an employee under the FLSA. No single factor should be controlling, and the factors should be viewed in light of the totality of the circumstances.

1. The intern is not predominantly performing “productive” or “menial” work including but not limited to document filing, clerical work, assisting customers, running errands, making photocopies, answering phones or responding to emails, cleaning, and making deliveries. The aforementioned list is non-exhaustive, and a court should consider the activities and tasks performed in light of the specific facts and their potential to aid in the development of useful skills. The proportion of overall work consisting of productive work should also be considered, and an intern will not be an employee under the FLSA solely because he or she completed some productive work.
2. Most of the skills taught by the employer are fungible and/or transferable. However, an employer is not entirely precluded from teaching skills only of value to the employer. An employer may wish to teach an intern some skills unique to their company, but a

223. Jeremy Peters, *Senate Prepares to Wrap Up Sluggish 2013*, N.Y. TIMES (Dec. 15, 2013), <http://www.nytimes.com/2013/12/16/us/politics/congress-prepares-to-leave-behind-a-sluggish-2013.html>, *archived at* <http://perma.cc/HY4W-M47Q> (reporting that, in 2013, the House of Representatives was at work for the fewest hours in a nonelection year since 2005 and that “the Senate was near its recorded lows for days [spent] on the floor”).

224. Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and The Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1325 (1992) (“A policy statement is an agency statement of substantive law or policy, of general or particular applicability and future effect, that was not issued legislatively . . .”).

225. See, e.g., *Mabee v. White Plains Pub. Co.*, 327 U.S. 178, 182 (1946) (The Administrator’s “rulings and interpretations” while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance” (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *McLaughlin v. Ensley*, 877 F.2d 1207, 1211 (4th Cir. 1989) (Wilkins, J., dissenting) (arguing the Trainee Guidelines are a reasonable application of the FLSA and *Portland Terminal* and are entitled to deference pursuant to *Chevron*, 467 U.S. at 837).

program that fails to teach any transferable skills, or teaches only employer-specific skills, strongly indicates that an employment relationship exists.

3. The duration of the internship is relevant to the determination of employee status. An internship that lasts more than one month may be indicative, but not determinative, of the existence of an employment relationship. The significance of this factor is highly dependent on the facts and will not, without more, support a finding of an employment relationship.
4. The establishment of an agreement that the intern will not be paid is not to be considered in the determination, even as only an inference that the intern was not an employee.

The internship programs in the *Glatt*²²⁶ and *Wang*²²⁷ cases depict common issues facing unpaid interns and serve as good examples to demonstrate the application of the proposed, revised regulations. They are also recent cases exemplifying the problems that arise when interns allege FLSA violations and courts attempt to analyze their experiences using the Trainee Guidelines. Thus, the following sections will analyze the facts of *Glatt* and *Wang*, using the revised regulations, where applicable.

A. Factor One—Performing Productive or Menial Work

The type of work performed by an unpaid intern must be given considerable weight when assessing the legality of an internship. An intern who predominantly, or only, performs productive or menial work should be considered an employee under the FLSA. Factor one is the most important factor and should be given considerable weight. Interns often point to the requirement to perform menial work as one of their primary complaints about unpaid internships.²²⁸ A revised factor to account for this issue would appear as follows:

The intern is not predominantly performing “productive” or “menial” work including but not limited to document filing, clerical work, assisting customers, running errands, making photocopies, answering phones or responding to emails, cleaning, and making deliveries. The aforementioned list is non-exhaustive, and a court should consider the activities and tasks performed in light of the specific facts and their potential to aid in the development of useful skills. The proportion of overall work consisting of productive work should also be considered,

226. *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013).

227. *Wang v. Hearst Corp.*, 293 F.R.D. 489, 492-93 (S.D.N.Y. 2013).

228. Greenhouse, *supra* note 19 (noting that many students reported having internships that involved non-educational menial work); Raphael Pope-Sussman, *Let’s Abolish This Modern-Day Coal Mine*, N.Y. TIMES (Feb. 7, 2012), <http://www.nytimes.com/roomfordebate/2012/02/04/do-unpaid-internships-exploit-college-students/unpaid-internships-should-be-illegal>, *archived at* <http://perma.cc/J69E-2RKV> (“Internships often involve mindless or menial work.”).

and an intern will not be an employee under the FLSA solely because he or she completed some productive work.

An analysis under factor one would require two steps: first, a reviewing court must decide whether tasks or assignments are productive, based on the individual facts surrounding the intern and the employer; second, the court must consider the amount of productive work completed in light of the total amount of overall work.

For example, in *Wang v. Hearst Corp.*, Ms. Wang described her work as Head Accessories Intern at Harper's Bazaar magazine as menial clerical work, which included coordinating pickups and deliveries of fashion samples, maintaining records of the contents of sample trunks and fashion closets, assisting at photo shoots, managing corporate expense reports, and processing reimbursement requests.²²⁹ Although the majority of these tasks are either productive or menial, some could be considered educational in light of the specific facts and Ms. Wang's career goals. A review under factor one would require consideration of Ms. Wang's skills and experience, her career aspirations, and whether such tasks would be required in her desired career. In addition, a court would have to consider the employer's operations, whether employees generally must share in the performance of productive work, and whether the employer used the task or assignment to teach the intern necessary or transferable skills.

Ms. Wang's clerical work, errands, and record maintenance were all menial, such that Ms. Wang was not developing new skills useful to a career in the fashion or magazine publication industry.²³⁰ While expense reports and reimbursements might be highly beneficial to an accounting intern, such tasks for Ms. Wang did not enhance her knowledge of the fashion or magazine publishing industries.²³¹ Ms. Wang also already had extensive experience, including internships at a modeling agency and a public relations firm.²³² Thus, the individualized analysis requires consideration of any productive tasks used to teach important skills that Ms. Wang already possessed. For example, if the facts revealed that Ms. Wang did extensive expense and reimbursement reporting in her previous positions, then such tasks would more likely be considered productive work.

Alternatively, it is possible that additional facts could reveal that she was learning valuable skills while performing some of the tasks. The assignment with the greatest possibility of being non-productive is the photo shoot assistance. A career in the fashion publication industry would certainly entail extensive involvement and exposure to photo shoots. Ms. Wang could be given important coaching and advice while assisting on photo shoots, if she had been working

229. Third Amended Class Action Complaint at 3, 14, *Wang v. Hearst Corp.*, 293 F.R.D. 489 (S.D.N.Y. 2013) (No. 12CV793(HB)).

230. *See generally Wang*, 293 F.R.D. at 489.

231. *See generally id.*

232. Sanburn, *supra* note 27.

alongside a more senior employee who explained how to efficiently manage a shoot. In other words, although Ms. Wang might have had to do productive work on the shoot, such as set up craft services or assemble wardrobe, the assignment might be non-productive if she was also able to ask the editors questions or shadow the designer. This factor and the accompanying example highlight the need for the totality approach, as the court will have to look closely at the facts and the work performed by the intern in light of the skills needed in the desired field and those already possessed by the intern.

Finally, the amount of Ms. Wang's productive work must be considered in conjunction with the total amount of work performed. If Ms. Wang spent as little as one hour per week of her forty-hour work week doing the expense reports, the internship might not be considered an employment relationship.

B. Factor Two—Learning Transferable Skills

The type of work performed is a relevant inquiry to determine if an employer uses unpaid interns in lieu of paid employees, as workers performing menial labor obviously must be paid.²³³ However, it also reveals whether or not the intern is actually learning transferable skills, which is a benefit to which they are owed for agreeing to forego wages.²³⁴ An internship that, notwithstanding other factors, enables the intern to develop valuable, transferable skills would not be considered an employment relationship under the FLSA. A fair test must consider whether the employer teaches the intern any employment skills and whether those skills are applicable only to the individual employer. A model for such a factor appears below:

Most of the skills taught by the employer are fungible and/or transferable. However, an employer is not entirely precluded from teaching skills only of value to the employer. An employer may wish to teach an intern some skills unique to their company, but a program that fails to teach any transferable skills, or teaches only employer-specific skills, strongly indicates that an employment relationship exists.

This factor recognizes the need for employers to teach interns some company-specific skills, as those skills may be necessary for successful completion of the internship itself. This language contrasts from that of other proposals requiring that *all* skills taught are transferable.²³⁵ The factor is supported by the court's language in *Glatt v. Fox Searchlight Pictures*, explaining that "internships must provide something beyond on-the-job training that [regular] employees receive."²³⁶

233. FACT SHEET #71, *supra* note 66 ("[I]f the interns . . . are performing productive work, then the fact that they may be receiving some benefits . . . will not exclude them from the FLSA's minimum wage and overtime requirements . . .").

234. NACE Position Statement, *supra* note 105.

235. *Id.*

236. *Glatt v. Fox Searchlight Pictures, Inc.*, 293 F.R.D. 516, 532 (S.D.N.Y. 2013).

The DOL itself recognizes the importance of transferable skills in the explanations included in Fact Sheet #71, although such recognition was unclear and confusingly placed within the explanation following the “benefit of the intern” factor.²³⁷ Specifically, the explanation states, “The more the internship provides the individual with skills that can be used in multiple employment settings, as opposed to skills particular to one employer’s operation, the more likely the intern would be viewed as receiving training,”²³⁸ and not be deemed an employee. The courts have also recognized this idea, as the Fourth Circuit noted the lack of transferable skills developed by the plaintiffs in *McLaughlin* and *Donovan*.²³⁹

If an internship provides no formal training or education, there is a strong presumption that the intern is an employee under the FLSA. Ms. Wang claimed that, as part of the harm she suffered, “the work she did for the magazine did not grant her a marketable skill set in lieu of wages.”²⁴⁰ In *Glatt*, the court found that one of the interns, a production office intern for the “Black Swan” film, “did not acquire any new skills aside from those specific” to the employer.²⁴¹ The only skills that the intern learned were acquired by simply being in the office and “not because his internship was engineered to be more educational than a paid position.”²⁴² The internship might have been viewed differently if the production intern had been taught how to review a script or had received tips on working with writers, instead of simply making copies of scripts.

As another example, a former unpaid editorial intern said that she “worked on every aspect of the editorial process; from copyediting, researching, [and] fact checking to writing everything from photo captions to long, feature length stories.”²⁴³ In such a case, the intern’s ability to learn transferable skills would be substantial, weighing against a finding of an employment relationship. However, this factor must be considered in light of all of the circumstances, such as the proportion of menial tasks compared to the intern’s overall work. For example, tasks such as fact-checking might be construed as productive or menial work to the more experienced intern. As a final example, Sotheby’s, the art auction house, offers an internship program that might fare better under this factor. Its interns are “taken on guided tours of New York art museums and galleries,” which arguably would aid them in developing their knowledge of

237. FACT SHEET #71, *supra* note 66.

238. *Id.*

239. *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989); *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 269-70 (5th Cir. 1982).

240. Katherine S. Newman, *The Piper Lecture: The Great Recession and the Pressure on Workplace Rights*, 88 CHI.-KENT L. REV. 529, 536 (2013).

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

242. *Id.*

243. Frances Bridges, *How Condé Nast Should Have Fixed Its Internship Program*, FORBES (Nov. 8, 2013), <http://www.forbes.com/sites/francesbridges/2013/11/08/how-conde-nast-should-have-fixed-the-internship-program/>, archived at <http://perma.cc/27ZA-XUXS>.

famous artwork, a necessary skill for one wishing to work in this unique field.²⁴⁴ Again, where one factor weighs against a finding of an employment relationship, it must be considered along with other factors and circumstances.

C. Factor Three—Internship Duration

The revised test should include a factor that addresses the length of time that the internship lasts, and it should suggest that a very brief internship would be less likely to qualify an intern as an employee. However, it should also clearly stipulate that this aspect of an internship is but one aspect that must be considered along with all other factors. The following is one proposed example:

The duration of the internship is also relevant to the determination of employee status. An internship that lasts more than one month may be indicative, but not determinative, of the existence of an employment relationship. The significance of this factor is highly dependent on the facts and will not, without more, support a finding of an employment relationship.

For example, in *McLaughlin* and *Portland Terminal*, both training programs lasted roughly one week, but the trainees in *McLaughlin* were deemed employees unlike the *Portland Terminal* trainees.²⁴⁵ An inquiry into the facts revealed that the *McLaughlin* trainees worked long hours (about ten to twelve hours per day) performing manual labor, including loading and unloading delivery trucks, restocking products, and sometimes preparing orders.²⁴⁶ Alternatively, the *Portland Terminal* “[t]rainees did not attend classrooms but, under the supervision of a yard crew, learned the work routine by observing the actual work. Each was then gradually permitted to do actual work under close scrutiny.”²⁴⁷ The two cases serve as a primary example of the importance of an individualized analysis that considers all circumstances. The trainees in both cases worked for only about a week, but their experiences were quite different. The *McLaughlin* trainees were essentially put to work and were not taught valuable skills, while the *Portland Terminal* trainees were able to shadow employees and practice certain tasks.²⁴⁸

Additionally, while the interns in *Wang* and *Glatt* worked anywhere from three to eight months,²⁴⁹ such longer durations do not indicate an employment relationship without consideration of all of the factors. For example, the firefighter trainees in *Reich* had to complete a ten-week firefighting academy

244. Yamada, *supra* note 15, at 231.

245. *McLaughlin v. Ensley*, 877 F.2d 1207, 1210 (4th Cir. 1989).

246. *Id.* at 1208.

247. *Donovan v. Am. Airlines, Inc.*, 686 F.2d 267, 271 (5th Cir. 1982).

248. *McLaughlin*, 877 F.2d at 1210.

249. *Wang v. Hearst Corp.*, No. 12CV793(HB), 2013 WL 1903787 at *1-2 (S.D.N.Y. May 8, 2013); Class Action Complaint at 12, 14, *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11CV06784, 2013 WL 2495140 (S.D.N.Y. June 11, 2013).

program.²⁵⁰ However, they were taught skills necessary for any other fire protection district, or, rather, transferable skills, and they were not considered employees.²⁵¹ In both cases, the duration of the training program played a small part in the determining the employee status, but it was highly dependent on the specific facts of the case and the influence of other factors.

D. Factor Four—Unpaid Interns Cannot Waive Rights under the FLSA

A complete regulation should also include the following factor: “The establishment of an agreement that the intern will not be paid is not to be considered in the determination, even as only an inference that the intern was not an employee.” Such agreements would typically be made at the beginning of an internship, before the parties’ respective benefits would be realized. Thus, the requirement that an intern sign such an agreement would be unfair, considering the intern would not know in advance whether the internship will meet his or her expectations. Also, agreements or employment contracts are not considered in the determination of whether an individual is an employee, because the FLSA does not allow employees to waive their entitlement to wages.²⁵²

CONCLUSION

Approximately one million interns are working in the United States each year, and about half of them are unpaid. Many interns, both paid and unpaid, would likely never consider raising a complaint in the workplace, let alone filing a suit against an employer providing the internship. The wide array of industries utilizing interns in large numbers, however, will inevitably lead to cases of unfair practices similar to those endured by the interns in *Wang* and *Glatt*.

The revised factors provide a fairer, more appropriate outcome for the *Wang* and *Glatt* interns. The interns would ultimately be deemed employees under the FLSA entitled to minimum wage and overtime pay. The overriding considerations are found in revised factors one and two. Due to the significant amount of productive or menial work required of the interns, they should have been provided with several opportunities to develop transferable skills applicable to their future careers in the relevant industries. However, they were forced to be “glorified gopher[s]”²⁵³ for the entirety of their internship experiences, and they should have been paid for this work.

Currently, the law determining whether an intern is protected by the FLSA is blurry at best. First, the FLSA does not directly address interns. Second, the DOL merely copied the older trainee test and also set inapplicable, unsuitable

250. *Reich v. Parker Fire Prot. Dist.*, 992 F.2d 1023, 1025 (10th Cir. 1993).

251. *See id.*

252. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 300-02 (1985) (explaining that “[i]f an exception to the Act were carved out for employees willing to testify that they performed work ‘voluntarily,’ employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act”).

253. GARDNER ET AL., PRIME TIME, *supra* note 28, at 11.

rules for interns without sufficient justification for doing so. Third, the courts do not agree on the correct test to apply to intern cases. Interns deserve clarification of this legal mess to allow them to fairly consider the viability of their legal claims. Employers deserve a clear, modern approach to discern whether their internships are legal and that enables them to provide unpaid internships offering benefits to employers and interns alike.

The problems facing unpaid interns will not be fairly or uniformly resolved if a legal test established for a different type of worker (trainee) is used in the intern context. The best solution is to establish new guidelines, issued by the Department of Labor in the form of a federal regulation, which consider the realities of internships in the United States.